

IDAHO COURT RULES

2012

VOLUME 1

IDAHO RULES OF CIVIL PROCEDURE
IDAHO RULES OF EVIDENCE



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IDAHO CODE

IDAHO COURT

RULES

VOLUME 1

Compiled Under the Supervision of the
Idaho Code Commission

RICHARD F. GOODSON
R. DANIEL BOWEN JEREMY P. PISCA
COMMISSIONERS

MAX M. SHEILS, JR.
EXECUTIVE SECRETARY

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PUBLISHER'S NOTE

The 2012 edition of the Idaho Court Rules is in two volumes. Volume 1 contains the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. Volume 2 contains the Idaho Criminal Rules, Misdemeanor Criminal Rules, Idaho Infraction Rules, Idaho Juvenile Rules, Idaho Court Administrative Rules, Idaho Rules of Professional Conduct, Idaho Appellate Rules and selected federal rules affecting Idaho.

These volumes replace the Idaho Code, 2011 Idaho Court Rules volumes. They contain the Idaho Court Rules, which comprise the Idaho Rules of Civil Procedure (I.R.C.P.), the Idaho Rules of Evidence (I.R.E.), the Idaho Criminal Rules (I.C.R.), the Misdemeanor Criminal Rules (M.C.R.), Idaho Infraction Rules (I.I.R.), Idaho Juvenile Rules (I.J.R.), Idaho Court Administrative Rules (I.C.A.R.), Idaho Rules of Professional Conduct (I.R.P.C.), and the Idaho Appellate Rules (I.A.R.). These rules have been adopted by the Supreme Court of Idaho with the purpose of simplifying and expediting court procedures. In addition, these volumes contain the Rules for the United States Court of Appeals, Ninth Circuit, the Local Rules for the United States District Court, District of Idaho and the Local Rules for the United States Bankruptcy Court for the District of Idaho.

The Idaho Rules of Civil Procedure, as originally adopted by the Supreme Court following a study by a committee appointed by the State Bar Commission, became effective November 1, 1958, but were amended by the court effective January 1, 1975, in accordance with Rule 86. These rules follow the Federal Rules of Civil Procedure insofar as practicable but contain modifications adopted state practice. In some instances new rules were written in order to clarify or preserve certain useful sections of the Idaho Code.

The Idaho Rules of Evidence became effective July 1, 1985; the Idaho Criminal Rules and the Misdemeanor Court Rules became effective July 1, 1980; the Idaho Infraction Rules became effective July 1, 1983; the Idaho Juvenile Rules became effective July 1, 1996; the Idaho Court Administrative Rules became effective July 1, 1980; the Idaho Rules of Professional Conduct became effective November 1, 1986, and the Idaho Appellate Rules became effective July 1, 1977.

The rules contained in these volumes are accompanied by a variety of notes designed to present the user of the rules volume with relevant information concerning the rule. These include compiler's notes, cross-references and annotations in which the rule itself or a similar rule or statute has been applied by the state or federal courts.

This publication contains annotations taken from decisions of the Idaho Supreme and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com*. These cases will be printed in the following reports:

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PUBLISHER'S NOTE

United States Supreme Court Reports, Lawyers' Edition, 2nd Series

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USER'S GUIDE

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of the Code. This guide contains comments and information on the many features found within the Idaho Code intended to increase the usefulness of this set of laws to the user.

TABLE OF CONTENTS

State Rules

Volume 1

Rules	Page
Idaho Rules of Civil Procedure	1
Index.....	747
Idaho Rules of Evidence	777
Index.....	943

Volume 2

Idaho Criminal Rules
Index
Misdemeanor Criminal Rules
Index
Idaho Infraction Rules
Index
Idaho Juvenile Rules
Index
Idaho Court Administrative Rules
Index
Idaho Rules of Professional Conduct
Index
Idaho Appellate Rules
Index

Federal Rules

Local Rules of Procedure of the United States District Court for the District of Idaho
Civil Rules and General Provisions
Criminal Rules
Appendices I-IV
Index
Local Bankruptcy Rules of Procedure for the United States Bank- ruptcy Court in the District of Idaho
Appendices I-III
Index
Rules of the United States Court of Appeals for the Ninth Circuit
Appendix of Forms

TABLE OF CONTENTS

Index

United States Court of Appeals for the Ninth Circuit Revised Provisions for the Representation on Appeal of Persons Financially Unable to Obtain Representation

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Index

Judicial Council of the Ninth Circuit — Amended Order Establishing and Continuing the Bankruptcy Appellate Panel of the Ninth Circuit

Index

Rules of the United States Bankruptcy Appellate Panel of the Ninth Circuit

Index

QUICK ACCESS GUIDE

To use the Quick Access Guide bend the book so that the black margin markers are visible and follow the pointer to the page with the corresponding margin marker.

State Rules

Idaho Rules of Civil Procedure	1 ►
Idaho Rules of Evidence	777 ►

IDAHO RULES OF CIVIL PROCEDURE

Rule

- 1(a). Scope of rules.
- 1(b). Amendments.
- 1(c). District court rules.
- 2. Form of action.
- 3(a). Commencement of action.
- 3(b). Designation of party.
- 3(c). Privacy protection for filings made with the court.
- 4(a). Process — Summons — Issuance — Time limits.
- 4(b). Summons — Form.
- 4(c)(1). By whom served.
- 4(c)(2). Executing process.
- 4(c)(3). Service of facsimile or telegraphic copy.
- 4(d)(1). Summons — Personal service.
- 4(d)(2). Service upon individuals.
- 4(d)(3). Service upon infants and incompetents.
- 4(d)(4). Service upon domestic or foreign corporations.
- 4(d)(5). Service upon state, agencies or governmental subdivisions.
- 4(d)(6). Receipt of service.
- 4(e)(1). Summons — Other service.
- 4(e)(2). Service — Completion.
- 4(f). Territorial limits of effective service.
- 4(g). Return.
- 4(h). Amendment.
- 4(i). General or special appearance.
- 5(a). Service and filing of pleadings and other papers — Service — When required.
- 5(b). Service — How made.
- 5(c). Service — Numerous defendants.
- 5(d). Filing.
- 5(e). Filing with the court.
- 5(f). Proof of service.
- 5(g). Service on attorney-legislator suspended during sessions — Emergency provisions.
- 6(a). Time computation.
- 6(b). Enlargement.
- 6(c)(1). [Repealed.]
- 6(c)(2). Order to show cause (other than contempt matters) — Affidavits.
- 6(c)(3). [Repealed.]
- 6(c)(4). [Repealed.]
- 6(c)(5). Support hearings — Affidavit to accompany copy of decree.
- 6(c)(6). Child Support Guidelines.
- 6(c)(7). Blood or other genetic tests in paternity actions.
- 6(d). [Repealed.]
- 6(e)(1). Additional time after service by mail.
- 6(e)(2). Setting hearings by court.
- 6(e)(3). Stipulations not binding on court — Continuance of trial or hearing.

Rule

- 7(a). Pleadings allowed — Form of motions — Pleadings.
- 7(b)(1). Motions and other papers.
- 7(b)(2). Captions, signing and form of motions.
- 7(b)(3). Time limits for filing and serving motions, affidavits and briefs.
- 7(b)(4). Hearings by telephone or video teleconference.
- 7(c). Demurrers, pleas and exceptions abolished.
- 8(a)(1). General rules of pleading — Claims for relief.
- 8(a)(2). Transfer.
- 8(b). Defenses — Form of denials.
- 8(c). Affirmative defenses.
- 8(d). Effect of failure to deny.
- 8(e)(1). Pleading to be concise and direct — Consistency.
- 8(e)(2). Two or more statements of claim or defense permissible.
- 8(f). Construction of pleadings.
- 9(a). Pleading special matters — Capacity.
- 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.
- 9(c). Conditions precedent.
- 9(d). Official document or act.
- 9(e). Judgment.
- 9(f). Time and place.
- 9(g). Damages.
- 9(h). Limitations.
- 9(i). Libel or slander.
- 9(j). Description of real property.
- 10(a)(1). Form of pleadings — Caption — Name of parties.
- 10(a)(2). Lost papers.
- 10(a)(3). Language, abbreviation and numbers.
- 10(a)(4). Unknown party.
- 10(a)(5). Designation of unknown.
- 10(a)(6). Filing fee — Waiver.
- 10(b). Paragraphs — Separate statements.
- 10(c). Adoption by reference — Exhibits.
- 11(a)(1). Signing of pleadings, motions, and other papers; sanctions.
- 11(a)(2). Successive applications for orders or writs — Motions for reconsideration.
- 11(a)(3). Withdrawal of files.
- 11(b)(1). Change of attorneys.
- 11(b)(2). Withdrawal of attorney.
- 11(b)(3). Leave to withdraw — Notice to client.
- 11(b)(4). Withdrawal upon death, extended illness, absence, or disbarment of attorney.
- 11(b)(5). Limited pro bono appearance.

IDAHO COURT RULES

Rule

- 11(c). Verification.
- 12(a). Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on pleadings — When presented.
- 12(b). How defenses and objections presented.
- 12(c). Motion for judgment on the pleadings.
- 12(d). Preliminary hearings.
- 12(e). Motion for more definite statement.
- 12(f). Motion to strike.
- 12(g). Waiver or preservation of certain defenses.
- 13(a). Compulsory counterclaims.
- 13(b). Permissive counterclaims.
- 13(c). Counterclaim exceeding opposing claim.
- 13(d). Counterclaim against the state.
- 13(e). Counterclaim maturing or acquired after pleading.
- 13(f). Omitted counterclaims.
- 13(g). Cross-claim against coparty.
- 13(h). Joinder of additional parties.
- 13(i). Separate trials — Separate judgments.
- 14(a). Third party practice — When defendant may bring in third party.
- 14(b). When plaintiff may bring in third party.
- 15(a). Amended and supplemental pleadings — Amendments.
- 15(b). Amendments to conform to the evidence.
- 15(c). Relation back of amendments.
- 15(d). Supplemental pleadings.
- 16(a). Pre-trial conferences, objectives.
- 16(b). Scheduling and planning.
- 16(c). Subjects to be discussed at pre-trial conferences.
- 16(d). Final pre-trial procedure — Formulating issues.
- 16(e). Pre-trial stipulation.
- 16(f). Pre-trial order.
- 16(g). Objections to pre-trial order.
- 16(h). Exhibits and witnesses.
- 16(i). Sanctions.
- 16(j). Mediation of child custody and visitation disputes.
- 16(k). Mediation of civil lawsuits.
- 16(l). Appointment of parenting coordinator in child custody and visitation disputes.
- 16(m). Alternative Dispute Resolution Screening.
- 16(n). Registration of private civil litigation evaluators.
- 16(o). Supervised access to children.
- 16(p). Informal custody trial.
- 17(a). Real party in interest.
- 17(b). Capacity to sue or be sued.
- 17(c). Infants or incompetent persons.

Rule

- 17(d). Unknown owners or heirs as parties.
- 18(a). Joinder of claims.
- 18(b). Joinder of remedies — Fraudulent conveyances.
- 19(a)(1). Persons to be joined if feasible.
- 19(a)(2). Determination by court whenever joinder not feasible.
- 19(a)(3). Pleading reasons for nonjoinder.
- 19(a)(4). Exception of class actions.
- 19(b). Motor vehicle owner.
- 20(a). Permissive joinder of parties — Permissive joinder.
- 20(b). Separate trials.
- 21. Misjoinder and nonjoinder of parties.
- 22. Interpleader.
- 23(a). Prerequisites to a class action.
- 23(b). Class actions maintainable.
- 23(c). Determination by order whether class action to be maintained: notice: judgment: actions conducted partially as class actions.
- 23(d). Orders in conduct of actions.
- 23(e). Dismissal or compromise.
- 23(f). Derivative actions by shareholders.
- 23(g). Actions relating to unincorporated associations.
- 24(a). Intervention of right.
- 24(b). Permissive intervention.
- 24(c). Procedure.
- 24(d). De facto custodian intervention.
- 25(a)(1). Substitution of parties — Death.
- 25(a)(2). Death of coparty — Effect.
- 25(b). Incompetency.
- 25(c). Transfer of interest.
- 25(d). Public officers — Death or separation from office.
- 25(e). Substitution at any stage.
- 26(a). Discovery methods.
- 26(b)(1). Scope of discovery in general.
- 26(b)(2). Insurance agreements.
- 26(b)(3). Trial preparation — Materials.
- 26(b)(4). Trial preparation — Experts.
- 26(b)(4)(B). Experts not expected as witnesses.
- 26(b)(4)(C). Fees of expert — Apportionment.
- 26(b)(5)(A). Privileged information withheld.
- 26(b)(5)(B). Privileged information produced.
- 26(c). Protective orders.
- 26(d). Sequence and timing of discovery.
- 26(e). Supplementation of responses.
- 26(f). Signing of discovery requests, responses, and objections.
- 27(a)(1). Depositions before action — Petition.
- 27(a)(2). Notice and service.
- 27(a)(3). Order and examination.
- 27(a)(4). Use of deposition.
- 27(b). Depositions pending appeal.
- 27(c). Perpetuation by action.
- 28(a). Persons before whom depositions may be taken — Within the United States.

IDAHO RULES OF CIVIL PROCEDURE

Rule

- 28(b). Taking in foreign countries.
- 28(c). Members of the armed forces.
- 28(d). Disqualification for interest.
- 28(e). [Repealed.]
- 29. Stipulations regarding discovery procedure.
- 30(a). Depositions upon oral examination — When depositions may be taken.
- 30(b)(1). Notice of examination.
- 30(b)(2). General requirements.
- 30(b)(3). Special notice.
- 30(b)(4). Audio-visual deposition.
- 30(b)(5). Production of documents and things.
- 30(b)(6). Deposition of organization.
- 30(b)(7). Depositions by conference telephone calls.
- 30(c). Examination and cross-examination — Record of examination — Oath — Objections.
- 30(d). Conduct during depositions; motion to terminate or limit examination.
- 30(e). Submission to witness — Changes — Signing.
- 30(f)(1). Certification by officer and non-filing — Exhibits.
- 30(f)(2). Copies.
- 30(f)(3). Notice of preparation of transcript and filing notice of mailing.
- 30(f)(4). Use of deposition.
- 30(f)(5). Exhibits to depositions.
- 30(g)(1). Failure to attend.
- 30(g)(2). Expenses.
- 31(a). Depositions upon written questions — Serving questions — Notice.
- 31(b). Officer to take responses and prepare record.
- 31(c). Notice of preparation of transcript and filing notice of mailing.
- 31(d). Orders for the protection of parties and deponents.
- 32(a). Use of depositions.
- 32(b). Objections to admissibility.
- 32(c). [Rescinded.]
- 32(d). Effect of errors and irregularities in depositions.
- 33(a). Interrogatories to parties — Availability — Procedures for use.
- 33(b). Scope — Use of interrogatories at trial or on motions.
- 33(c). Option to produce records.
- 34(a). Production of documents, electronically stored information, things and entry upon land for inspection and other purposes — Scope.
- 34(b). Procedure.
- 34(c). Persons not parties.
- 34(d). Notice of filing and notice of compliance.
- 35(a). Physical and mental examination of persons.

Rule

- 35(b). Report of examining physician.
- 36(a). Requests for admission.
- 36(b). Effect of admission.
- 36(c). Non-filing of requests for admission and responses thereto.
- 36(d). Use of admissions.
- 37(a). Sanctions for violation of orders — Motion for order compelling discovery.
- 37(b). Failure to comply with discovery order — Sanctions.
- 37(c). Expenses on failure to admit.
- 37(d). Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.
- 37(e). General sanctions — Failure to comply with any order.
- 37(f). Expenses against state of Idaho.
- 38(a). Jury trial of right — Right preserved.
- 38(b). Demand.
- 38(c). Demand — Specification of issues.
- 38(d). Waiver.
- 39(a). Trial by jury or by the court — By jury.
- 39(b). Trial by the court.
- 39(c). Advisory jury and trial by consent.
- 40(a). [Rescinded.]
- 40(b). Request for trial setting.
- 40(c). Dismissal of inactive cases.
- 40(d)(1). Disqualification without cause.
- 40(d)(2). Disqualification for cause.
- 40(d)(3). [Rescinded.]
- 40(d)(4). Voluntary disqualification.
- 40(d)(5). Disqualification and assignment of new judge.
- 40(e). Change of venue.
- 41(a)(1). Dismissal of actions — Voluntary dismissal — Effect thereof — By plaintiff — By stipulation.
- 41(a)(2). Dismissal by order of court.
- 41(b). Involuntary dismissal — Effect thereof.
- 41(c). Dismissal of counterclaim, cross-claim, or third-party claim.
- 41(d). Costs of previously dismissed action.
- 42(a). Consolidation of separate trials — Consolidation.
- 42(b). Separate trials.
- 43(a). Taking of testimony.
- 43(b)(1). Direct and cross-examination.
- 43(b)(2). Interpreters.
- 43(b)(3). Rules governing cross-examination. [Rescinded effective July 1, 1985.]
- 43(b)(4). Cross-examination of adverse party. [Rescinded effective July 1, 1985.]
- 43(b)(5). Reexamination and recalling of witnesses.
- 43(b)(6). Impeachment by adverse party. [Rescinded effective July 1, 1985.]
- 43(b)(7). Impeachment of party's own witness. [Rescinded effective July 1, 1985.]

IDAHO COURT RULES

Rule

- 43(b)(8). Impeachment by showing inconsistent statements. [Rescinded effective July 1, 1985.]
- 43(b)(9). Evidence of good character. [Rescinded effective July 1, 1985.]
- 43(b)(10). Exclusion of trial witnesses. [Rescinded effective July 1, 1985.]
- 43(b)(11). Refreshment of memory. [Rescinded effective July 1, 1985.]
- 43(b)(12). Inspection of writings.
- 43(c). [Rescinded.]
- 43(d). Affirmation in lieu of oath.
- 43(e). Evidence on motions.
- 43(f). View of premises, property or things.
- 44(a). Proof of official record — Authentication of copy. [Rescinded effective July 1, 1985.]
- 44(b). Proof of lack of record. [Rescinded effective July 1, 1985.]
- 44(c). Other proof of record. [Rescinded effective July 1, 1985.]
- 44(d). Judicial notice of facts and foreign law.
- 45(a). Subpoena — For attendance of witnesses — Issuance.
- 45(b). Subpoena for production or inspection of documents, electronically stored information or tangible things, or inspection of premises.
- 45(c). Form.
- 45(d). Protection against subpoena.
- 45(e)(1). Witness fees and expenses.
- 45(e)(2). Service of subpoena.
- 45(f)(1). Subpoena for taking depositions — Place of examination.
- 45(f)(2). Depositions — Attendance where required.
- 45(g). Subpoena for a hearing or trial.
- 45(h). Contempt for nonobedience of subpoena.
- 45(i). Interstate depositions and discovery.
- 45(i)(1). Statement of purpose.
- 45(i)(2). Definitions.
- 45(i)(3). Issuance of subpoena for interstate depositions and discovery.
- 45(i)(4). Service of subpoena for interstate depositions and discovery.
- 45(i)(5). Deposition, production, inspection, witness fees, expenses, place of examination, attendance where required.
- 45(i)(6). Application to court.
- 45(i)(7). Uniformity of application and construction.
- 45(i)(8). Application to pending action.
- 46. Exceptions unnecessary.
- 47(a). Selection of master jury list and master jury wheel.
- 47(b). Selection of jury panel.
- 47(c). [Rescinded.]
- 47(d). Juror questionnaires.

Rule

- 47(e). Roll call of jurors.
- 47(f). Oath to panel.
- 47(g). Selecting initial jury.
- 47(h). Challenges for cause.
- 47(i). Opening statements — Voir dire examination of jurors — Challenges — Struck jury.
- 47(j). Peremptory challenges — Number.
- 47(k). Exercise of peremptory challenges.
- 47(l). Additional jurors.
- 47(m). Oath of jurors.
- 47(n). Separation of jury — Admonition by court.
- 47(o). Notes by jurors — Juror notebooks.
- 47(p). Taking documents and exhibits to jury room.
- 47(q). Juror questioning of witnesses.
- 47(u). Declaration of mistrial — Sanctions.
- 48(a). Juries of less than twelve — Majority verdict.
- 48(b). Rendering verdict — Polling jury.
- 49(a). Special verdicts and interrogatories — Special verdicts.
- 49(b). General verdict accompanied by answer to interrogatories.
- 50(a). Motion for directed verdict — When made — Effect.
- 50(b). Motion for judgment notwithstanding the verdict.
- 50(c). Motion for judgment notwithstanding verdict — Conditional rulings on granted motions.
- 50(d). Denial of motion.
- 51(a)(1). Instructions to jury — Requests — Objections.
- 51(a)(2). Use of Idaho Jury Instructions (IDJI).
- 51(b). Rulings on objections — Final instructions and arguments.
- 52(a). Findings by the court — Effect.
- 52(b). Amendment of findings of court.
- 53(a)(1). Masters — Appointment and compensation.
- 53(a)(2). Disqualification of master.
- 53(a)(3). Motion and notice for disqualification.
- 53(b). Reference to a master.
- 53(c). Powers of master.
- 53(d)(1). Proceedings — Meetings.
- 53(d)(2). Witnesses.
- 53(d)(3). Statement of accounts.
- 53(e)(1). Master's report — Contents and filing.
- 53(e)(2). Master's findings in nonjury actions.
- 53(e)(3). Master's report in jury actions.
- 53(e)(4). Stipulation as to findings of master.
- 53(e)(5). Draft report of master.
- 54(a). Judgments — Definition — Form.
- 54(b). Judgment upon multiple claims or involving multiple parties.

IDAHO RULES OF CIVIL PROCEDURE

Rule

- 54(c). Demand for judgment.
- 54(d)(1). Costs — Items allowed.
- 54(d)(2). Multiple parties.
- 54(d)(3). Costs on postponement.
- 54(d)(4). Nonresident cost bond prohibited.
- 54(d)(5). Memorandum of costs.
- 54(d)(6). Objections to costs.
- 54(d)(7). Settlement of costs by order of court.
- 54(e)(1). Attorney fees.
- 54(e)(2). Findings.
- 54(e)(3). Amount of attorney fees.
- 54(e)(4). Pleading — Default judgments.
- 54(e)(5). Attorney fees as costs.
- 54(e)(6). Objection to attorney fees.
- 54(e)(7). Settlement of attorney fees by order of court — Determination not binding on attorney and client.
- 54(e)(8). Claims to which rule applies.
- 54(e)(9). Effective date.
- 55(a)(1). Default — Entry.
- 55(a)(2). Default proof — Time limitation.
- 55(a)(3). Actions at issue — Not default.
- 55(b)(1). Default judgment by the court or clerk.
- 55(b)(2). Default judgment by the court — Persons exempt from.
- 55(c). Setting aside default judgment.
- 55(d). Plaintiffs, counterclaimants, cross-claimants covered by default judgment rule.
- 55(e). Judgment against the state.
- 56(a). Summary judgment — For claimant.
- 56(b). Summary judgment — For defending party.
- 56(c). Motion for summary judgment and proceedings thereon.
- 56(d). Case not fully adjudicated on motion for summary judgment.
- 56(e). Form of affidavits — Further testimony — Defense required.
- 56(f). When affidavits are unavailable in summary judgment proceedings.
- 56(g). Affidavits in summary judgment proceedings made in bad faith.
- 57. Declaratory judgments.
- 58(a). Entry of judgment.
- 58(b). Satisfaction of judgment.
- 59(a). New trial — Amendment of judgment — Grounds.
- 59(b). Time for motion for new trial.
- 59(c). Time for serving affidavits on motion for new trial.
- 59(d). On initiative of court.
- 59(e). Motion to alter or amend a judgment.
- 59.1. Additurs or remittiturs in lieu of new trial.
- 60(a). Relief from judgment or order — Clerical mistakes.
- 60(b). Mistake, inadvertence, excusable neglect, newly discovered evidence,

Rule

- fraud, grounds for relief from judgment or order.
- 60(c). Proceedings to modify child custody or child support orders.
- 61. Harmless error.
- 62(a). Stay of proceedings to enforce a judgment — Stay upon entry of judgment.
- 62(b). Stay on motion for new trial or for judgment.
- 62(c). Injunction — Writ of mandate pending appeal.
- 62(d). Stay upon appeal.
- 62(e). Stay in favor of the state, subdivision, or agency thereof — Waiver.
- 62(f). Powers of Supreme Court and district court not limited.
- 62(g). Stay of judgment upon multiple claims.
- 63. Disability of a judge.
- 64. Seizure of person or property.
- 65(a). Injunctions — Preliminary injunction.
- 65(b). Temporary restraining order — Notice — Hearing — Duration.
- 65(c). Security given with injunction or restraining order.
- 65(d). Form and scope of injunction or restraining order.
- 65(e). Grounds for preliminary injunction.
- 65(f). Employer and employee actions exempt from rules as to injunctions or restraining orders.
- 65(g). Divorce and related proceedings — Bond or notice discretionary in prohibitive or mandatory orders.
- 66(a). Justification of sureties on bond.
- 66(b). Counsel not acceptable as surety.
- 67. Deposit in court.
- 68. Offer of judgment.
- 69. Execution — In general.
- 70. Judgment for specific acts — Vesting title.
- 71. Process in behalf of and against persons not parties.
- 72(a). Uniform probate code — Guardians and conservators.
- 72(b) — 72(z). [Reserved.]
- 73. Receivers.
- 74(a). Mandate and prohibition.
- 74(b). Application for writ.
- 74(c). Opposing writ.
- 74(d). Trial — Judgment.
- 75. Contempt.
- 75(a). Definitions.
- 75(b). Summary proceedings.
- 75(c). Nonsummary proceedings — Commencement.
- 75(d). Nonsummary proceedings — Service — Time limits.
- 75(e). Nonsummary proceedings — Warrant of attachment and bail.

IDAHO COURT RULES

Rule

- 75(f). Nonsummary proceedings — Initial appearance of respondent.
- 75(g). Nonsummary proceedings — Plea.
- 75(h). Nonsummary proceedings — Defenses to the contempt.
- 75(i). Nonsummary proceedings — Trial.
- 75(j). Nonsummary proceedings — Burden of proof.
- 75(k). Nonsummary proceedings — Findings of fact.
- 75(l). Nonsummary proceedings — Imposition of sanctions.
- 75(m). Nonsummary proceedings — Attorney fees.
- 75(n). Other rules of civil procedure.
- 76. Decree of adoption.
- 77(a). Court in continuous session — Terms abolished.
- 77(b). Trials and hearings.
- 77(c). Clerk's office and orders by clerk.
- 77(d). Notice of orders or judgments.
- 78. Motion day.
- 79(a) — 79(d). [Rescinded.]
- 79(e). Reclaiming exhibits, documents or property.
- 79(f). Other books and records of the clerk.
- 80. Stenographic report or transcript as evidence.
- 81(a). Small claims — Defaults.
- 81(b). Counterclaims prohibited.
- 81(c). Transfer to magistrates division — When permitted.
- 81(d). Appearance and witnesses at small claim proceeding.
- 81(e). Disqualification of magistrate in small claim proceeding.
- 81(f). Dismissal of small claims for inactivity or lack of service.
- 81(g). Nature of trial.
- 81(h). Judgment on small claim.
- 81(i). Vacating, reconsidering, or correcting clerical errors of a judgment in a small claim.
- 81(j). Execution.
- 81(k). Who may appeal a small claim judgment.
- 81(l). Notice of appeal and appeal bond.
- 81(m). [Rescinded.]
- 81(n). Appeal of small claims judgment.
- 81(o). Procedure on appeal.
- 81(p). Costs on appeal.
- 81(q). Attorney fees on appeal.
- 82(a). Jurisdiction and venue unaffected.
- 82(b). Attorney magistrates.
- 82(c)(1). Jurisdiction of all magistrates.
- 82(c)(2). Assignment of additional cases to attorney magistrates.
- 82(c)(3). Objection to assignment to magistrates.
- 82(c)(4). Special assignment to attorney magistrates.

Rule

- 82(c)(5). Enlargement of dollar amount of cases assignable.
- 82(d). Costs — Jurisdictional amounts.
- 82(e). Counterclaims or cross-claims exceeding jurisdiction.
- 82(f) — 82(g). [Rescinded.]
- 83(a). Appeals from decisions of magistrates.
- 83(b). Magistrate appeals — Judicial review.
- 83(c). [Rescinded.]
- 83(d). Record of proceedings of magistrates division.
- 83(e). Filing appeal.
- 83(f). Notice of appeal — Contents.
- 83(g). Cross appeals.
- 83(h). [Rescinded.]
- 83(i). Stay during appeal — Powers of magistrate.
- 83(j). Method of appeal — Transcript of proceedings — Listening to recording tapes — Trial de novo.
- 83(k). Payment of fees — Preparation of transcript.
- 83(l). Form of transcript.
- 83(m). [Rescinded.]
- 83(n). Clerk's record.
- 83(o). Settlement of transcript.
- 83(p). Filing of transcript and record.
- 83(q). Augmentation of the record.
- 83(r). Joint use of transcript.
- 83(s). Effect of failure to comply with time limits.
- 83(t). Motions.
- 83(u). Appellate review.
- 83(v). Appellate briefs.
- 83(w). Appellate argument.
- 83(x). Other appellate rules.
- 83(y). Listening to or copying recording tapes.
- 83(z). Judgment entered on appeal.
- 84. Judicial Review of Agency Actions by the District Court.
- 84(a). Judicial review of state agency and local government actions.
- 84(b). Filing petition for judicial review.
- 84(c). Cross-petitions for judicial review.
- 84(d). Petition for judicial review — Contents.
- 84(e). Method and scope of review.
- 84(f). Payment of fee — Preparation of record.
- 84(g). Payment of fee — Preparation of transcript.
- 84(h). Joint use of transcripts.
- 84(i). Form of transcript.
- 84(j). Settlement of transcript and record.
- 84(k). Lodging of transcript and record.
- 84(l). Augmentation of record — Additional evidence presented to the district court — Remand to agency to take additional evidence.

Rule

- 84(m). Stay during consideration of petition for judicial review — Power of agency.
- 84(n). Effect of failure to comply with time limits.
- 84(o). Motions.
- 84(p). Briefs and memoranda.
- 84(q). Oral argument.
- 84(r). Other procedural rules.
- 84(s). Listening to, watching or copying recording tapes.
- 84(t). Finality of Judgments or Decisions and Remittiturs.
- 85. Small Lawsuit Resolution Act Procedures.
- 85(a). Application of rule.
- 85(b). Computation of amount of claim.
- 85(c). Notice of initiation of Act.

Rule

- 85(d). Selection of senior or retired judge by the parties.
- 85(e). Appointment of senior judges as evaluators.
- 85(f). List of evaluators.
- 85(g). Registration of private civil litigation evaluators.
- 85(h). Compensation of evaluator.
- 85(i). Authority of evaluator.
- 85(j). Impartiality.
- 85(k). Sanctions.
- 85(l). Notice of request for trial de novo.
- 85(m). Statistical information.
- 86. Effective date.
- 87. Title.
- Appendix “A” — Filing Fee Schedule — District Court and Magistrate Division

Rule 1(a). Scope of rules.

These rules govern the procedure and apply uniformly in the district courts and the magistrate’s divisions of the district courts in the state of Idaho in all actions, proceedings and appeals of a civil nature whether cognizable as cases at law or in equity, including probate proceedings and proceedings in which a judge pro tempore is appointed pursuant to Idaho Court Administrative Rule 4; except that proceedings in the small claims department are governed by these rules only as provided by Rule 81. All references in these rules to the court or district court shall include the magistrate’s division, and all references to judges or clerks shall include magistrates and their clerks and a judge pro tempore appointed pursuant to Idaho Court Administrative Rule 4, except as referred to in Rules 81, 82 and 83. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding. (Amended June 15, 1987, effective November 1, 1987; amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler’s Notes. These rules, which were patterned, after the Federal Rules of Civil Procedure to the extent practicable, were originally adopted by the Idaho Supreme Court to become effective on November 1, 1958. Subsequently, the rules were amended by an order of the Supreme Court which read: “The report of the Civil Rules Advisory Committee having been submitted to the Court for the amendment of the Idaho Rules of Civil Procedure and the rescission of all other rules of civil procedure now in effect, and the Court having reviewed said report, and the Court having determined that amendments to the Idaho Rules of Civil Procedure are in the best interest of the judicial

system of the State of Idaho,

NOW, THEREFORE, IT IS HEREBY ORDERED, that the Idaho Rules of Civil Procedure be, and the same are hereby amended to read as indicated in the attached copy of the Idaho Rules of Civil Procedure, as amended.

IT IS FURTHER ORDERED, that the civil rules contained in the Rules of the Court for Magistrates Division of the District Court and the District Court, adopted effective January 11, 1971, be, and the same are hereby rescinded.

IT IS FURTHER ORDERED, that the civil rules contained in the Uniform District Court Rules adopted effective January 1, 1966 be, and the same are hereby rescinded.

IT IS FURTHER ORDERED, that the civil rules, except for rules concerning the assignment of jurisdiction to the magistrates division and the establishment of calendars and case setting procedures contained in each and all of the Local District Court Rules of the seven judicial districts be, and same are hereby, rescinded.

IT IS FURTHER ORDERED, that the Civil Appellate Rules be, and the same are hereby rescinded.

IT IS FURTHER ORDERED, that the Order Promulgating Rules of Practice and Procedure of this Court, dated September 19, 1951, declaring statutes of the state of Idaho to be rules of the Court be, and the same is hereby rescinded."

A separate order of the Court provided that the Rules should become effective January 1, 1975.

Cross References. Counterclaims in small claims proceedings, Rule 81(b).

District courts, making and amending rules, Rule 1(c).

Divorce and related proceedings, Rule 65(g).

Jurisdiction and venue unaffected by rules, Rule 82(a).

Labor disputes, proceedings regarding exempt, Rule 65(f).

Small claims proceedings generally, Rule 81(a).

Title of rules, Rule 85.

JUDICIAL DECISIONS

ANALYSIS

Construction.

Determination of Action.

Disqualification of Judge.

Habeas Corpus Proceedings.

Liberal Construction.

Post-Conviction Procedure Act.

Probate Proceedings.

Summary Judgment.

Construction.

This rule is a constant reminder that the rules are to be liberally construed and a just result is always the ultimate goal to be accomplished. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

A general policy favors providing an appellant his day in court. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

The Idaho Rules of Civil Procedure are not designed to be all inclusive. The rules do not prescribe everything that takes place in the courtroom, during a trial, pre-trial proceedings, or post-trial proceedings. Not everything that happens in a lawsuit will fit neatly under a particular rule. *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 967, 812 P.2d 274 (1991).

Determination of Action.

A "determination" of an action within the meaning of this rule is meant to be a determination of the controversy on the merits — not a termination on a procedural technicality which serves litigants not at all; and a determination entails a finding of the facts and an application of the law in order to resolve the legal rights of the litigants who hope to resolve their differences in the courts. *Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978).

In an action concerning an easement and

trespass dispute, although the district court's order on remand failed to comply with the requirements of Idaho R. Civ. P. 52(a), it was sufficient to permit appellate review. The district court's order on remand clearly articulated the facts the district court accepted and the law that it applied. *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175 (2009).

Disqualification of Judge.

To construe I.R.C.P. 40(d)(1) to allow disqualification solely for delay would be contrary to the spirit of the rules; hence, to disqualify a judge under Rule 40(d)(1), the judge who is to be disqualified must be named. Disqualification cannot occur prior to assignment of a judge to the case. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Habeas Corpus Proceedings.

The Idaho Civil Rules of Procedure are applicable to habeas corpus proceedings. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

Liberal Construction.

A dismissal for failure to include a summary of expected assignments of error was not contrary to this rule where the appellant did not attempt to correct the error in the five-month period between the magistrate's ruling and the ruling on the motion to dismiss. In re *Estate of Mattson*, 99 Idaho 24, 576 P.2d 1058 (1978).

The "liberal construction" of the rules required by this rule, while it cannot alter compliance which is mandatory and jurisdictional, will ordinarily preclude dismissal of an appeal for that which is but technical noncompliance, and this will be especially so where no prejudice is shown by any delay which may

have been occasioned. *Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978).

The liberal construction requirement of this rule means that I.R.C.P. 17(a), 19(a)(1) and 21 should be read to require the granting of a motion by plaintiffs, in an action to impress an easement on adjoining property, to substitute a corporation owned by plaintiffs as a party plaintiff where the corporation held title to the property on which the plaintiffs resided, and where defendants would not have been prejudiced by the substitution. *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981).

Post-Conviction Procedure Act.

An action under the Uniform Post Conviction Procedure Act is civil in nature. Thus, the Idaho Rules of Civil Procedure are applicable in such a proceeding. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

Probate Proceedings.

When the Idaho Department of Health and Welfare attempted to proceed against decedent's estate to recover Medicaid benefits, the estate's motion for judgment on the pleadings pursuant to I.R.C.P. 12(c) was treated as a motion for summary judgment under I.R.C.P. 56. The civil procedure rules are applicable to probate proceedings. *State, Dept. of Health & Welfare v. Estate of Elliott (In re Estate of Elliott)*, 141 Idaho 177, 108 P.3d 324 (2005).

Summary Judgment.

On appeal from the magistrate's court to the district court, a motion for summary judgment is applicable on trial de novo when there is no genuine issue as to any material fact. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

Cited in: *Longteig v. Neal*, 98 Idaho 195, 560 P.2d 866 (1977); *Northwest Health Care, Inc. v. Idaho Dep't of Health & Welfare*, 99 Idaho 843, 590 P.2d 99 (1979); *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982); *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982); *Smethers v. Wilson*, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984); *Brummett v. Ediger*, 106 Idaho 724, 682 P.2d 1271 (1984); *Estate of Thompson v. Turner*, 107 Idaho 470, 690 P.2d 925 (1984); *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984); *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986); *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987); *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987); *Christensen v. Rice*, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988); *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 815 P.2d 461 (Ct. App. 1991); *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992); *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006); *Harrison v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 145 Idaho 179, 177 P.3d 393 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Construction of Rules.

Law and Equity Actions.

Construction of Rules.

Under the liberal standards inherent in notice pleading provisions of the Idaho Rules of Civil Procedure, pleading which imparted sufficient notice of claim, namely that injuries were occasioned by defendant's improper operation of bus, adequately stated a cause of action, and it was neither necessary nor controlling to characterize cause of action as *ex delicto* or *ex contractu*. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972).

Law and Equity Actions.

Actions at law and in equity may be blended in the same complaint. *Wa Ching v. Constantine*, 1 Idaho 266 (1869).

While the distinction between actions at law and suits of equity is abolished and the plaintiff is entitled to any relief warranted by his complaint and established by his evidence, without regard to the form of his prayer, yet where plaintiff draws his complaint on the theory that he is entitled to legal relief, and shows himself by his evidence only entitled to equitable relief, and does not offer to amend his complaint to conform to his proof, he cannot be granted any relief. *Anderson v. War Eagle Consol. Mining Co.*, 8 Idaho 789, 72 P. 671 (1903).

Rule 1(b). Amendments.

These rules may be amended or repealed by order of the Supreme Court effective on the date stated in the order. Any such order shall be published before the effective date as ordered by the Supreme Court, except in cases

declared to be an emergency, in which case the order may be declared effective immediately.

Rule 1(c). District court rules.

No district court or magistrates division of the state shall make rules of procedure except as expressly authorized by these rules. The district courts of each judicial district by majority vote of all district judges may make rules governing the internal case management and procedure of the district court including procedures for setting the time and place for the trial of actions and the hearing of all other proceedings and motions. Such rules shall be consistent with these rules, and must be approved and published by order of the Supreme Court before the effective date thereof, except in cases declared by the Supreme Court to be an emergency, in which case the order may be declared to be effective immediately.

JUDICIAL DECISIONS

Dismissal for Want of Prosecution.

The trial court has the authority to dismiss a case because of a failure to prosecute, and the trial court's exercise of such authority will

not be disturbed on appeal unless it is shown that there was a manifest abuse of discretion. *Kirkham v. 4.60 Acres of Land*, 100 Idaho 781, 605 P.2d 959 (1980).

DECISIONS UNDER PRIOR RULE OR STATUTE

Dismissal for Want of Prosecution.

District court rule providing for dismissal of case in which no action has been taken or paper filed within a period of one year prior thereto, although going beyond § 10-705 (now repealed), was not in conflict therewith and was valid, the Supreme Court not having promulgated rules for district courts. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

Rule of district court requiring dismissal of

actions for want of prosecution was not a rule of limitations, since the latter apply only to commencement of action. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

District court rule requiring dismissal of suits for want of prosecution should be construed so as to promote decisions on merit rather than on strict formal procedure. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

Rule 2. Form of action.

There shall be one form of action to be known as "civil action."

STATUTORY NOTES

Compiler's Notes. This rule is in accord with the Idaho Constitution, Art. V, § 1.

Cross References. Injunctions, preliminary, Rule 65(a).

Joinder of claims, Rule 18(a).
Receivers, Rule 73.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Contempt.
In General.
Law and Equity Actions.

What Constitutes Civil Action.

Contempt.

Contempt proceeding could be brought in same action seeking other relief. *Nordick v.*

Sorensen, 81 Idaho 117, 338 P.2d 766 (1959).

In General.

Under the law of this state the distinctions between actions at law and suits in equity, and the forms of such actions and suits, are prohibited to the end that there shall be but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action. *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959).

Law and Equity Actions.

Actions at law and in equity may be blended in the same complaint. *Wa Ching v. Constantine*, 1 Idaho 266 (1869).

While the distinction between actions at law and suits at equity is abolished and the plaintiff is entitled to any relief warranted by his complaint and established by his evidence, without regard to the form of his prayer, yet where plaintiff draws his complaint on the theory that he is entitled to legal

relief, and shows himself by his evidence only entitled to equitable relief, and does not offer to amend his complaint to conform to his proof, he cannot be granted any relief. *Anderson v. War Eagle Consol. Mining Co.*, 8 Idaho 789, 72 P. 671 (1903).

What Constitutes Civil Action.

Since the abolition of *scire facias*, an action on a judgment is, a new action and not an action or proceeding in the original action to revive the original judgment. *Stevens v. Hall*, 8 Idaho 549, 69 P. 282 (1902).

A proceeding for the appointment of an administrator was an action, within the meaning of the term as used in former section governing forms of action. *Gwinn v. Melvin*, 9 Idaho 202, 72 P. 961 (1903).

The proceeding for a writ of mandate is a special proceeding of a civil nature, and is not a suit at common law, or a civil action, and neither party to such proceeding is entitled as a matter of right to a trial by jury. *Nelson v. Steele*, 12 Idaho 762, 88 P. 95 (1906).

Rule 3(a). Commencement of action.

(1) A civil action is commenced by the filing of a complaint with the court, which may be denominated as a complaint, petition or application, and the party filing the same shall be designated as the plaintiff or petitioner, and any party against whom the same is filed shall be designated as the defendant or respondent. Complaints, petitions or applications in family law cases, including divorce, custody, paternity, modification, minor guardianship, adoption, termination of parental rights, civil protection orders, and child protection act shall not be filed unless and until the filing party furnishes to the clerk a completed family law case information sheet on a form adopted by the Supreme Court and furnished by the clerk. This family law case information sheet shall be exempt from disclosure according to I.C.A.R. 32(d). No claim, controversy or dispute may be submitted to any court in the state for determination or judgment without filing a complaint or petition as provided in these rules; nor shall any judgment or decree be entered by any court without service of process upon all parties affected by such judgment or decree in the manner prescribed by these rules.

(2) **Commencement of a protection order proceeding.** An action for a domestic violence protection order may not be filed unless accompanied by information in whatever form required by the court to allow entry of the protection order into the Idaho Law Enforcement Telecommunications System (to be transferred by the court to the appropriate law enforcement agency with any signed order). A copy of this sheet shall not be maintained in the court file. Such action may be commenced or defended on behalf of a minor as set forth in I.R.C.P. 17(c). (Amended December 19, 1975, effective January 1, 1976; amended April 22, 2004, effective July 1, 2004; amended effective July 1, 2005; amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Cross References. Filing papers with court, defined, Rule 5(e).

Injunctions, issuance, Rule 65(a).

JUDICIAL DECISIONS

ANALYSIS

Civil Action.

Zoning Application.

Civil Action.

Where Medicaid applicant brought denial of Medicaid benefits before the District Court on appeal from the hearing officer's decision, that proceeding did not constitute a "civil action" as defined by this rule and attorney fees were not available under § 12-121. *McCoy v. State, Dep't of Health & Welfare*, 127 Idaho 792, 907 P.2d 110 (1995).

Because a claimant for unemployment benefits does not file a complaint pursuant to this rule, but files claims for benefits according to § 72-1368(a), the claim for unemployment benefits does not constitute a civil action for which attorney fees can be awarded pursuant to § 12-121. *Johnson v. Idaho Cent. Credit Union*, 127 Idaho 867, 908 P.2d 560 (1995).

Because appeal to the district court under the Idaho Administrative Procedure Act does not constitute a "civil action" as defined by this rule, attorney fees were not available under § 12-121 to county which had its denial of reimbursement to hospital for medical indigency benefits upheld on appeal. *University of Utah Hosp. v. Board of Comm'rs*, 128 Idaho 529, 915 P.2d 1387 (Ct. App. 1996).

Matter before the district court was a decision of the Idaho personnel commission (commission) made pursuant to the appeals provision of the Personnel System Act and brought before the district court by the filing of an appeal; these proceedings did not constitute a civil action commenced by the filing of a complaint as required by Idaho R. Civ. P. 3(a); thus, the commission correctly ruled it did not have authority under § 12-121 to award fees.

Sanchez v. State, 143 Idaho 239, 141 P.3d 1108 (2006).

Landowner's action against the county was not a civil judicial proceeding, Idaho R. Civ. P. 3(a)(1), and since it was a petition for judicial review, a proceeding that did not commence with a complaint filed in court, the courts could not award fees. *Smith v. Wash. County*, 150 Idaho 388, 247 P.3d 615 (2010)

Civil action was one that is commenced by the filing of a complaint, Idaho R. Civ. P. 3(a)(1); this case began with an application for a writ of mandamus that was treated as a petition for judicial review of an administrative decision, and since this was not a civil action, the landowner was not entitled to costs under Idaho R. Civ. P. 54(d)(1). *Smith v. Wash. County*, 150 Idaho 388, 247 P.3d 615 (2010)

Zoning Application.

Where a matter before the district court stemmed from a decision of a county zoning commission pursuant to §§ 67-6507—67-6509 regarding an application filed with the zoning commission and brought before the district court by the filing of an appeal, this matter did not constitute a civil action commenced by the filing of a complaint as required by this rule, and an award of attorney's fees pursuant to § 12-121 was error as the proceeding in question was not a "civil action." *Lowery v. Board of County Comm'rs*, 117 Idaho 1079, 793 P.2d 1251 (1990).

Cited in: *Rogers v. State*, 98 Idaho 742, 572 P.2d 176 (1977); *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989); *Terra West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010); *Beach v. Wells Fargo Bank, Na (In re Beach)*, — Bankr. —, 2011 Bankr. LEXIS 4027 (Oct. 19, 2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Action to Recover Personalty.

Application.

Injunction.

Issuance of Process.

Pendency of Action.

Petition.

Procedure Where Action Moot.

Service of Process.

Action to Recover Personalty.

An action to recover the possession of personal property is commenced by filing a complaint, and the filing of the affidavit and undertaking in "claim and delivery" is not

required in order to commence or maintain the action. *Bates v. Capital State Bank*, 21 Idaho 141, 121 P. 561 (1912).

Application.

Former section governing commencement of actions was applicable to action for foreclosure of mechanic's lien. *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911).

Injunction.

Allowance of writ of injunction does not take effect until the filing of the complaint and bond. *Elmore County Irrigated Farms Ass'n v. Stockslager*, 22 Idaho 420, 126 P. 616 (1912).

Issuance of Process.

Action must be commenced before process can issue. *West v. Theis*, 15 Idaho 167, 96 P. 932 (1908).

Pendency of Action.

Action is not pending until it is commenced. *Gold Hunter Mining & Smelting Co. v. Holleman*, 3 Idaho 99, 27 P. 413 (1891).

Petition.

Where intervenor brought action against warehouseman for conversion of grain more than three years after making demand on warehouseman for the grain three year stat-

ute of limitations of § 5-218 was not tolled by intervenor's petitioning the Commissioner of Agriculture under § 69-209 as Commissioner did not commence a suit in intervenor's behalf and intervenor's petition to Commissioner did not constitute commencing an action. *United States v. Fireman's Fund Ins. Co.*, 191 F. Supp. 317 (D. Idaho 1961).

Procedure Where Action Moot.

Where action to declare § 67-2743A (repealed) moot was adversely decided in lower court, but statute and regulations were then repealed, it was better practice to remand the adverse decision with instructions to dismiss the action as moot, since once an action is commenced it remains pending until the time to appeal has expired or the appeal proceeds to a final determination; by utilizing this procedure the rights of the parties are preserved for future relitigation. *Moon v. Investment Bd.*, 102 Idaho 131, 627 P.2d 310 (1981).

Service of Process.

A party which is to be joined must be served with summons and complaint in accordance with I.R.C.P. 4 and this rule, and be given an opportunity to respond and to defend itself. Without service of process, the court in fact has no jurisdiction over the purportedly joined party. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Rule 3(b). Designation of party.

Any civil action for or against a person in an individual capacity shall designate such person by name and any action against a person in a representative capacity shall indicate the nature of the representative capacity for which the person is made a party to the action. Provided, all civil actions by or against a governmental unit or agency, or corporation, shall designate such party in its governmental or corporate name only, and individuals constituting the officers of the governing boards of governmental units, boards or agencies or of corporations, shall not be designated as parties in any capacity unless the action is brought against them individually or for relief under Rules 65 or 74. An action against a partnership or unincorporated association shall designate the name of the partnership or association as defendant, in which case any judgment obtained shall be enforceable against the partnership or association property; but no such judgment shall be entered personally against an individual partner or member unless named as an individual defendant in an individual capacity and served with process. (Amended July 2, effective October 1, 1976; amended April 22, 2004, effective July 1, 2004; amended March 24, 2005, effective July 1, 2005.)

STATUTORY NOTES

Cross References. Partnership charged with notice to partner, § 53-312.

Public officer as party to action, effect of death or resignation, Rule 25(d).

Service upon corporations, Rule 4(d)(4).

JUDICIAL DECISIONS

ANALYSIS

City as Party.

Trustees in Individual Capacity.

City as Party.

Being clear from the caption of this case that only the city was named as a party, rather than the elected officials individually, the temporary restraining orders were improperly issued and the finding of contempt was void. *Weyyakin Ranch Property Owners' Ass'n v. City of Ketchum*, 127 Idaho 327, 896 P.2d 327 (1995).

Trustees in Individual Capacity.

Where trustees had not been named as parties in their individual capacity when suit was instituted, the trial court never obtained jurisdiction over them in their individual capacity and the judgment against them as individuals was void; thus the trial court abused its discretion in refusing to set aside such judgment. *Collier Carbon & Chem. Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710 P.2d 618 (Ct. App. 1985).

Cited in: *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986).

DECISIONS UNDER PRIOR RULE OR STATUTE

In General.

The party prosecuting a special proceeding must be designated as a plaintiff and the

adverse party as the defendant. *Connolly v. Woods*, 13 Idaho 591, 92 P. 573 (1907).

Rule 3(c). Privacy protection for filings made with the court.

(1) **Redacted Filings.** Unless the court orders otherwise, the parties shall refrain from including or shall partially redact, where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits. This rule does not apply to exhibits offered at a trial or hearing unless they are filed with the court.

(a) **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last three digits of that number shall be used.

(b) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child shall be used.

(c) **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year shall be used.

(d) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers shall be used.

(2) Exceptions.

(a) The redaction requirement does not apply to the record of a court, tribunal, administrative or agency proceeding if that record was filed before the effective date of this rule.

(b) The redaction requirement does not apply to documents that are exempt from disclosure pursuant to Idaho Court Administrative Rule 32.

(c) The redaction requirement does not apply to documents that are required by statute or rule to include personal data identifiers.

(3) **Options when personal data identifiers are necessary.** A party filing a redacted document need not also file an unredacted version of the document; however, where inclusion of the unredacted personal data identifiers is necessary, a party may:

(a) File the redacted document together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list shall be clearly identified as a reference list filed pursuant to this rule and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information. The reference list shall be secured in the file and be exempt from disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the reference list with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

(b) File the redacted document together with an unredacted copy of the document. The unredacted copy shall be clearly identified as an unredacted copy filed pursuant to this rule and placed in a manila envelope marked “sealed” with a general description of the records, and the redacted copy placed in the court file. The unredacted copy shall be exempt from disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the unredacted copy with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

(4) **Orders of the court.**

(a) If possible, the court shall refrain from including in court orders the personal data identifiers set forth in subsections 1(a)(1) through 1(a)(5) of this rule. If personal data identifiers are included in the order, the order shall be placed in a manila envelope marked “sealed” and be exempt from disclosure pursuant to Idaho Court Administrative Rule 32. Copies of the order shall be served on the parties and shall be available to the parties and other government agencies without court order for purposes of the business of those agencies. Upon request a redacted copy shall be prepared.

(b) **Exceptions.** The court may include personal data identifiers in orders that are exempt from disclosure pursuant to Idaho Court Administrative Rule 32, or that are required by statute to include personal data identifiers.

(5) **Responsibility for compliance.** The parties and counsel are solely responsible for redacting personal data identifiers. The clerk will not review each document for compliance with the rule. Failure to comply with this rule is grounds for contempt. (Adopted March 18, 2011, effective July 1, 2011; June 3, 2011, effective July 1, 2011.)

STATUTORY NOTES

Editor's Note.— A supreme court order dated December 9, 2011 provides "APPLICATION OF THIS RULE TO FAMILY LAW CASES that are not already exempt from disclosure, including any action for divorce,

custody, child support or modification of child support, paternity, or guardianship, shall be further SUSPENDED until July 1, 2012, so that court assistance forms may be reviewed and appropriate changes made."

Rule 4(a). Process — Summons — Issuance — Time limits.

(1) **Summons.** At the request of the plaintiff, the clerk of the district court shall forthwith issue a summons and deliver it for service as provided by Rule 4(c). Upon request of the plaintiff separate or additional summons shall issue against any defendant.

(2) **Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within six (6) months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with 14 days notice to such party or upon motion. (Amended June 15, 1987, effective November 1, 1987; amended February 10, 1993, effective July 1, 1993; amended April 19, 1995, effective July 1, 1995.)

STATUTORY NOTES

Cross References. By whom served, Rule 4(c)(1).

Completion of service, Rule 4(e)(2).

Corporations, domestic or foreign, serving, Rule 4(d)(4).

Depositions, notice and service, Rule 27(a)(2).

Depositions upon written interrogatories, notice, Rule 31(a).

Form of summons, Rule 4(b).

Incompetents, serving, Rule 4(d)(3).

Individuals, serving, Rule 4(d)(2).

Lack of jurisdiction over person, motion presenting, Rule 12(b).

Minors, serving, Rule 4(d)(3).

Other service prescribed by statute, Rule 4(e)(1).

Personal service in general, Rule 4(d)(1).

Process exhibited, Rule 4(c)(2).

Proof of service, Rule 4(g).

State of Idaho or other agency, serving, Rule 4(d)(5).

Telegraphic copy, service, Rule 4(c)(3).

Territorial limits of effective service, Rule 4(f).

Voluntary appearance, Rule 4(i).

JUDICIAL DECISIONS

ANALYSIS

Construction with Other Rules.

Dismissal.

Good Cause.

Jurisdiction.

Time of Service.

Waiver.

Construction with Other Rules.

Subdivision (a)(2)(B) of IRCP 11 provides the authority for a district court to reconsider and vacate interlocutory orders like the one in instant case under subdivision (a)(2) of this

rule so long as final judgment has not yet been ordered. *Telford v. Neibaur*, 130 Idaho 932, 950 P.2d 1271 (1998).

The plaintiff's argument that a state action filed at the same time as a federal action would have been dismissed if plaintiff had timely served the state complaint on the defendant did not constitute good cause for failing to serve the state complaint within six months of its filing, since there is no requirement that a motion for dismissal be granted, and the trial court might instead have stayed the state action pending determination of the

federal action. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

A finding of good cause under I.R.C.P. 40(c) justifying retention of a case on the court's calendar is wholly irrelevant to a determination of whether good cause has been shown for failing to serve a defendant with a copy of a state complaint under this rule. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Dismissal.

The version of this rule referring to a one-year period after filing of the complaint for issuing a summons authorized, but did not specifically require, that the summons be issued by the clerk within that period; the rule contained no provision invalidating a summons issued after one year, nor did it provide for dismissal of an action solely upon the ground that the summons was issued more than one year after the complaint had been filed. *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987) (decision prior to 1987 amendment).

Where, although the interval between the filing of the complaint and the service of process was 19 months, the defendants did not promptly seek to dismiss upon being served, but rather filed their first motion to dismiss five months later, having answered the complaint and having responded to a detailed set of interrogatories propounded by the plaintiffs, and they had been on notice of a possible lawsuit and had investigated the facts potentially underlying such a suit, this rule afforded no basis to dismiss the action. *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987) (decision prior to 1987 amendment).

Court did not err in dismissing the plaintiff's suit for untimely service where the service was made after the six-month period had expired, and the plaintiff did not show good cause as to why service was not timely made. *Hincks v. Neilson*, 137 Idaho 610, 51 P.3d 424 (Ct. App. 2002).

Where defendants appeared in the action within six months after the filing of the complaint, the trial court erred in dismissing them from the action under Idaho R. Civ. P. 4(a)(2). *Engleman v. Milanez*, 137 Idaho 83, 44 P.3d 1138 (2002).

Where the district court dismissed an inmate's civil rights case because he did not show good cause why he failed to serve defendants within the six month time period set forth in subsection (2) of this rule, the dismissal was affirmed; appellate record did not show what information was presented to the district court in an attempt to show good

cause. *Murray v. Spalding*, 141 Idaho 99, 106 P.3d 425 (2005).

District court properly dismissed a negligence complaint against the Board of Professional Discipline of the Idaho State Board of Medicine because the claimants failed to serve the summons and complaint upon the Idaho Secretary of State as well as the Idaho Attorney General within six months after filing the complaint, and did not show good cause for their failure to do so. *Harrison v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 145 Idaho 179, 177 P.3d 393 (2008).

Trial court did not err in dismissing plaintiffs' negligence action against the Idaho department of correction, pursuant to paragraph (2) of this rule, as the inexperience and failures of plaintiffs' attorney did not constitute good cause for failure to timely serve the defendant. *Naranjo v. Idaho Dep't of Corr.*, — Idaho —, 265 P.3d 529 (2011).

Good Cause.

The determination of whether good cause exists under this rule is a factual one. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Whether the defendant knew of the claim and complaint, or suffered prejudice, was irrelevant in determining if the plaintiff had good cause under this rule, since the court had to consider the totality of the circumstances in determining whether the plaintiff had a legitimate reason for not serving the defendant with a copy of a state complaint within six months of the filing of the complaint. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Although the defendant's unexpected relocation impeded service of process, where there was no real element of affirmative evasion, and where the only explanation why counsel would have voluntarily withheld service so long or allowed the time limit to expire without moving for an extension was the ongoing settlement negotiations, good cause was not demonstrated for non-compliance with this rule. *Martin v. Hoblit*, 133 Idaho 372, 987 P.2d 284 (1999).

Factors deemed irrelevant to a good cause analysis include the pro se status of the plaintiff, that the action will be time barred if dismissal is granted, lack of prejudice to the defendant from untimely service, prior notice of the claim to the defendant, and the timing of the defendant's motion to dismiss. *Martin v. Hoblit*, 133 Idaho 372, 987 P.2d 284 (1999).

It is the six-month period following the filing of the complaint that should be the focus of the court's good cause inquiry regarding why timely service was not made. *Martin v. Hoblit*, 133 Idaho 372, 987 P.2d 284 (1999).

Fraud case against an attorney was properly dismissed based on a failure to serve a complaint and summons within 6 months, because no good cause was shown by the mailing of the documents after filing or by the lack of prejudice; moreover, there was no request to refrain from serving process, despite discussions regarding the need for extra time. Since there was no good cause for failing to serve, a district court did not abuse its discretion by reconsidering an earlier decision to allow late service. *Campbell v. Reagan*, 144 Idaho 254, 159 P.3d 891 (2007).

Jurisdiction.

A party which is to be joined must be served with summons and complaint in accordance with I.R.C.P. 3 and 4, and be given an opportunity to respond and to defend itself. Without service of process, the court in fact has no jurisdiction over the purportedly joined party. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Time of Service.

Service of process 18 months after complaint was filed was reasonable where plaintiffs used diligence in the prosecution of their claim against difficult-to-locate corporate defendant and corporation did not suffer any prejudice as a result of such delay. *Crawford v. Pacific Car & Foundry Co.*, 112 Idaho 820, 736 P.2d 872 (Ct. App. 1987).

Where there was no agreement by the defendant's insurer to waive the time limits, and where there was no evidence that the defendant or his insurer enticed the plaintiffs to forego service or led their attorney to believe that the defendant would not assert his rights if service was not accomplished by the deadline, settlement negotiations did not provide justification for delay of service and did not in and of themselves constitute good cause for non-compliance with this rule. *Martin v. Hoblit*, 133 Idaho 372, 987 P.2d 284 (1999).

The settlement negotiations that occurred prior to filing the complaint did not constitute

good cause for the late service of process. *Regjovich v. First Western Invs., Inc.*, 134 Idaho 154, 997 P.2d 615 (2000).

Worker's negligence action against a home owner was properly dismissed because the worker failed to timely serve the owner, and the alternate service by publication failed to inform the owner of the nature of the grounds of the claim against him. *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009).

Waiver.

Family's medical malpractice suit against a hospital and doctors was properly dismissed as no defendant was actually served with the summons and complaint prior to the expiration of the six-month period and there was no evidence showing diligent attempts to effect service before the six-month period expired; defendants' participation in discovery after the expiration of the six-month period did not constitute waiver of their right to seek dismissal. *Rudd v. Merritt (In re Estate of Rudd)*, 138 Idaho 526, 66 P.3d 230 (2003).

While it appeared that defendant father was not served pursuant to Idaho R. Civ. P. 4(d)(2) and the judgment could have been rendered void pursuant to Idaho R. Civ. P. 60(b)(4), the court concluded that the father, by pursuing the case without requesting a hearing or final determination from either of the lower courts on the personal service of process question, abandoned the issue of personal service; the father's actions in defending on the merits constituted a voluntary appearance because they were done before any denial of his motion under Idaho R. Civ. P. 12(b)(2), (4), or (5). *Lohman v. Flynn*, 139 Idaho 312, 78 P.3d 379 (2003).

Cited in: *Nagel v. Wagers*, 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986); *Rincover v. State, Dep't of Fin.*, 128 Idaho 653, 917 P.2d 1293 (1996); *Brennan v. Owens-Corning Fiberglas Corp.*, 134 Idaho 800, 10 P.3d 749 (2000); *KEB Enters., L.P. v. Smedley*, 140 Idaho 746, 101 P.3d 690 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Alias Summons.
Attachment.
Drainage Districts.
Irregularities.
Liens.
Time of Service.

When Issued.

Alias Summons.

In considering the sufficiency of an alias summons it will be presumed that the demand on the clerk was duly made therefor, in the absence of any showing to the contrary. *Hill v. Morgan*, 9 Idaho 718, 76 P. 323 (1904).

Attachment.

Writ of attachment may issue at time of issuing of summons or at any time thereafter. *Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 P. 827 (1908).

Drainage Districts.

Service of summons on proposed change of plans in drainage district is entirely distinct proceeding from service of summons in civil actions. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

Irregularities.

The omission of the seal of the court on an alias summons is not fatal, but is a mere irregularity and does not render the process void. *Harpold v. Doyle*, 16 Idaho 671, 102 P. 158 (1908).

The proceedings of courts of general jurisdiction, where summons is served by publication, are supported by the same presumptions as where the service is personally made, and cannot be avoided for mere errors or irregularities. *Harpold v. Doyle*, 16 Idaho 671, 102 P. 158 (1908).

Liens.

Former section governing issuance of summons was applicable to action to foreclose mechanic's lien. *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911).

Time of Service.

There is no statutory limitation as to the time within which the summons must be served after being issued; but the action may be dismissed where reasonable diligence to serve it is not shown, and reasonable diligence is a question of fact. *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911).

Where delay in serving summons makes a prima facie case of lack of diligence without explanation on part of plaintiff, trial court does not abuse discretion in dismissing action. *Werner Piano Co. v. Baker*, 35 Idaho 496, 207 P. 588 (1922).

When Issued.

Actions must be commenced before summons can issue. *West v. Theis*, 15 Idaho 167, 96 P. 932 (1908).

RESEARCH REFERENCES

A.L.R. Validity of service of summons or complaint on Sunday or holiday. 63 A.L.R.3d 423.

Recognition and application of court's dis-

cretion, absent showing of good cause, to extend time for, or excuse late, service of process under Fed. R. Civ. P. 4(m). 54 A.L.R. Fed 2d 255.

Rule 4(b). Summons — Form.

The summons shall be signed by the clerk of the district court, be under the seal of the court, contain the name of the court, the assigned number of the case, the names of the parties, the county in which the action is brought, the mailing address, physical address (if different) and phone number of the district court clerk, and state the name and address of the plaintiff's attorney, if any, otherwise, the plaintiff's address.

(1) **Eviction Proceedings.** — In an action exclusively for eviction where an expedited proceeding is contemplated under I.C. § 6-310 the summons shall be in substantially the following form:

ATTORNEY'S NAME
FIRM NAME
STREET ADDRESS
MAILING ADDRESS
CITY, STATE & ZIP CODE
TELEPHONE NUMBER
Attorney(s) for Plaintiff(s)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____

_____)	
Plaintiff(s),	)	Case No. _____
)	
vs.	)	SUMMONS FOR
	)	EVICTON
	)	PURSUANT
	)	TO IDAHO CODE § 6-310
Defendant(s).	)	(Expedited Proceedings)
_____)	

TO THE ABOVE NAMED DEFENDANT(S): YOU HAVE BEEN SUED BY THE ABOVE NAMED PLAINTIFF(S).

A trial will be held on ____, 20__, at ____ o'clock ____ .m. at (location) to determine if you should be evicted from the premises described in the Complaint which is served with this Summons. If the Court grants the request to evict you, it may also order you to pay costs of this proceeding. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly, to allow adequate time for trial preparation.

This Summons and the Complaint shall be served upon the Defendant(s) not less than five (5) days [computed pursuant to IRCP Rule 6(a)] prior to the date of the hearing.

CLERK OF THE DISTRICT COURT
[Mailing address, physical address (if different) and telephone number of the clerk]

DATED: _____ By _____
Deputy Clerk

(2) **Other Civil Proceedings.** — In other civil proceedings the summons shall contain the time within which these rules require the defendant to file a written response or written motion in defense to the complaint, and shall notify the defendant that in case of the defendant’s failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. The summons shall be in substantially the following form:

ATTORNEY’S NAME
FIRM NAME
STREET ADDRESS
MAILING ADDRESS
CITY, STATE & ZIP CODE
TELEPHONE NUMBER
Attorney(s) for Plaintiff(s)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____

)	
Plaintiff(s),	)	Case No. _____
)	
vs.	)	SUMMONS
)	
Defendant(s).)	
)	

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S); THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: _____

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court at [mailing address, physical address (if different) and telephone number of the clerk] within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the plaintiff(s) in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this ____ day of _____, 20 ____.

CLERK OF THE DISTRICT COURT
By _____
Deputy Clerk

(3) **Publication.** — Where service is to be made by publication, the Summons to be published shall be substantially as follows:

SUMMONS

To: [Defendant's Name]

You have been sued by [Plaintiff's Name], the Plaintiff, in the District Court in and for [Name of County] County, Idaho, Case No. [Case No.].

The nature of the claim against you is [nature of claim].

Any time after 20 days following the last publication of this summons, the court may enter a judgment against you without further notice, unless prior to that time you have filed a written response in the proper form, including the Case No., and paid any required filing fee to the Clerk of the Court at [mailing address, physical address (if different) and telephone number of the clerk] and served a copy of your response on the Plaintiff's attorney at [name, address, and phone number of Plaintiff's attorney].

A copy of the Summons and Complaint can be obtained by contacting either the Clerk of the Court or the attorney for Plaintiff. If you wish legal assistance, you should immediately retain an attorney to advise you in this matter.

DATED: _____

[Name of County] County District Court
By _____, Deputy Clerk

(Adopted February 2, 1993, effective July 1, 1993; amended February 26, 1997, effective July 1, 1997; amended March 9, 1999, effective July 1, 1999; amended February 9, 2012, effective July 1, 2012.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Alias Summons.
Amendment Where Defective.
Complaint.
Compliance.
Nonresidents.
Omission of Seal.
Publication Insufficient.
Summons Returnable to Wrong County.

Alias Summons.

An alias summons must be in the same form as the original but need not be in identically the same language, and is not vitiated by the insertion of a few additional words which do not attempt to change the nature of the action or the demand for relief. Hill v. Morgan, 9 Idaho 718, 76 P. 323 (1904).

Amendment Where Defective.

The court could order a defective summons so amended as to conform to the requirements of former statute, and after amendment could order it withdrawn from the files and served. Ridenbaugh v. Sandlin, 14 Idaho 472, 94 P. 827 (1908).

Complaint.

In some circumstances a copy of the complaint attached to and served with the copy of the summons may be deemed a part of the notice to defendant, and should be read with the summons to explain any ambiguity or omission in the latter, such as the court in which the action is pending. Mattice v. Babcock, 52 Idaho 653, 20 P.2d 207 (1932).

Compliance.

A substantial compliance with the former statute was all that was required. Hill v. Morgan, 9 Idaho 718, 76 P. 323 (1904); McKnight v. Grant, 13 Idaho 629, 92 P. 989 (1907); Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908); Snake River Valley Irrigation Dist. v. Stevens, 18 Idaho 541, 110 P. 1033 (1910); Mattice v. Babcock, 52 Idaho 653, 20 P.2d 207 (1932).

Service on a mother of a father's child custody modification petition was proper under this rule, because the affidavit of service clearly stated that service was personally effected at the mother's last known address, which was the same address found on her

answer. *Woods v. Sanders*, 150 Idaho 53, 244 P.3d 197 (2010).

Nonresidents.

Since Idaho statutes authorized substitute service in an action against a nonresident for debt, and service being essential to the maintenance of such an action, the court did not err in denying the motion to quash service of summons secured by substitute service on a nonresident husband in an action by divorced wife to recover past due instalments of child support on the ground that the action was not in rem. *Skillem v. Ward*, 79 Idaho 350, 317 P.2d 1050 (1957).

Omission of Seal.

The omission of a seal does not ipso facto render the summons or other process void, although required to be affixed by statutory enactment; there is a mere irregularity. The same is true where the seal is not discernible.

Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908).

Publication Insufficient.

Worker's negligence action against a home owner was properly dismissed because the worker failed to timely serve the owner, and the alternate service by publication failed to inform the owner of the nature of the grounds of the claim against him and such omission failed to meet the due process requirement of notice. *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009).

Summons Returnable to Wrong County.

Where summons is properly captioned but is mistakenly made returnable to the wrong county, the summons is not void and its service conferred jurisdiction over defendant in the court out of which it issued. *Mattice v. Babcock*, 52 Idaho 653, 20 P.2d 207 (1932).

RESEARCH REFERENCES

A.L.R. Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like. 6 A.L.R.3d 1179.

dating civil process, summons, or the like. 6 A.L.R.3d 1179.

Rule 4(c)(1). By whom served.

Service of all process shall be made by an officer authorized by law to serve process, or by some person over the age of eighteen (18), not a party to the action. A subpoena may be served as provided in Rule 45.

STATUTORY NOTES

Cross References. Executing process, Rule 4(c)(2).

Service of telegraphic copies, Rule 4(c)(3). Subpoenas, issuance, Rule 45(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

Record of Clerk.

Where clerk's record does not show issuance of summons, and return of service is on

unauthenticated copy, default based thereon is void. *Leonard v. Brady*, 27 Idaho 78, 147 P. 284 (1915).

Rule 4(c)(2). Executing process.

The officer or other person executing process need not have in his or her possession the original process, summons, writ, order or subpoena at the time of service of the document. (Adopted March 23, 1990, effective July 1, 1990.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Justification for Issuance.

Presumption of Performance of Duty.

Justification for Issuance.

Ministerial officer may justify the execution of process regular on its face and issued by competent authority. *Coombs v. Collins*, 6 Idaho 536, 57 P. 310 (1899).

Presumption of Performance of Duty.

Presumption of law is that an officer has performed his duty, and that return correctly states the facts relative to service of process until contrary is proved. *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 168 (1927); *McCall v. First Nat'l Bank*, 47 Idaho 519, 277 P. 562 (1929).

Rule 4(c)(3). Service of facsimile or telegraphic copy.

Any summons, writ, order or other paper requiring service may be transmitted by facsimile machine process or telegraph and the copy transmitted may be served or executed by the officer or person to whom sent, and returned in the same manner, and with the same force, effect, authority and liability as the original. The original must be filed in the court from which issued. (Amended November 15, 1989, effective January 1, 1990.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Notice Duly Filed.

Service by Telegram Lawful.

Notice Duly Filed.

Where a copy of a notice of appeal was deposited in the post office in a sealed envelope with postage prepaid, and directed to the respondent's attorney at his post office address within the ninety days after the entry of

the judgment appealed from, and other copy of such notice was transmitted by telegram to the clerk of the lower court, and filed by him within such time, the notice was duly filed within the time required by law. *Roddy v. State*, 64 Idaho 653, 135 P.2d 298 (1943).

Service by Telegram Lawful.

The service of notice of appeal by telegram is lawful. *Roddy v. State*, 64 Idaho 653, 135 P.2d 298 (1943).

Rule 4(d)(1). Summons — Personal service.

A copy of the complaint shall be served with the summons, except when the service is by publication as provided in Rule 4(e). The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

STATUTORY NOTES

Cross References. Domestic or foreign corporations, Rule 4(d)(4).
Incompetents, Rule 4(d)(3).
Individuals, Rule 4(d)(2).

Minors, Rule 4(d)(3).
Other service of summons, Rule 4(e)(1).
State of Idaho or any agency, Rule 4(d)(5).

JUDICIAL DECISIONS

Cited in: *Houck v. State*, 109 Idaho 204, 706 P.2d 93 (Ct. App. 1985).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Constructive Service.

Jurisdiction.

Partners.

Proof of Service.

Signing.

Constructive Service.

Tendency of recent decisions is to strengthen position that orders and proceedings of courts of general jurisdiction, when process is constructively served, are supported by same presumptions as in case of personal service and can no more be avoided for mere errors and irregularities than can other orders and judgments. *Blandy v. Modern Box Mfg. Co.*, 40 Idaho 356, 232 P. 1095 (1925).

Jurisdiction.

Jurisdiction of person of defendant is acquired by service of process and attaches upon service and not upon return. *Blandy v. Modern Box Mfg. Co.*, 40 Idaho 356, 232 P. 1095 (1925).

Partners.

Where a partnership and individual members of the partnership were ordered made

parties defendant to an action originally commenced against one member of the partnership and no summons was ever served on any of the added parties nor upon the partner originally sued as a member of the partnership, valid judgment could not be rendered against the partnership nor against any individual partner not served. *Legg v. Barinaga*, 92 Idaho 225, 440 P.2d 345 (1968).

Proof of Service.

Where the sheriff made return that he served a certified copy of the complaint with the summons, and plaintiff made affidavit that a paper purporting to be a copy of the complaint was served on defendant with a copy of the summons and defendant refused to produce such paper after being ordered to do so, a motion to quash, based on an affidavit by defendant that no copy of the complaint had been served with the summons, was properly overruled. *Forsman v. Bright*, 8 Idaho 467, 69 P. 473 (1902).

Signing.

Where the service is made by the sheriff, it may be signed by deputy under the sheriff's direction. *Boise Valley Traction Co. v. City of Boise*, 37 Idaho 20, 214 P. 1037 (1923).

RESEARCH REFERENCES

A.L.R. Stipulation extending time to answer or otherwise proceed as waiver of objec-

tion to jurisdiction for lack of personal service: state cases. 77 A.L.R.3d 841.

Rule 4(d)(2). Service upon individuals.

Upon an individual other than those specified in subdivision (3) of this rule, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person over the age of eighteen (18) years then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

STATUTORY NOTES

Cross References. Enlargement of time computation, Rule 6(b).

Incompetents, Rule 4(d)(3).

Minors, Rule 4(d)(3).

Relief upon grounds of inadvertence or excusable neglect, Rule 60(b).

JUDICIAL DECISIONS

ANALYSIS

Dwelling Place.
 Personal Service.
 Service upon Spouse of Party.

Dwelling Place.

Attorney/defendant was not properly served, where plaintiff mailed a copy of the summons and complaint to his law office rather than to his home or dwelling place, in lieu of personally serving him. *Davidson v. Davidson*, 150 Idaho 455, 248 P.3d 242 (2011).

Personal Service.

Personal service of a defendant within the

borders of a state of his residence is always sufficient to invoke the jurisdiction of a court of that state. *Jonasson v. Gibson*, 108 Idaho 459, 700 P.2d 81 (Ct. App. 1985).

Service upon Spouse of Party.

Wife, merely by virtue of being married to husband, was not considered an "agent authorized by law," and therefore service on wife at a local bar did not constitute service on husband. *Thiel v. Stradley*, 118 Idaho 86, 794 P.2d 1142 (1990).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Evidence of Jurisdiction.
 Nonresidents.

Evidence of Jurisdiction.

Jurisdiction to enter judgment against defaulting defendants rests upon facts of service itself and return of service is simply evidence of jurisdictional fact. *Blandy v. Modern Box Mfg. Co.*, 40 Idaho 356, 232 P. 1095 (1925).

Nonresidents.

A person going into Idaho from another state as a witness or as a party defendant in a suit in Idaho is exempt from process in Idaho. *Skinner & Mounce Co. v. Waite*, 155 F. 828 (C.C.D. Idaho 1907).

A nonresident who commences a suit in the circuit court of the United States against a resident of this state, and attends in this state for the purpose of conducting said suit, is not by reason of such attendance exempt from service of summons in a suit against him brought by the defendant in the first suit. *Guynn v. McDanel*, 4 Idaho 605, 43 P. 74 (1895).

Nonresident is subject to service in a suit filed by resident while in state attending hearing in a suit filed against him by another resident. *Lacharite v. District Court*, 74 Idaho 65, 256 P.2d 787 (1953).

RESEARCH REFERENCES

A.L.R. Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicile, as used in statutes relating to service of process. 32 A.L.R.3d 112.

Rule 4(d)(3). Service upon infants and incompetents.

Upon a minor less than fourteen (14) years of age, service shall be upon the guardian if one (1) has been appointed, and if there is none then upon either the father or mother, and if neither guardian, father or mother be found within the state then upon any person having the care and custody of such minor, and unless the court otherwise orders, also upon the minor, said service to be in the manner set forth in subdivision (2) of this rule. Upon an incompetent person who has been judicially declared to be of unsound mind or incapable of conducting the incompetent person's own affairs, service shall be had upon the guardian if one (1) has been appointed in this state, or if there is none by service upon a competent adult member of the family with whom the incompetent person resides, or if the incompetent person is living in an institution then upon the chief executive officer of the institu-

tion, or if service cannot be had upon any of them, then as provided by order of the court, and unless the court otherwise orders, also upon the incompetent. If any of the parties upon whom service is directed to be made is a plaintiff, then service shall be upon such other person as the court may designate.

STATUTORY NOTES

Cross References. Incompetents defending suit, manner, Rule 17(c).

Infants defending suit, manner, Rule 17(c).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Failure to Assert Infancy.
Nonresident Insane Defendant.
Sales by Administrators.

Failure to Assert Infancy.

After a minor more than fourteen years of age has been served with process, appears in person and by counsel, files answer and other pleadings, goes to trial and is represented therein, awaits the return of the verdict and judgment without asserting his infancy, he cannot, after judgment, upon reaching his majority interpose his infancy as the sole ground for setting aside the verdict and judgment. *Trolinger v. Cluff*, 56 Idaho 570, 57 P.2d 332 (1936).

Nonresident Insane Defendant.

In action against nonresident defendant for divorce on the ground of insanity, jurisdiction of the action or of the parties, as contemplated by former section governing service on infants and incompetents, was not complete until service was had on the insane defendant in compliance with the requirements of the former section. *Gorges v. Gorges*, 42 Idaho 357, 245 P. 691 (1926).

Sales by Administrators.

A statute providing for the service of an order to show cause for sale by administrator or by publication of notice is all inclusive and unaffected by other statutes providing additional procedure. *Harkness v. Utah Power & Light Co.*, 49 Idaho 756, 291 P. 1051 (1930).

RESEARCH REFERENCES

A.L.R. Incapacity caused by accident in suit as affecting notice of claim required as condition of holding local governmental unit liable for personal injury. 44 A.L.R.3d 1108.

Local government tort liability: minority as affecting notice of claim requirement. 58 A.L.R.4th 402.

Rule 4(d)(4). Service upon domestic or foreign corporations.

(A) Upon a domestic or foreign corporation by delivering a copy of the summons and complaint to an officer, managing or general agent, or to any other agent authorized by appointment or by statute of this state to receive service of process, and upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer or the managing or general agent of the partnership or association, or to any other agent authorized by appointment or by statute of this state to receive service of process. If service is upon a statutory agent, any statutory requirement as to the number of copies of summons and complaint to be served shall be followed, and if such agent is a state official such service may be made by registered or certified mail, and also, if the statute so requires, by mailing a copy to the defendant.

(B) Whenever any foreign corporation which has qualified in the state by filing with the Secretary of State or a domestic corporation or association shall not have designated a person actually residing in the state upon whom service of process can be made, or whenever such agent of a corporation shall resign, be removed from office, or shall have died or shall have moved from the state, or if after due diligence neither the designated agent of the corporation nor any officer or managing agent of the corporation can be found within the state, then service of any summons and complaint against the corporation may be made by the party serving the same by mailing copies of the summons and complaint by registered or certified mail to the corporation addressed to its registered place of business and to the president or secretary of the corporation at the addresses shown on the most current annual statement filed with the Secretary of State. Service shall be complete upon such mailing by certified or registered mail. The party or attorney serving the corporation under this paragraph shall make a return certificate indicating compliance with the provision of this rule and attaching a receipt of the mailing. (Amended effective July 1, 1977; amended April 11, 1979, effective May 1, 1979.)

STATUTORY NOTES

Cross References. Defenses and objections, presentment, Rule 12(a).

JUDICIAL DECISIONS

ANALYSIS

Agent of Corporation.
Service Insufficient.

Agent of Corporation.

Where defendant and defendant's agent were served by mail and by leaving copies of the pleadings at the commercial mail box center, there was no valid service under this rule. *Morningstar Holding Corp. v. G2, LLC*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 118706 (Nov. 8, 2010).

Service Insufficient.

Plaintiff failed to properly serve a retail corporation where the corporation had a registered agent in the state; service upon a store's shift manager did not satisfy the requirements of Rule 4(d)(4)(A) and Rule 4(d)(1)(B) did not apply. *David v. Wal-Mart Stores, Inc.*, — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 69887 (June 27, 2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Agent of Corporation.
Amended Return.
Foreign Corporations.
Irrigation Districts.
Partnerships.
Presence in State.

Agent of Corporation.

Proof of service of summons on the president of a foreign corporation without any-

thing to show that the president was a managing or business agent or cashier of the corporation is fatally defective. *Applington v. G.V.B. Mining Co.*, 6 Idaho 216, 55 P. 241 (1898).

Service of summons on a corporation is sufficient when made upon a person who had theretofore been served with process, and the corporation accepted such service by its appearance, where the corporation, through its attorney or some one authorized to act for it

did not inform the party in interest how a better service could be made. *Hill v. Morgan*, 9 Idaho 718, 76 P. 323 (1904).

Service of summons on "manager" of corporation is prima facie service upon the corporation. *Densel v. Atlanta Mercantile Co.*, 17 Idaho 432, 106 P. 2 (1909).

The commissioner of finance, when designated by a foreign insurance corporation to receive service of process for it as provided by I.C.A. 1932, § 40-502 (since repealed) was its statutory agent, and delivery to the commissioner of a copy of the summons and complaint in an action wherein it was defendant was service on the corporation. *Voellmeck v. Northwestern Mut. Life Ins. Co.*, 60 Idaho 412, 92 P.2d 1076 (1939).

Amended Return.

Where at time of entry of default the return of service showed service on the wrong officer of a corporation, but before motion to vacate default was heard an amended return was filed showing service in fact on the designated agent, the motion was properly denied, jurisdiction to enter default being based on fact of service, not on the return. *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087 (1936), cert. denied, 299 U.S. 615, 57 S. Ct. 319, 81 L. Ed. 453 (1937).

Foreign Corporations.

Foreign corporations may be sued in any county of the state, although the designated agent for the service of process resides in some other county than that of suit. *Boyer v. Northern Pac. Ry.*, 8 Idaho 74, 66 P. 826 (1901).

It is not the length of time that a foreign corporation is here, it is the purpose for which it comes that determines whether compliance with the statute is necessary. *State v. Winstead*, 66 Idaho 504, 162 P.2d 894 (1945).

An appeal did not lie in an action to recover against a foreign insurance company where summons was served on the state insurance commissioner on behalf of the defendant insurance company by registered mail, as provided in former § 41-608, and service was completed on that day where a minute entry considered an order for judgment was later vacated by order of court, such order not being considered a special order made as final judgment. *McPheters v. Central Mut. Ins. Co.*, 83 Idaho 472, 365 P.2d 47 (1961).

Irrigation Districts.

An irrigation district is a "corporation" within the meaning of the statute, as to service of process on certain designated officers of corporations, and the members of the board of directors are not required to be served. *Tingwall v. King Hill Irrigation Dist.*, 64 Idaho 207, 129 P.2d 898 (1942).

Partnerships.

In a suit against the partnership in its common name, the complaint or summons does not have to name the partners if summons is served on at least one of the partners. *Lucky Five Mining Co. v. H. & H. Mines, Inc.*, 75 Idaho 423, 273 P.2d 676 (1954).

Service in quiet title proceedings against partnership was sufficient where complaint and summons contained name of copartnership, body of complaint enumerated names of members of partnership, and copy of summons and complaint was mailed to last known address of partnership and partner. *Lucky Five Mining Co. v. H. & H. Mines, Inc.*, 75 Idaho 423, 273 P.2d 676 (1954).

In an action to set aside an executor's sale of a deceased partner's interest in the partnership to the surviving partners as a partnership, service of summons upon one partner is sufficient to give the court jurisdiction of the partnership. *Spencer v. Spencer*, 91 Idaho 880, 434 P.2d 98 (1967).

Where a partnership and individual members of the partnership were ordered made parties defendant to an action originally commenced against one member of the partnership and no summons was ever served on any of the added parties nor upon the partner originally sued as a member of the partnership, valid judgment could not be rendered against the partnership nor against any individual partner not served. *Legg v. Barinaga*, 92 Idaho 225, 440 P.2d 345 (1968).

Presence in State.

The presence of a corporation within a state necessary to service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. *State v. Scrivner*, 66 Idaho 498, 162 P.2d 897 (1945).

RESEARCH REFERENCES

A.L.R. Attorney representing foreign corporation in litigation as its agent for service of

process in unconnected actions or proceedings. 9 A.L.R.3d 738.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent. 17 A.L.R.3d 625.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transactions within state. 20 A.L.R.3d 1201.

Construction and application of state statutes or rules of court predicated in personam

jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 A.L.R.3d 551.

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business within the state. 27 A.L.R.3d 397.

Rule 4(d)(5). Service upon state, agencies or governmental subdivisions.

Upon the state of Idaho, or any agency thereof, service shall be made by delivering two (2) copies of the summons and complaint to the attorney general or any assistant attorney general. Upon any other governmental subdivision, municipal corporation, or quasi-municipal corporation or public board service shall be made by delivering a copy of the summons and complaint to the chief executive officer or the secretary or clerk thereof. In all actions brought under specific statutes requiring service to be made upon specific individuals or officials, service shall be made pursuant to the statute in addition to service as provided above. (Amended effective July 1, 1977.)

JUDICIAL DECISIONS

Dismissal.

District court properly dismissed a negligence complaint against the Board of Professional Discipline of the Idaho State Board of Medicine because the claimants failed to serve the summons and complaint upon the

Idaho Secretary of State as well as the Idaho Attorney General within six months after filing the complaint, and did not show good cause for their failure to do so. *Harrison v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 145 Idaho 179, 177 P.3d 393 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Drainage Districts.
Representation of State.

Drainage Districts.

Service of summons on proposed change of plans in drainage district is entirely distinct proceeding from service of summons in civil actions. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 P. 443 (1928).

Representation of State.

Former identical rule did not give the exclusive right to the attorney general to represent the state in all actions involving the highway department, since with former § 40-120 the legislature delegated to the Idaho board of highway directors the power to hire legal counsel of its own choosing. *Padgett v. Williams*, 82 Idaho 28, 348 P.2d 944 (1960).

Rule 4(d)(6). Receipt of service.

In lieu of service upon an individual as provided above in this rule, service may be accomplished by an acknowledged written admission by the individual that the individual has received service of process, stating the capacity in which such service of process was received.

Rule 4(e)(1). Summons — Other service.

Whenever a statute of this state provides for service of a summons, or of a notice, or of an order in lieu of summons, upon a party not an inhabitant of, or found within the state, or upon unknown persons, service shall be made under the circumstances and in the manner prescribed by the statute. Personal service outside of the state, when authorized by statute, shall be as provided by Rule 4(d). Whenever the summons, notice or order is served by publication it shall contain in general terms a statement of the nature of the grounds of the claim, and copies of the summons and complaint shall be mailed to the last known address most likely to give notice to the party.

STATUTORY NOTES

Cross References. Completion of service, Rule 4(e)(2).

JUDICIAL DECISIONS**ANALYSIS**

Prerequisites.
Publication Insufficient.

Prerequisites.

Attorneys for injured parties attempted twice to serve the other driver involved in a car accident by publication, but did not comply with the mailing requirements of Idaho R. Civ. P. 4(e)(1); although the attorneys maintained that they did not have an address for the other driver, and there was some evidence that the other driver's attorney refused to disclose her whereabouts, this did not excuse the non-compliance with the mailing require-

ment. *McGlooin v. Gwynn*, 140 Idaho 727, 100 P.3d 621 (2004).

Publication Insufficient.

Worker's negligence action against a home owner was properly dismissed because the worker failed to timely serve the owner, and the alternate service by publication failed to inform the owner of the nature of the grounds of the claim against him and such omission failed to meet the due process requirement of notice. *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009).

Cited in: *Brown's Tie & Lumber Co. v. Kirk*, 109 Idaho 589, 710 P.2d 18 (Ct. App. 1985).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Divorce Actions.
Nonresident Insane Persons.
Prerequisites.
Substantial Compliance.

Divorce Actions.

Constructive service of process by publication in divorce proceedings is valid. *Gorges v. Gorges*, 42 Idaho 357, 245 P. 691 (1926).

Since Idaho statutes authorized substitute service in an action against a nonresident for debt, and service was essential to the maintenance of such an action, the court did not err in denying the motion to quash service of summons secured by substitute service on a nonresident husband, in an action by divorced wife to recover past due installments of child support, on the ground that the action was

not in rem. *Skilern v. Ward*, 79 Idaho 350, 317 P.2d 1050 (1957).

Nonresident Insane Persons.

Service of summons by guardian ad litem and county attorney in proceedings against nonresident insane person is not compliance with statute, but merely additional to it. *Gorges v. Gorges*, 42 Idaho 357, 245 P. 691 (1926).

Prerequisites.

Existence of verified complaint on file, stating cause of action against defendant against whom service is sought, is essential prerequisite to issuance of order for personal service outside state. *Elliott & Healy v. Wirth*, 34 Idaho 797, 198 P. 757 (1921).

Substantial Compliance.

Statutory requirements authorizing service

by publication must receive substantial compliance. *Mills v. Smiley*, 9 Idaho 317, 76 P. 783 (1903); *McKnight v. Grant*, 13 Idaho 629, 92 P. 989 (1907).

A substantial compliance with the statute (now rule) is all that is required. *Hill v. Morgan*, 9 Idaho 718, 76 P. 323 (1904); *McKnight v. Grant*, 13 Idaho 629, 92 P. 989 (1907); *Harpold v. Doyle*, 16 Idaho 671, 102 P. 158 (1908); *Snake River Valley Irrigation Dist. v.*

Stevens, 18 Idaho 541, 110 P. 1033 (1910); *Mattice v. Babcock*, 52 Idaho 653, 20 P.2d 207 (1932).

Former statute governing constructive service did not dispense with the use of due diligence to ascertain the residence or post office address of the defendant, and the mere assertion of diligence in the affidavit was not compliance with said statute. *Loehr v. Curley*, 27 Idaho 739, 152 P. 185 (1915).

Rule 4(e)(2). Service — Completion.

Personal service within or without the state is complete on the date of delivery; service by publication is complete upon the date of the last publication.

JUDICIAL DECISIONS

Fact of Service.

It is the fact, not the proof, of service which gives the court jurisdiction. *Workman v.*

Brown, 103 Idaho 945, 655 P.2d 462 (Ct. App. 1982).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal.

Compliance.

Time of Completion.

Appeal.

An appeal would not lie in an action to recover against a foreign insurance company where summons had been served on the state insurance commissioner in behalf of the defendant insurance company by registered mail as provided in former § 41-608 and service was completed on that day where a minute entry considered an order for judgment was later vacated by order of court, such order not being considered a special order made as final judgment. *McPheters v. Central Mut. Ins. Co.*, 83 Idaho 472, 365 P.2d 47 (1961).

Compliance.

Where the order for publication of sum-

mons directed the publication be made "at least once a week for one full month" and the summons was published in a weekly newspaper for five consecutive weeks, the first publication being made on September 16 and the last publication October 14 following, the requirement of former statute governing completion of service was met. *Harpold v. Doyle*, 16 Idaho 671, 102 P. 158 (1908).

Time of Completion.

After order for publication of summons was personally served on the defendant out of the state, the service did not become complete until the expiration of the time prescribed in the order for publication and the defendant had forty days after the expiration of such time in which to answer; accordingly, the default judgment entered within such forty days was void. *Bowen v. Harper*, 6 Idaho 654, 59 P. 179 (1899).

Rule 4(f). Territorial limits of effective service.

All process, other than a subpoena, may be served anywhere within territorial limits of the state and, when a statute or rule so provides, beyond the territorial limits of the state. A subpoena may be served as provided in rule 45.

STATUTORY NOTES

Cross References. Subpoena, issuance, Rule 45(a). Summons, other service, Rule 4(e)(1).

DECISIONS UNDER PRIOR RULE OR STATUTE

Nonresident Husband.

Since Idaho statutes authorized substitute service in action against a nonresident for debt, and service was essential to the maintenance of such an action, the court did not err in denying the motion to quash service of

summons procured by substitute service on a nonresident husband, in an action by divorced wife to recover past due instalments of child support, on the ground that the action was not in rem. *Skillern v. Ward*, 79 Idaho 350, 317 P.2d 1050 (1957).

Rule 4(g). Return.

Proof of service of process shall be in writing specifying the manner of service, the date and place of service and unless the party served files an appearance the return must be filed with the court:

(1) If service is made by a sheriff or deputy sheriff, or any peace officer or court marshall, anywhere within the state of Idaho, then by certificate of the officer indicating service as required by these rules.

(2) If service is by any person other than those specified in (1) above, then by affidavit of such person indicating the person is over the age of 18 years and service as required by these rules.

(3) If service is by mailing, not requiring proof of receipt, then by affidavit of mailing by a person over the age of 18 years who mailed such service indicating the documents mailed and the date and address to which they were mailed.

(4) If service is by certified or registered mail, then by affidavit of a person over the age of 18 years who mailed such process together with postal receipts indicating whether the person received the service of process by mail.

(5) If service is by publication, then by affidavit of the publisher of the newspaper, or the publisher's designated agent over the age of 18 years, stating the dates of publication and attaching a true copy of the publication.

(6) In lieu of any of the above, the party's acknowledged written admission that service of process was received, as provided by rule 4(d)(6).

(7) The return of service shall list and identify all documents served. (Amended effective July 1, 1977; amended March 23, 1990, effective July 1, 1990; amended August 22, 1990, effective August 22, 1990.)

JUDICIAL DECISIONS

ANALYSIS

Record for Appeal.
Service Actually Made.

Record for Appeal.

The original summons was not automati-

cally included in the record for an appeal from a default judgment in a debt collection, thus the mere absence of the summons in the record, without a proper request for its inclusion by defendant, was insufficient evidence upon which to base defendant's allegation of

error that there was no valid summons in the record. *Credit Bureau, Inc. v. Harrison*, 101 Idaho 554, 617 P.2d 858 (1980).

Service Actually Made.

A default judgment will not be set aside where in fact service has been made, and the

moving party neither denies that fact nor shows substantial prejudice, but relies solely upon a ministerial defect in the proof of service. *Workman v. Brown*, 103 Idaho 945, 655 P.2d 462 (Ct. App. 1982).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Presumption of Performance of Duty.

Proof of Service.

Record as to Issuance.

Signing.

Verity of Return.

Presumption of Performance of Duty.

Presumption of law is that an officer has performed his duty, and that return correctly states the facts relative to service of process, until contrary is proved. *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 168 (1927); *McCall v. First Nat'l Bank*, 47 Idaho 519, 277 P. 562 (1929).

Proof of Service.

It has been statutorily prescribed what shall constitute the proof of service of summons when the service was made by publication; proof of service in such cases does not include the affidavit in order for the publication of summons, in addition to the affidavits

provided for by the statute. *O'Neill v. Potvin*, 13 Idaho 721, 93 P. 20 (1907).

Record as to Issuance.

Where clerk's record does not show issuance of summons, and return of service is on unauthenticated copy, default based thereon is void. *Leonard v. Brady*, 27 Idaho 78, 147 P. 284 (1915).

Signing.

Where the service is made by the sheriff, it may be signed by deputy under the sheriff's direction. *Boise Valley Traction Co. v. City of Boise City*, 37 Idaho 20, 214 P. 1037 (1923).

Verity of Return.

Such verity attaches to an officer's return that it can only be overcome by unequivocal proof that such service was not made as certified to by the officer in his return. *Boise Valley Traction Co. v. City of Boise City*, 37 Idaho 20, 214 P. 1037 (1923).

Rule 4(h). Amendment.

At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial right [rights] of the party against whom the process issued.

STATUTORY NOTES

Compiler's Notes. The bracketed word "rights" was inserted by the compiler.

Cross References. Return as prima facie evidence, § 31-2204.

JUDICIAL DECISIONS

Cited in: *Workman v. Brown*, 103 Idaho 945, 655 P.2d 462 (Ct. App. 1982).

DECISIONS UNDER PRIOR RULE OR STATUTE

Presumption of Performance of Duty.

Presumption of law is that an officer has performed his duty, and that return correctly states the facts relative to service of process,

until contrary is proved. *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 168 (1927); *McCall v. First Nat'l Bank*, 47 Idaho 519, 277 P. 562 (1929).

RESEARCH REFERENCES

A.L.R. Construction of Federal Civil Procedure Rule 4 (h), dealing with amendment of process or proof of service. 2 A.L.R. Fed. 513.

Rule 4(i). General or special appearance.

(1) **General appearance.** The voluntary appearance of a party or service of any pleading by the party, except as provided in subsection (2) hereof, constitutes voluntary submission to the personal jurisdiction of the court.

(2) **Motion or Special Appearance to Contest Personal Jurisdiction.** A motion under Rule 12(b)(2), (4) or (5), whether raised before or after judgment, a motion under Rule 40(d)(1) or (2), or a motion for an extension of time to answer or otherwise appear does not constitute a voluntary appearance by a party under this rule. The joinder of other defenses in a motion under Rules 12(b)(2), (4) or (5) does not constitute a voluntary appearance by the party under this rule. After a party files a motion under Rule 12(b)(2), (4) or (5), action taken by that party in responding to discovery or to a motion filed by another party does not constitute a voluntary appearance. If, after a motion under Rules 12(b)(2), (4), or (5) is denied, the party pleads further and defends the action, such further appearance and defense of the action will not constitute a voluntary appearance under this rule. The filing of a document entitled "special appearance," which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4), or (5) within fourteen (14) days after filing such document, or within such later time as the court permits. (Amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective May 1, 1979; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987; amended April 19, 1995, effective July 1, 1995; amended April 22, 2004, effective July 1, 2004; amended March 24, 2005, effective July 1, 2005.)

JUDICIAL DECISIONS

ANALYSIS

Appearance.
Preservation of Objection.
Waiver.

Appearance.

The mere act of writing of a letter, without more, does not constitute an appearance subjecting a party to personal jurisdiction of the court. *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

In action for wrongful discharge, the trial judge did not err in denying the defendant employer's request to dismiss it as the defen-

dant, where the pre-trial stipulation named it as the defendant, and it voluntarily appeared to defend the action on the merits. *Nilsson v. Mapco*, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988).

In a breach of contract suit, the trial court erred in granting the buyer's motion to dismiss for lack of in personam jurisdiction under Rule 12(b)(2) because the buyer's filing of a motion to strike the seller's amended complaint was a general appearance; a defendant making a special appearance to challenge in personam jurisdiction could only file a motion to dismiss or file a response to a pleading or

motion under this rule, and the motion to strike the amended complaint was not a response to a pleading as defined by the Idaho Rules of Civil Procedure. *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008).

Preservation of Objection.

The Idaho Rules of Civil Procedure do not allow a party to "preserve the right" to object to personal jurisdiction at a later date when filing a motion for change of venue. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Waiver.

In a divorce action, the husband did not waive his jurisdictional challenge by signing a

stipulation on the merits of the child support and attorney fee issues after his motion to dismiss had been denied. *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

By filing a motion for change of venue without joining the motion to dismiss for lack of personal jurisdiction, the defendants waived the defense of lack of personal jurisdiction. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Cited in: *Houck v. State*, 109 Idaho 204, 706 P.2d 93 (Ct. App. 1985); *Flahiff Funeral Chapels, Inc. v. Roll*, 125 Idaho 136, 867 P.2d 1010 (Ct. App. 1994); *Engleman v. Milanez*, 137 Idaho 83, 44 P.3d 1138 (2002).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Defects in Service.

General Appearance.

Objection to Jurisdiction.

Waiver of Service.

Defects in Service.

Illegality in the service of process by which jurisdiction is obtained is not waived by special appearance of defendant to move that service be set aside, or after such motion is denied, by his answering to the merits. Objection to illegal service is considered as abandoned only when party pleads to merits in first instance. *Harkness v. Hyde*, 98 U.S. 476, 25 L. Ed. 237 (1879).

By appearance and answer in attachment suit any defect in service of summons is cured. *Moseley v. Fidelity & Deposit Co.*, 33 Idaho 37, 189 P. 862, 25 A.L.R. 564 (1920).

Defective service of summons is cured by general appearance. *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924).

General Appearance.

Making of a motion to quash summons and dismiss action constitutes general appearance. *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911).

Stipulation that the defendant has until a certain date to make settlement of the amount claimed by plaintiff, and containing a promise on part of defendant that in event settlement is not made by that time, it will confess judgment in action then pending between the parties, is not an appearance. *Washington County Land & Dev. Co. v. Weiser Nat'l Bank*, 26 Idaho 717, 146 P. 116 (1915).

Filing answer in suit constitutes general appearance. *Moseley v. Fidelity & Deposit*

Co., 33 Idaho 37, 189 P. 862, 25 A.L.R. 564 (1920); *Newman v. Cheesman Auto Co.*, 33 Idaho 685, 197 P. 826 (1921); *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924).

Participation in trial of cause by examining witnesses constitutes general appearance. *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921); *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924).

Where a defendant purports to appear specially and moves that a sale under execution be set aside by reason of inadequacy of the sum paid for the property sold, he seeks relief which could be granted only upon the hypothesis that the court has jurisdiction of the cause. Such appearance is accordingly a general appearance and gives the court jurisdiction over him for all purposes of the case. *Elliott & Healy v. Wirth*, 34 Idaho 797, 198 P. 757 (1921).

Stipulation to take depositions in case constitutes general appearance. *Pingree Cattle Loan Co. v. Webb*, 36 Idaho 442, 211 P. 556 (1922), error dismissed, *Charles J. Webb & Co. v. Pingree Cattle Loan Co.*, 264 U.S. 570, 44 S. Ct. 333, 68 L. Ed. 854 (1924); *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924).

Appealing to district court and filing bond and notice of appeal constitutes general appearance. *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924).

As a general rule, motion for change of venue is appearance in case. *American Surety Co. v. Ada County Dist. Court*, 43 Idaho 589, 254 P. 515 (1927).

Wife appearing in proceeding to terminate alimony and making no objection to jurisdiction is barred from asserting that she is not in court. Any appearance which recognizes a

case as pending with jurisdiction of subject-matter and parties is general and confers jurisdiction over the person. *McDonald v. McDonald*, 55 Idaho 102, 39 P.2d 293 (1934).

Nonresidents of Idaho who appear generally in an action in Idaho state court thereby submit themselves to the court's jurisdiction, and are bound by a judgment or decree made therein. *Treinius v. Sunshine Mining Co.*, 99 F.2d 651 (9th Cir. 1938), *aff'd*, 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939).

The order of the court denying the motion to quash service of summons secured by substituted service on divorced husband in action by divorced wife to recover past due installments of child support and fixing and allowing time for defendant husband to plead did not require him to make a general appearance, for at that stage of the proceedings the court would have had no jurisdiction to make such an order. Therefore, defendant's subsequent general appearance by demurrer and answer must be held to have been voluntary and by such pleadings and by his participation in the trial, defendant submitting himself to jurisdiction of the court, judgment in personam was authorized. *Skillern v. Ward*, 79 Idaho 350, 317 P.2d 1050 (1957).

Where a party filed an answer, litigated on the merits, cross-examined witnesses and appeared as a witness, she submitted herself to personal jurisdiction although she did not intend to do so. *Smestad v. Smestad*, 94 Idaho 181, 484 P.2d 730 (1971).

Objection to Jurisdiction.

Appearance in action means general ap-

pearance and does not include special appearance merely to contest jurisdiction of court. *Kline v. Shoup*, 35 Idaho 527, 207 P. 584 (1922).

If party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. *Pingree Cattle Loan Co. v. Webb*, 36 Idaho 442, 211 P. 556 (1922), error dismissed, *Charles J. Webb & Co. v. Pingree Cattle Loan Co.*, 264 U.S. 570, 44 S. Ct. 333, 68 L. Ed. 854 (1924); *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924); *American Surety Co. v. Ada County Dist. Court*, 43 Idaho 589, 254 P. 515 (1927); *McDonald v. McDonald*, 55 Idaho 102, 39 P.2d 293 (1934).

Where the defendant made a special appearance for particular and exclusive purpose of objecting to a trial court's jurisdiction, a later acceptance by the defendant's attorney, as a mere formal courtesy, of papers from the plaintiff, was not a special or general appearance. *Aker v. Silbaugh*, 62 Idaho 539, 113 P.2d 814 (1941).

Waiver of Service.

Participation in trial by examining and cross-examining witnesses is waiver of service of process and cross-complaint. *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921).

It is doubtful whether mere stipulation of attorneys, standing alone, would amount to waiver of service of cross-complaint and general appearance in action. *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921).

Rule 5(a). Service and filing of pleadings and other papers — Service — When required.

Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, brief and memorandum of law, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

STATUTORY NOTES

Cross References. Filing, Rule 5(d)(1).
Filing with the court defined, Rule 5(e).
How made, Rule 5(b).
Jury trial, failure to serve a demand a waiver, Rule 38(d).

Service of process, procedure, Rules 4(a)-4(i).
Numerous defendants, service on, Rule 5(c).
Proof of service, Rule 5(f).
Service by mail, additional time after, Rule

6(e)(1).

JUDICIAL DECISIONS

ANALYSIS

Counterclaims.
Service Requirements.

Counterclaims.

Service of a motion for leave to file a counterclaim, even with the proposed counterclaim attached, is not the equivalent of service of the claim itself, since it is possible that the court might deny the motion. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Service Requirements.

The defendant was required to serve his

counterclaim on the plaintiff even though the plaintiff had not made a new appearance within 20 days of its attorney's withdrawal, since on the date of that withdrawal judicial permission had not yet been obtained for the filing of a counterclaim. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Cited in: *State v. Delezene* (In re Williams), 120 Idaho 473, 817 P.2d 139 (1991); *McIntire v. Orr*, 122 Idaho 351, 834 P.2d 868 (1992); *McGlooin v. Gwynn*, 140 Idaho 727, 100 P.3d 621 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Costs.
Cross-Complaints.
Motion for New Trial.
Receivership.
Service Requirements.
Written Notice of Appearance.

Costs.

No cost can be taxed in the absence of a serving or filing of a cost bill. *Gem State Mut. Life Ass'n v. Gray*, 77 Idaho 157, 290 P.2d 217 (1955).

Cross-Complaints.

A cross-complaint must relate to or depend upon the contract or transaction upon which the main case is founded, or affect the property to which the action relates, but need not necessarily seek relief against all or any of the original plaintiffs or defendants. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

Where a defendant files a cross-complaint by way of answer, this, being in the nature of a bill in equity, must contain all the essential and necessary averments of such a bill, and properly pleaded, it makes the party so pleading an actor and plaintiff with respect to all matters alleged in such affirmative defense; and such defense must be of such a character as may call for a decree in such party's favor. *Penninger Lateral Co. v. Clark*, 22 Idaho 397, 126 P. 524 (1912), overruled on other grounds, *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

Service of cross-complaint is essential to give court jurisdiction to try cause therein set

forth. Service may be waived, however. *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921).

Motion for New Trial.

A motion for a new trial follows after notice and may be oral or in writing, and is not declared to be in any particular form or to state form from which same is made. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912).

It is contemplated that the party intending to move for a new trial shall prosecute such action with diligence. *Behrensmeyer v. Gwinn*, 25 Idaho 186, 136 P. 623 (1913).

Filing of a notice of intention is not required but only for a filing of motion, which can be entitled either "notice of motion for a new trial," or "motion for a new trial," since name is immaterial as long as pleading contains statutory requirements. *Davis v. Rogers*, 72 Idaho 33, 236 P.2d 1006 (1951).

Receivership.

After an action is commenced and defendant has appeared, court has no jurisdiction to appoint a receiver without notice to defendant, except in case of emergency when defendant has absconded and material injury will result to plaintiff unless order is made. *Cummings v. Steele*, 6 Idaho 666, 59 P. 15 (1899).

Service Requirements.

Filing and service required by the statute should be pursued with reference to pleadings filed by a garnishee, as well as by the plaintiff. *Eagleson v. Rubin*, 16 Idaho 92, 100 P. 765 (1909).

Service on attorney of nonresident relative to modification of custody decree was suffi-

cient where divorce proceeding was still pending. *Kalousek v. Kalousek*, 77 Idaho 433, 293 P.2d 953 (1956).

The order of the court, denying the motion to quash service of summons secured by substitute service on divorced husband in action by divorced wife to recover past due installments of child support, and fixing and allowing time for defendant husband to plead, did not require him to make a general appearance; at that state of the proceedings the court had no jurisdiction to make such an order. Therefore, defendant's subsequent general appearance by demurrer and answer was

voluntary and by such pleadings and by his participation in the trial, defendant submitting himself to jurisdiction of the court, judgment in personam was authorized. *Skillern v. Ward*, 79 Idaho 350, 317 P.2d 1050 (1957).

Written Notice of Appearance.

Written notice of appearance is a statement in writing by a defendant or his attorney whereby plaintiff is informed that defendant has appeared, generally or specially, in the case and has submitted himself to jurisdiction of the court. *Domer v. Stone*, 27 Idaho 279, 149 P. 505 (1915).

Rule 5(b). Service — How made.

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by:

(A) handing it to the attorney or the party;

(B) leaving it:

(i) at the attorney's office with the person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the office is closed or the person to be served has no office, at the person's dwelling or usual place of abode with someone over the age of eighteen years who resides there;

(C) mailing it to the person's last known address in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

(F) transmitting the copy by a facsimile machine process although this rule shall not require a facsimile machine to be maintained in the office of an attorney; or

[G] (F) delivering it by any other means that the person consented to in writing in which event service is complete when the person making service delivers it to the agency designated to make delivery. (Amended November 15, 1989, effective January 1, 1990; amended January 30, 2001, effective July 1, 2001; amended April 22, 2004, effective July 1, 2004; repealed and adopted March 18, 2011, effective July 1, 2011.)

STATUTORY NOTES

Cross References. Change of attorney, Rule 11(b)(1).

New trial, motion for, service, Rule 59(b).

Time computation, Rule 6(a).

Publisher's Note:

The bracketed [G] was added by the publisher.

JUDICIAL DECISIONS

ANALYSIS

Last Known Address.
Timely Notice.
Timely Service.
Unknown Mailing Address.

Last Known Address.

Where the record reflected that the defendants received the request for trial setting filed and served by plaintiff which was sent to a post office box number, it was not a clear abuse of discretion for the trial court to conclude that such box was an adequate address at which the defendants could be reached prior to their departure from the country. Judgment was not set aside because defendants did not receive notice of trial date sent to that address. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Timely Notice.

The trial court erred in finding that the service of notice was complete on October 17, 1983, where the certificate of mailing was dated October 17, 1983, but the notice was filed on October 25th, the post office stamped the envelope containing the notice on October 26th, and, the notice was not received until October 31. *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

Timely Service.

Where the wife of counsel stated that she mailed a copy of the notice of appeal to opposing counsel two days before the expiration of the 60-day time limit, the notice was timely served as required by this rule. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

Unknown Mailing Address.

Where, as the defendants were leaving this country, they informed the court in writing that they did not know what their address would be from that day forward for an indeterminate period of time, and the request for a trial date was filed with the clerk after it was returned from defendants' former address, the judgment would not be reversed for improper service. When parties disavow their mailing address and choose to do without the services of an attorney who might be counted upon to be contacted by the court, they shoulder the responsibility of maintaining contact with the court to keep themselves apprised of the status of their case. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Cited in: *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987); *University of Utah Hosp. v. Twin Falls County*, 113 Idaho 447, 745 P.2d 1068 (Ct. App. 1987).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Construction.
Cross-Complaint.
Custody Decree.
Divorce Actions.
Nonemployment of Counsel.
Nonresident Attorneys.
Service by Mail.
Service on Attorney.

Construction.

Former statute allowing constructive service was in derogation of the common law, which required personal service, and must be strictly construed. *Warner v. Teachenor*, 2 Idaho 38, 2 P. 717 (1884).

Cross-Complaint.

Where a defendant files a cross-complaint and all parties to be affected thereby have appeared in main action and are represented by counsel, it is a sufficient service of such cross-complaint to serve same upon attorneys who have appeared for respective parties affected thereby. *Collins v. Brown*, 19 Idaho 360, 114 P. 671 (1911).

Custody Decree.

Service on attorney of nonresident in action for modification of custody decree was sufficient where the divorce proceeding was still pending. *Kalousek v. Kalousek*, 77 Idaho 433, 293 P.2d 953 (1956).

Divorce Actions.

Service of notice of motion to amend and modify a divorce decree need not be personal, where the party to be served had appeared in the suit and had subsequently removed from the state. *Keller v. Keller*, 30 Idaho 79, 162 P. 927 (1917).

Where plaintiff in a divorce action obtained a decree of divorce which embraced the custody of the children and an award of alimony, and plaintiff thereafter left the state and her attorney in the action refused to accept service of a notice of a motion to modify the alimony award and change of custody of the children on the ground that he no longer represented her, the plaintiff could be properly served by serving the clerk of the court who forwarded the papers to her by mail. *Keller v. Keller*, 30 Idaho 79, 162 P. 927 (1917).

Nonemployment of Counsel.

Where attorneys representing respondent withdrew and appellant caused written notice and demand to be served on such respondents, said notice being served and allowing an intervening period of sixteen days until the date set for argument before the court, but respondent failed and refused to comply with such notice, further not showing any excuse for not employing another counsel or appearing in person, notice was held to be sufficient and the respondent was held under the circumstances to comply with the notice served. Application of Paul, 78 Idaho 370, 304 P.2d 641 (1956).

Nonresident Attorneys.

Before a nonresident attorney may appear in the state courts he must have associated with him a resident attorney, whose name shall appear on the pleadings. Anderson v. Coolin, 27 Idaho 334, 149 P. 286 (1915).

Service by Mail.

Service of transcript, under certain circumstances, may be made by mail. Hattabaugh v. Vollmer, 5 Idaho 23, 46 P. 831 (1896).

Service of notice of appeal is complete when notice of copy thereof was deposited in mail. People's Sav. & Trust Co. v. Rayl, 45 Idaho 776, 265 P. 703 (1928).

Service on Attorney.

In order to justify service of notice on anyone else than attorney personally, it must be shown that attorney was absent from his office, and that person served, if any, was clerk of attorney, or a person having charge of his office. Peter v. Kalez, 11 Idaho 553, 83 P. 502 (1905).

It is proper practice to serve papers in an action upon resident attorney. Beck v. Lavin, 15 Idaho 363, 97 P. 1028 (1908).

Notice of hearing served on attorney of record is valid notice. Egus v. Triumph Mining Co., 71 Idaho 354, 232 P.2d 136 (1951).

RESEARCH REFERENCES

A.L.R. Attorney's right to appear pro hac vice in state court. 20 A.L.R.4th 855.

Service of Process Via Computer or Fax. 30 A.L.R.6th 413.

Rule 5(c). Service — Numerous defendants.

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Pleadings Tendered Too Late.
Statutory Requirements.
Waiver of Service of Process.

Pleadings Tendered Too Late.

In action to quiet title, refusal to receive defendant's amended answer and cross-complaint tendered on day case was set for separate trial was not error. Idaho Trust Co. v. Eastman, 43 Idaho 142, 249 P. 890 (1926).

Statutory Requirements.

The filing and service required by former statutes should be pursued with reference to

pleadings filed by a garnishee, as well as by the plaintiff. Eagleson v. Rubin, 16 Idaho 92, 100 P. 765 (1909).

Waiver of Service of Process.

Participation in trial by examining and cross-examining witnesses is waiver of service of process of cross-complaint. Miller v. Prout, 33 Idaho 709, 197 P. 1023 (1921).

Service of cross-complaint is essential to give court jurisdiction to try cause; service may be waived however. Miller v. Prout, 33 Idaho 709, 197 P. 1023 (1921).

It is doubtful whether mere stipulation of attorneys, standing alone, would amount to

waiver of service of cross-complaint and general appearance in action. *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921).

Rule 5(d). Filing.

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. If the papers have been filed before service, the filing date shall be noted thereon. (Amended April 22, 2004, effective July 1, 2004; amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Cross References. Jury trial, failure to serve a demand a waiver, Rule 38(d).
Lodging and service of briefs, Rule 5(d)(2).

Requirements for filing of pleadings and papers, Rule 5(e).

JUDICIAL DECISIONS

Timely Filed.

"Made" as used in Rule 60(b) contemplates either filing or service, such that a motion is timely "made" if it either is filed prior to the

6-month time limit or is served within that time period and then filed "within a reasonable time thereafter." *Miller v. Haller*, 129 Idaho 345, 924 P.2d 607 (1996).

DECISIONS UNDER PRIOR RULE OR STATUTE

Statutory Requirements.

The filing and service required by former statutes should be pursued with reference to

pleadings filed by a garnishee as well as by the plaintiff. *Eagleson v. Rubin*, 16 Idaho 92, 100 P. 765 (1909).

Rule 5(e). Filing with the court.

(1) **Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may accept the papers for filing, in which event the judge shall note thereon the filing date, hour and minute and forthwith transmit them to the office of the clerk. The judge or clerk shall indorse upon every pleading and other paper the hour and minute of its filing.

(2) **Filing by facsimile.** Any pleading or document except those documents requiring a filing fee or filed as proof of incarceration of a party to the action may be transmitted to the court for filing by a facsimile machine process. The clerk shall file stamp the facsimile copy as an original and the signature, court seal, and notary seal on the copy shall constitute the required signature and be considered as originals under Rule 11(a)(1). After a document is filed by facsimile, there is no need to mail that document to the court. Filings may be made to the court only during the normal working hours of the clerk and only if there is a facsimile machine in the office of the filing clerk of the court. Provided, documents over ten (10) pages in length cannot be filed by the facsimile machine process.

(3) **Other use of facsimile copies.** Any facsimile machine process copy that is not transmitted directly to the court may be filed with the court. The clerk shall file stamp the facsimile copy as an original and the signature on

the copy shall constitute the required signature under Rule 11(a)(1). There shall be no limit as to the number of pages of a facsimile copy which was not transmitted directly to the court by the facsimile machine process.

(4) **Additional filings by county.** Each county, on an individual basis, may elect to waive any or all of the restrictions of subsection (2) above to the extent that (a) documents requiring a filing fee may be transmitted to the court for filing by a facsimile machine process provided that the fee is prepaid by credit card in accordance with the county's credit card acceptance policy; (b) filings may be made at any time, provided that filings received outside normal working hours or on any non-judicial day will be file stamped at 9:00 a.m. on the next judicial day; (c) documents of any length may be faxed. (Amended November 15, 1989, effective January 1, 1990; amended April 3, 1996, effective July 1, 1996; amended February 26, 1997, effective July 1, 1997; amended March 9, 1999, effective July 1, 1999; amended April 18, 2003, effective July 1, 2003; amended effective July 1, 2004.)

JUDICIAL DECISIONS

Cited in: Department of Emp. v. Drinkard, 98 Idaho 222, 560 P.2d 1312 (1977); R.T. Nahas Co. v. Hulet, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

Statutory Requirements.

The filing and service required by the statutes should be pursued with reference to

pleadings filed by a garnishee as well as by the plaintiff. Eagleson v. Rubin, 16 Idaho 92, 100 P. 765 (1909).

Rule 5(f). Proof of service.

Proof of service shall be made by a certificate of the attorney or the party making service. The certificate of service shall be attached to the copy of the document filed with the court, or if the document is not filed with the court, the certificate shall be filed within a reasonable time after service of the document. The certificate of service shall state the date and manner of service and the name and address of the person served. Failure to make proof of service does not affect the validity of the service. (Amended effective July 1, 2004; amended effective July 1, 2005.)

STATUTORY NOTES

Cross References. Change of attorney, Rule 11(b)(1). Return, proof of service, Rule 4(g).

Rule 5(g). Service on attorney-legislator suspended during sessions — Emergency provisions.

During such time as any attorney shall be serving as a legislator or legislative attache while the legislature is in general or special session, the attorney shall not be required to attend in court at any trial or other proceeding, and in any pending matter in which the attorney appears as attorney of record, the time within which the attorney would normally be

required to file any pleading or other paper shall be extended for a period of ten days following adjournment of such session of the legislature, provided, that such extension of time is not intended to, and shall not, toll or otherwise extend the running of any limitation period provided by statute and provided further, that upon motion by an aggrieved party or attorney, supported by appropriate affidavit, that an emergency exists or said party would be unduly prejudiced or irreparable damage would accrue, the court in which said action is pending may order, ex parte, such attorney to make appropriate arrangements to appear or for another member of the Idaho state bar to represent said attorney's clients in such pending matter, which said order shall be served upon the attorney by special delivery mail addressed to the attorney at the legislature.

Rule 6(a). Time computation.

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

STATUTORY NOTES

Cross References. Additional time after service by mail, Rule 6(e)(1).

Affidavits, Rule 7(b)(3).

Answer to complaint, Rule 12(a).

Depositions before action, notice, Rule 27(a)(2).

Documents, admission and objection to, Rule 36(a).

Enlargement, Rule 6(b).

Facts, admission and objection to, Rule 36(a).

Findings by the court, amendment, Rule 52(b).

Interrogatories, Rule 33.

Judgment, motion to alter or amend, Rule 59(e).

Judgment notwithstanding verdict, motion for, Rule 50(b).

Judgment or order, relief from, Rule 60(a).

Jury trial demand, Rule 38(b).

Motion for new trial, time for, Rule 59(b).

Motions, Rule 7(b)(3).

New trial on initiative of judge, when, Rule 59(d).

New trial, time for serving affidavits, Rule 59(c).

Reply to counterclaim, Rule 12(a).

Service by mail complete with act of mailing, Rule 5(b).

Substitution of parties, Rule 25(a)(1).

Temporary restraining order, duration, Rule 65(b).

Written interrogatories, notice, Rule 31(a).

JUDICIAL DECISIONS

ANALYSIS

Intervening Weekend.

Purpose.

Timely Answer.

Timely Motion.

Intervening Weekend.

While the defendant's motion to disqualify the magistrate, filed at the preliminary hear-

ing itself, was clearly untimely, the state's motion, at the District Court level, was timely because a Saturday and a Sunday intervened in the time between the setting of trial and the filing of the motion; therefore, the defendant was not prejudiced by grant of the state's motion. *State v. Powers*, 100 Idaho 614, 603 P.2d 569 (1979).

Intervening weekend days must be included in computing the ten-day notice period for liquor license applicant to notify Alcohol Beverage Control Division of intention to accept the license. *Young v. Idaho Dep't of Law Enforcement*, 123 Idaho 870, 853 P.2d 615 (Ct. App. 1993).

Purpose.

Based upon § 1-212 and this rule, it is clear that the Legislature and the Supreme Court were attempting to compensate for the closure of the clerk's office on weekends and holidays and, in this regard, the time limitation contained in § 45-510 is analogous to a statute of limitation; when one considers the purpose of the rule and the statute the only interpretation is that this rule is applicable to § 45-510. This interpretation permits the court clerk's office to be closed on Saturdays, Sundays and legal holidays without shortening the time established by the Legislature within which the action must be filed; to hold otherwise, for all practical purposes, would result in a shortening of the statutory limitation period. *Cather v. Kelso*, 103 Idaho 684, 652 P.2d 188 (1982).

Timely Answer.

Where materialman filed lien on property and second materialman filed foreclosure action in which first materialman was named as a defendant, and where the last day of the sixth-month limitation period established by § 45-510 fell on a Saturday, the time period was carried over to the next business day, pursuant to this rule, and first materialman's answer, counterclaim and cross-claim, which were filed on the following Monday, were timely. *Cather v. Kelso*, 103 Idaho 684, 652 P.2d 188 (1982).

Timely Motion.

In an appeal of a County Planning and Zoning Commission's grant of a conditional use permit and zoning certificate for a veterinary clinic, the county's objection to the prevailing parties' motion for costs and attorney fees was timely pursuant to I.R.C.P. 54(d) and 54(e) which, at that time, required that a motion to disallow costs and attorney fees be filed within ten days of service of the memorandum of costs and fees, where the parties were served with the memorandum by mail, and the objection was filed 13 days later, under I.R.C.P. 6(e)(1) and this rule allowing a three-day extension where service is by mail, and exclusion of the day of service. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990).

Cited in: *Harris v. Beco Corp.*, 110 Idaho 28, 713 P.2d 1387 (1986); *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987); *Busse v. Busse*, 141 Idaho 566, 113 P.3d 224 (2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Computing Time of Service of Summons.
Sunday Last Day.

Computing Time of Service of Summons.

In computing time of service of summons, day on which service was made must be excluded. *Soderman v. Peterson*, 36 Idaho 414, 211 P. 448 (1922).

Sunday Last Day.

Notice of appeal filed on ninety-first day is

good when day fell on Sunday. *Falls Creek Timber Co. v. Day*, 39 Idaho 495, 228 P. 313 (1924); *Myers v. Harvey*, 39 Idaho 724, 229 P. 1112 (1924).

Where ninetieth day fell on Sunday, appeal on following day though on ninety-first day was timely. *Huggins v. Green Top Dairy Farms, Inc.*, 74 Idaho 266, 260 P.2d 407 (1953).

Rule 6(b). Enlargement.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation, which does not disturb the orderly dispatch of business or the convenience of the court, filed in the action, before or after the expiration of the specified period, may enlarge the period, or the court

for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but the time may not be extended for taking any action under rules 50(b), 52(b), 59(b), (d), (e), and 60(b) except to the extent and under the conditions stated in them.

STATUTORY NOTES

Cross References. Amendment of findings of court, Rule 52(b).

Judgment notwithstanding verdict, motion for, Rule 50(b).

Motion to alter or amend judgment, Rule 59(e).

New trial on initiative of court, Rule 59(d).

Relief from mistakes, inadvertence, excusable neglect, newly discovered evidence or fraud, Rule 60(b).

Time for motion for new trial, Rule 59(b).

JUDICIAL DECISIONS

ANALYSIS

Default Judgment.

Discretion of Court.

Discretion of Trial Court.

Motion for New Trial.

Default Judgment.

The district court is only vested with discretion to set aside a default judgment if the moving party has complied with the guidelines, and the time for taking any such action pursuant to I.R.C.P. 60(b) may not be extended by either the parties or the court under this rule. *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

Discretion of Court.

Where plaintiff moved for summary judgment in December, defendant filed opposing motion in February, supported only by his own and his attorney's affidavits, and defendant moved for an extension of time in March, in which to file additional affidavits, it was no abuse of discretion to grant summary judgment and deny the extension of time; I.R.C.P. 11(c), prior to the 1976 amendment, forbade attorney affidavits in connection with motions for summary judgments, and there was no explanation presented to the trial court as to why information that plaintiff had actual knowledge of defendant having filed a petition in bankruptcy so as to discharge his earlier judgment against defendant could not have been sooner found. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

Where appellants paid to use water from the city's pipeline, they were not entitled to

claim ownership of water rights after the pipeline was cut and capped by the city; property held by a municipality in trust for public use could not be acquired by adverse possession or prescription; when the district court adopted the special master's summary judgment recommendation to deny appellants' claimed water rights, appellants' motion to challenge the special master's decision was not timely filed within 14 days in accordance with Idaho R. Civ. P. 53(e)(2); the district court did not abuse its discretion by denying appellants' motion to deem their challenge as timely filed under Idaho R. Civ. P. 6(b). *Bedke v. City of Oakley (In re SRBA)*, 148 Idaho 738, 228 P.3d 1005 (2010).

Discretion of Trial Court.

The 10-day (now 14-day) period of Rule 54(d)(6), unlike the 10-day (now 14-day) periods of Rules 52 and 59, may be enlarged at the discretion of the trial court. *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979).

District court's denial of a motion to deem timely a challenge to the special master's recommendations in a water rights proceeding was a proper exercise of discretion under Idaho R. Civ. P. 6(b) because no reasonable explanation was presented for the tardy filing; Idaho R. Civ. P. 55(c) did not govern because the ruling was not a default judgment. *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 237 P.3d 1 (2010).

Motion for New Trial.

This rule does not allow for the extension of the time for filing a motion for a new trial. *O'Neil v. Schuckardt*, 116 Idaho 507, 777 P.2d 729 (1989).

Cited in: *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983); *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987); *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764

P.2d 431 (Ct. App. 1988); *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990); *Taylor v. AIA Servs. Corp.*, — Idaho —, 261 P.3d 829 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

Presumption of Good Cause Shown.

It will be presumed that an order extending time for preparation and service of a statement was made upon good cause shown, in

the absence of proof to the contrary; record may not contain evidence upon which order was based. *Snyder v. Viola Mining & Smelting Co.*, 3 Idaho 28, 26 P. 127 (1891).

Rule 6(c)(1). District court held in each county. [Repealed.]

Rule 6(c)(2). Order to show cause (other than contempt matters) — Affidavits.

(A) All applications for an order to show cause must be accompanied by an affidavit or supported by a verified complaint setting forth the facts and grounds upon which the application is based. If the court finds that an application makes a prima facie showing for an order commanding a person to do or refrain from doing specific acts or to pay a sum of money, the court shall enter an order to show cause to the opposing party to comply with the request or show cause before the court at a time and place certain why such order should not be entered. An order to show cause must be served upon the party to whom it is directed, or the party's attorney of record in the action, at least five (5) days prior to the date of the show cause hearing in the same manner as a notice for hearing of a motion under these rules. If the party to whom the order to show cause is directed opposes the entry of the order, the court shall hear the show cause proceeding. The order to show cause procedure may not be used to seek a modification of a decree of divorce with respect to child support or custody. Any proceeding for contempt must be brought pursuant to Rule 75.

(B) Any party may elect to produce testimony and evidence at the hearing, or to cross-examine the adverse party and/or the adverse party's affiants, by giving notice to the court and the adverse party at least twenty-four (24) hours before the hearing, such notice shall designate the person(s) sought to be cross-examined. The party against whom relief is sought shall be given written notice of the requirements of this subsections when served with the order to show cause.

(C) If a party timely gives notice of the intent to cross-examine, the adverse party shall have the person(s) designated in the notice present at the hearing, unless otherwise ordered by the court. If the adverse party or such party's affiants are not excused by the court and fail to appear as requested in such notice, the court may impose sanctions as it deems appropriate including awarding attorney fees to the requesting party. (Amended March 31, 1998, effective July 1, 1998; amended March 24, 2005, effective July 1, 2005; amended March 17, 2006, effective July 1, 2006.)

JUDICIAL DECISIONS

ANALYSIS

Effect of Previous Appearance. Sufficiency of Application.

Effect of Previous Appearance.

Where the appellant had already appeared in the action by seeking a prior modification of a divorce decree, an order to show cause was simply a notice of motion in the nature of a citation to a party to appear at a stated time and place and to show why the requested relief should not be granted. *Fuller v. Fuller*, 101 Idaho 40, 607 P.2d 1314 (1980).

Sufficiency of Application.

The presentation to the court for signature of an order to show cause, accompanied by a motion for modification of decree of divorce, an affidavit in support of the motion, and notice of hearing, constituted an “application” within contemplation of this rule. *Fuller v. Fuller*, 101 Idaho 40, 607 P2d 1314 (1980).

Cited in: *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990); *State v. Delezene (In re Williams)*, 120 Idaho 473, 817 P.2d 139 (1991).

Rule 6(c)(3). Show cause hearings in divorce and custody proceedings (other than contempt matters). [Repealed.]

Rule 6(c)(4). Show cause hearings (other than contempt matters) — Generally. [Repealed.]

Rule 6(c)(5). Support hearings — Affidavit to accompany copy of decree.

In the event a decree for the payment of child support is forwarded to another county for enforcement under section 32-710A.(C), Idaho Code, the prosecuting attorney forwarding the necessary certified copies of the decree for support shall attach thereto an affidavit of the party entitled to receive support payments under the decree setting forth the financial and other circumstances of such party. The affidavit shall be in substantially the following form:

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____

Plaintiff,

vs.

Defendant(s).

State of Idaho

County of _____

AFFIDAVIT FOR SUPPORT

SS.

_____, being duly sworn, testifies as follows:

- 1. State your full name:
- 2. Where do you reside:
- 3. When and where were you married to the other party:
- 4. List the names and dates of birth of all living children born of your marriage to the other party, and state which of these are living with you:
- 5. List the names and ages of all persons residing in your home other than the above children and state their relationship to you:
- 6. State whether you have remarried, and if so, give the name of your new spouse, the place of his or her employment and his or her monthly earnings:
- 7. Itemize the monthly sums of money required for the support of the above children living with you:

	<u>Per Month</u> <u>Children</u>	<u>Per Month</u> <u>Self</u>
Housing	\$	\$
Food		
Utilities		
Medical		
Day Care or Baby-sitting		
Transportation		
Clothing		
Other		
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
TOTAL	\$	\$

- 8. State whether you are employed and if so give the name of your employer, your monthly gross income, and your monthly take home income from that employment:
- 9. State the source and amount of any other monthly income (other than support from the other party) which is available to you for the support of the children:
- 10. List and explain any special medical problems of yourself or the children and state what expenses, if any, are incurred by reason of these medical problems:
- 11. Do you receive any financial assistance from any public agency, and if so, in what monthly amount:
- 12. What is the occupation of the other party, where does the other party work and what is the other party's monthly wage or salary:
- 13. List all income of the other party known to you, which you feel is available to pay the support required by the decree of divorce:
- 14. List all assets of the other party known to you, which you feel are available to pay the support required by the decree of divorce:

15. State any other facts which you think the court should know in enforcing the support required by the decree of divorce:

Affiant
SUBSCRIBED AND SWORN to before me the _____ day of _____,
20 ____, at _____, Idaho.

Notary Public for Idaho
Residing at:_____

(Seal)
(Adopted March 24, 1982, effective July 1, 1982.)

STATUTORY NOTES

Cross References. Child support, §§ 32-704, 32-706, 32-709, 32-710A.

Rule 6(c)(6). Child Support Guidelines.

Pursuant to Section 32-706A, Idaho Code, the Idaho Child Support Guidelines (I.C.S.G.) adopted by the Supreme Court are as follows:

IDAHO CHILD SUPPORT GUIDELINES

Section 1. Introduction. The Child Support Guidelines are intended to give specific guidance for evaluating evidence in child support proceedings. Acknowledging there are diverse needs and resources in individual cases, the following Guidelines will produce a more equitable and uniform approach in establishing child support obligations. The Guidelines may be referred to as the Idaho Child Support Guidelines (I.C.S.G.).

Section 2. Application. The Guidelines apply to determinations of child support obligations between parents in all judicial proceedings that address the issue of child support for children under the age of eighteen years or children pursuing high school education up to the age of nineteen years. Support for post-secondary education after age eighteen is beyond these Guidelines.

Section 3. Function of Guidelines. The Guidelines are premised upon the following general assumptions: (a) the costs of rearing a child are reasonably related to family income, and the proportion of family income allocated to child support remains relatively constant in relation to total household expenditures at all income levels; (b) in relation to gross income, there is a gradual decline in that proportion as income increases; and (c) the Guidelines amount is the appropriate average amount of support during the minority of the child at a given parental income, so that age-specific expenses do not alter the Guidelines amount. These assumptions may not be accurate in all cases. The amount resulting from the application of the Guidelines, which includes the basic child support calculation and all adjustments, is the amount of child support to be awarded unless evidence

establishes that amount to be inappropriate. In such case the court shall set forth on the record the dollar amount of support that the Guidelines would require and set forth the circumstances justifying departure from the Guidelines; and (d) child support received and the custodial parent's share of support are spent on the child(ren).

Section 4. Basic Guideline Principles. These Child Support Guidelines are premised upon the following basic principles to guide parents, lawyers, and courts in arriving at child support obligations:

(a) Both parents share legal responsibility for supporting their child. That legal responsibility should be divided in proportion to their Guidelines Income, whether they be separated, divorced, remarried, or never married.

(b) In any proceeding where child support is under consideration, child support shall be given priority over the needs of the parents or creditors in allocating family resources. Only after careful scrutiny should the court delay implementation of the Guidelines amount because of debt assumption.

(c) Support shall be determined without regard to the gender of the custodial parent.

(d) Rarely should the child support obligation be set at zero. If the monthly income of the paying parent is below \$800.00, the Court should carefully review the incomes and living expenses to determine the maximum amount of support that can reasonably be ordered without denying a parent the means for self-support at a minimum subsistence level. There shall be a rebuttable presumption that a minimum amount of support is at least \$50.00 per month per child.

Section 5. Modifications. The amount of child support provided for under these Guidelines may constitute a substantial and material change of circumstances for granting a motion for modification for child support obligations. A support order may also be modified to provide for health insurance not provided in the support order.

Section 6. Guidelines Income Determination — Income Defined. For purposes of these Guidelines, Guidelines Income shall include: (a) the gross income of the parents and (b) if applicable, fringe benefits and/or potential income; less adjustments as set forth in Section 7.

(a) **Gross Income Defined.**

(1) **Gross income.**

(i) Gross income includes income from any source, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, dividends, pensions, interest, trust income, annuities, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, alimony, maintenance, any veteran's benefits received, education grants, scholarships, other financial aid and disability and retirement payments to or on behalf of a child. If benefits are being paid to a child on behalf of a disabled or retired parent and are received by the parent entitled

to support, and if credit against a support obligation is being given pursuant to section 8(e)(1), the amount of the disability payments to the child will be added to the income of the disabled or retired parent. The court may consider when and for what duration the receipt of funds from gifts, prizes, net proceeds from property sales, severance pay, and judgments will be considered as available for child support. Benefits received from public assistance programs for the parent shall be included except in cases of extraordinary hardship. Child support received is assumed to be spent on the child and is not income to the parent. Payments received as a result of the child's disability are not income of either parent.

(ii) Compensation received by a party for employment in excess of a 40 hour week shall be excluded from gross income, provided the party demonstrates and the Court finds: (1) the excess employment is voluntary and not a condition of employment; and (2) the excess employment is in the nature of additional, part-time employment, or is employment compensable as overtime pay by the hour or fractions of the hour, and (3) the party's compensation structure has not been changed for the purpose of affecting a support or maintenance obligation, and (4) the party is otherwise paid for full time employment at least 48 weeks per year, and (5) child support payments are calculated based upon current income. This provision is intended to benefit those who already work a full-time job, and undertake voluntary, additional employment. It is not intended to benefit self-employed individuals who may work more than 40 hours per week, those that may be seasonally employed in more than one job (none of which is full-time), those who may be employed in excess of 40 hours per week for part of the year, but are not employed full-time for most of the year, nor those whose employer regularly requires overtime as part of their employment.

(2) **Rents and business income.** For rents, royalties, or income derived from a trade or business (whether carried on as a sole proprietorship, partnership or closely held corporation), gross income is defined as gross receipts minus ordinary and necessary expenses required to carry on the trade or business or to earn rents and royalties. Excluded from ordinary and necessary expenses under these Guidelines are expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine the level of gross income of the parent to satisfy a child support obligation. This amount may differ from a determination of business income for tax purposes. Additionally, specifically permitted are the following deductions, unless, in the sole discretion of the Court, permitting any or all of such deductions would result in an inequitable or inappropriate amount of child support in view of all the circumstances:

(A) Straight line depreciation for the life of the asset.¹

(B) One-half of the self-employment social security tax paid on the trade or business income.

(3) **Income of parents and spouse.** Gross income ordinarily shall not include a parent's community property interest in the financial resources or obligations of a spouse who is not a parent of the child, unless compelling reasons exist. This subsection limits the application of *Yost v. Yost*, 112 Idaho 677, 735 P.2d 988 (1987).

(4) **Contributions to living expenses.** Where a parent derives a benefit through contribution to living expenses of the parent or children, e.g., from parents, spouse or others, or by sharing expenses, the court shall not consider the benefit to the parent as an available resource, unless compelling reasons exist.

(b) **Fringe Benefits Defined.** Fringe benefits received by a parent in the course of employment, or operation of a trade or business shall be counted as income if they are significant and reduce personal living expenses. Such fringe benefits might include a company car, free housing, or room and board.

(c) **Potential Income.**

(1) **Potential earned income.** If a parent is voluntarily unemployed or underemployed, child support shall be based on gross potential income, except that potential income should not be included for a parent that is physically or mentally incapacitated. A parent shall not be deemed underemployed if gainfully employed on a full-time basis at the same or similar occupation in which he/she was employed for more than six months before the filing of the action or separation of the parties, whichever occurs first. On post-judgment motions, the six month period is calculated from the date the motion is filed. Ordinarily, a parent shall not be deemed underemployed if the parent is caring for a child not more than 6 months of age. Determination of potential income shall be made according to any or all of the following methods, as appropriate:

(A) Determine employment potential and probable earnings level based on the parent's work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

(B) Where a parent is a student, potential monthly income during the school term may be determined by considering student loans from any source.

(2) **Potential unearned income.** If a parent has assets that do not currently produce income, or that have been voluntarily transferred or placed in a condition or situation to reduce earnings, the court may attribute reasonable monetary value of income to the assets so that an adequate award of child support may be made.

¹"Life of the asset" is defined as the recovery period of the asset under the alternative depreciation system (ADS) as provided in Internal Revenue Service Rev. Proc. 87-56, 1987-2 CB 674.2

Section 7. Adjustments to Gross Income.

Alimony, Maintenance, and Other Child Support Obligations.

(1) **Other court orders.** A deduction shall be allowed from Gross Income for the amount ordered pursuant to any other court order for child support or spousal maintenance from another relationship.

(2) **Spousal maintenance in current case.** A deduction shall be allowed in gross income for any spousal maintenance being ordered in the current case.

(3) **Support paid without court order.** A deduction shall be allowed from Gross Income for payments without court order currently being made (or an average thereof, if amounts vary) for the support of a child from another relationship where that parent has established a regular pattern of payment.

(4) **Support of other children living in home.** Because the custodial parent's share of support is presumed to be spent directly on the child a deduction shall be allowed from Gross Income when a natural or adopted child of another relationship resides in the home of either parent. The deduction shall be the Guideline support amount calculated for that child, using only that parent's income.

(5) In a proceeding to modify an existing award, children who are born or adopted after the entry of the existing order, shall not be considered.²

Section 8. Adjustments to the Award of Child Support.

(a) **Child Care Costs.** A basic child support calculation does not cover work-related child care expenses. The court may order a sharing of reasonable work-related child care expenses incurred by either party in proportion to their Guideline Income. If the court imputes income to a student parent, then the court may order up to a pro-rata sharing of the student's reasonable child care expenses while attending school. If ordered, these payments shall be paid directly between the parties, unless agreed otherwise. The court may consider whether the federal child care tax credit for such minor is available as a benefit to a parent.

(b) **Transportation.** The court may order an allocation of transportation costs and responsibilities between the parents after considering all relevant factors, which shall include:

- (1) The financial resources of the child;
- (2) The financial resources, needs and obligations of both parents which ordinarily shall not include a parent's community property interest

²Example: Bob and Alice are divorcing. They have two children. Bob has a child from another relationship living with him for whom he receives \$240 per month support. The two children will live with Alice as the custodial parent. In computing support for the two children living with Alice, Bob's gross income is reduced by a sum, computed under the Guidelines (from the one child Table) that he would have to pay as support for his child from the other relationship if that child were not living with him and the child's mother has no income. If Bob's gross income is \$1,800 per month, the child support which he would have to pay for the child of his first relationship is \$312, so that Bob's monthly gross income would be reduced from \$1,800 to \$1,488. Because the support Bob receives is also assumed to be completely spent for the child, it is not considered in the calculation.

in the financial resources or obligations of a spouse who is not a parent of the child, unless compelling reasons exist;

(3) The costs and difficulties to both parents in exercising custodial and visitation time;

(4) The reasons for the parent's relocation; and

(5) Other relevant factors.

(c) **Tax Benefits.** The actual federal and state income tax benefits recognized by the party entitled to claim the federal child dependency exemption should be considered in making a child support award. The parties may agree to an allocation of the dependency benefits. Otherwise, the court should assign the dependency exemption(s) to the parent who has the greater tax benefit calculated from the tables below using the marital status and guidelines income of each parent at the time of the child support award calculation. The parent not receiving the exemption(s) is entitled to a pro rata share of the income tax benefit or child tax credit in proportion to his/her share of the guidelines income. The pro rata share of the income tax benefit will be either a credit against or in addition to basic child support and shall be included in the child support order.

Federal and Idaho Income Tax Benefit per Exemption*

Status at Calculation Date	Guidelines Income of Parent		1st Child	2nd Child	3rd Child	4th Child	5th Child
Remarried	Greater than	& Less than or Equal to					
		\$12,000	\$1,000	\$350	\$0	\$0	\$0
	\$12,000	\$14,000	\$1,000	\$500	\$0	\$0	\$0
	\$14,000	\$16,000	\$1,000	\$800	\$0	\$0	\$0
	\$16,000	\$18,000	\$1,000	\$1,000	\$0	\$0	\$0
	\$18,000	\$20,000	\$1,000	\$1,000	\$400	\$0	\$0
	\$20,000	\$22,000	\$1,200	\$1,000	\$700	\$0	\$0
	\$22,000	\$24,000	\$1,300	\$1,000	\$900	\$0	\$0
	\$24,000	\$26,000	\$1,400	\$1,100	\$1,000	\$200	\$0
	\$26,000	\$28,000	\$1,400	\$1,300	\$1,100	\$500	\$0
	\$28,000	\$30,000	\$1,500	\$1,500	\$1,200	\$600	\$0
	\$30,000	\$32,000	\$1,500	\$1,500	\$1,300	\$1,000	\$200
	\$32,000	\$34,000	\$1,600	\$1,600	\$1,400	\$1,200	\$500
	\$34,000	\$36,000	\$1,600	\$1,600	\$1,500	\$1,400	\$900
	\$36,000	\$38,000	\$1,700	\$1,700	\$1,600	\$1,500	\$900
	\$38,000	\$40,000	\$1,700	\$1,700	\$1,700	\$1,600	\$900
	\$40,000	\$42,000	\$1,800	\$1,700	\$1,700	\$1,600	\$1,300
	\$42,000	\$44,000	\$1,800	\$1,800	\$1,700	\$1,700	\$1,300
	\$44,000	\$46,000	\$1,800	\$1,900	\$1,700	\$1,700	\$1,600
	\$46,000	\$48,000	\$1,800	\$1,900	\$1,800	\$1,700	\$1,600
	\$48,000	\$50,000	\$1,800	\$1,900	\$1,800	\$1,800	\$1,700
	\$50,000	\$52,000	\$1,800	\$1,900	\$1,900	\$1,800	\$1,700
	\$52,000	\$54,000	\$1,800	\$1,900	\$1,900	\$1,800	\$1,700
	\$54,000	\$56,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,800
	\$56,000	\$58,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,800
	\$58,000	\$60,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,800
	\$60,000	\$62,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$62,000	\$64,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$64,000	\$66,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$66,000	\$68,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$68,000	\$70,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$70,000	\$72,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$72,000	\$74,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$74,000	\$76,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$76,000	\$78,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
	\$78,000	\$80,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900

\$80,000	\$82,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
\$82,000	\$84,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
\$84,000	\$86,000	\$1,800	\$1,900	\$1,900	\$1,900	\$1,900
\$86,000	\$88,000	\$1,900	\$2,000	\$1,900	\$1,900	\$1,900
\$88,000	\$90,000	\$2,000	\$2,000	\$1,900	\$1,900	\$1,900
\$90,000	\$92,000	\$2,100	\$2,100	\$1,900	\$1,900	\$1,900
\$92,000	\$94,000	\$2,100	\$2,100	\$1,900	\$1,900	\$1,900
\$94,000	\$96,000	\$2,200	\$2,200	\$2,000	\$1,900	\$1,900
\$96,000	\$98,000	\$2,200	\$2,200	\$2,100	\$2,000	\$1,900
\$98,000	\$100,000	\$2,200	\$2,300	\$2,200	\$2,000	\$1,900
\$100,000	\$102,000	\$2,200	\$2,300	\$2,200	\$2,100	\$1,900
\$102,000	\$104,000	\$2,200	\$2,300	\$2,200	\$2,200	\$1,900
\$104,000	\$106,000	\$2,200	\$2,300	\$2,200	\$2,200	\$1,900
\$106,000	\$108,000	\$2,200	\$2,300	\$2,200	\$2,200	\$2,000
\$108,000	\$110,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
\$110,000	\$112,000	\$2,100	\$2,300	\$2,300	\$2,300	\$2,200
\$112,000	\$114,000	\$2,100	\$2,200	\$2,300	\$2,300	\$2,200
\$114,000	\$116,000	\$2,000	\$2,200	\$2,300	\$2,300	\$2,200
\$116,000	\$118,000	\$1,900	\$2,200	\$2,300	\$2,300	\$2,200
\$118,000	\$120,000	\$1,800	\$2,200	\$2,300	\$2,300	\$2,200
\$120,000	\$122,000	\$1,700	\$2,200	\$2,300	\$2,300	\$2,200
\$122,000	\$124,000	\$1,600	\$2,200	\$2,300	\$2,300	\$2,200
\$124,000	\$126,000	\$1,500	\$2,200	\$2,300	\$2,300	\$2,200
\$126,000	\$128,000	\$1,400	\$2,200	\$2,300	\$2,300	\$2,200
\$128,000	\$130,000	\$1,300	\$2,200	\$2,300	\$2,300	\$2,200
\$130,000	\$132,000	\$1,200	\$2,200	\$2,300	\$2,300	\$2,200
\$132,000	\$134,000	\$1,200	\$2,200	\$2,300	\$2,300	\$2,200
\$134,000	\$136,000	\$1,200	\$2,100	\$2,300	\$2,300	\$2,200
\$136,000	\$138,000	\$1,200	\$2,000	\$2,300	\$2,300	\$2,200
\$138,000	\$140,000	\$1,200	\$1,900	\$2,300	\$2,300	\$2,200
\$140,000	\$142,000	\$1,200	\$1,800	\$2,200	\$2,300	\$2,200
\$142,000	\$144,000	\$1,200	\$1,700	\$2,200	\$2,300	\$2,200
\$144,000	\$146,000	\$1,200	\$1,600	\$2,200	\$2,300	\$2,200
\$146,000	\$148,000	\$1,200	\$1,500	\$2,200	\$2,300	\$2,200
\$148,000	\$150,000	\$1,200	\$1,400	\$2,200	\$2,300	\$2,200
\$150,000	\$152,000	\$1,200	\$1,300	\$2,200	\$2,300	\$2,200
\$152,000	\$154,000	\$1,200	\$1,300	\$2,200	\$2,300	\$2,200
\$154,000	\$156,000	\$1,200	\$1,300	\$2,100	\$2,300	\$2,200
\$156,000	\$158,000	\$1,200	\$1,300	\$2,000	\$2,300	\$2,200
\$158,000	\$160,000	\$1,200	\$1,300	\$1,900	\$2,300	\$2,200
\$160,000	\$162,000	\$1,200	\$1,300	\$1,800	\$2,300	\$2,200

Federal and Idaho Income Tax Benefit per Exemption*

Status at Calculation Date	Guidelines Income of Parent		1st Child	2nd Child	3rd Child	4th Child	5th Child
	Greater than	& Less than or Equal to					
Single - parent has custody		\$12,000	\$1,000	\$350	\$0	\$0	\$0
	\$12,000	\$14,000	\$1,100	\$500	\$0	\$0	\$0
	\$14,000	\$16,000	\$1,200	\$800	\$0	\$0	\$0
	\$16,000	\$18,000	\$1,400	\$1,000	\$300	\$0	\$0
	\$18,000	\$20,000	\$1,500	\$1,300	\$400	\$0	\$0
	\$20,000	\$22,000	\$1,600	\$1,400	\$800	\$0	\$0
	\$22,000	\$24,000	\$1,600	\$1,500	\$1,200	\$0	\$0
	\$24,000	\$26,000	\$1,700	\$1,500	\$1,400	\$400	\$0
	\$26,000	\$28,000	\$1,800	\$1,700	\$1,400	\$800	\$0
	\$28,000	\$30,000	\$1,800	\$1,800	\$1,500	\$1,200	\$200
	\$30,000	\$32,000	\$1,800	\$1,800	\$1,700	\$1,400	\$800
	\$32,000	\$34,000	\$1,800	\$1,800	\$1,800	\$1,400	\$1,200
	\$34,000	\$36,000	\$1,900	\$1,900	\$1,800	\$1,500	\$1,400
	\$36,000	\$38,000	\$1,900	\$1,900	\$1,800	\$1,700	\$1,600
	\$38,000	\$40,000	\$1,900	\$1,900	\$1,800	\$1,800	\$1,700
	\$40,000	\$42,000	\$1,900	\$1,900	\$1,900	\$1,800	\$1,800
	\$42,000	\$44,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,800
	\$44,000	\$46,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$46,000	\$48,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$48,000	\$50,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$50,000	\$52,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$52,000	\$54,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$54,000	\$56,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$56,000	\$58,000	\$1,900	\$1,900	\$1,900	\$1,900	\$1,900
	\$58,000	\$60,000	\$2,000	\$1,900	\$1,900	\$1,900	\$1,900
	\$60,000	\$62,000	\$2,000	\$2,000	\$1,900	\$1,900	\$1,900
	\$62,000	\$64,000	\$2,100	\$2,000	\$2,000	\$1,900	\$1,900
	\$64,000	\$66,000	\$2,100	\$2,100	\$2,100	\$1,900	\$1,900
	\$66,000	\$68,000	\$2,100	\$2,100	\$2,100	\$2,000	\$1,900
	\$68,000	\$70,000	\$2,100	\$2,100	\$2,100	\$2,000	\$2,000
	\$70,000	\$72,000	\$2,200	\$2,200	\$2,100	\$2,100	\$2,000
	\$72,000	\$74,000	\$2,200	\$2,200	\$2,200	\$2,200	\$2,100
	\$74,000	\$76,000	\$2,300	\$2,200	\$2,200	\$2,200	\$2,200
	\$76,000	\$78,000	\$2,100	\$2,200	\$2,200	\$2,200	\$2,200

\$78,000	\$80,000	\$2,000	\$2,300	\$2,300	\$2,200	\$2,200
\$80,000	\$82,000	\$1,900	\$2,300	\$2,300	\$2,300	\$2,300
\$82,000	\$84,000	\$1,800	\$2,300	\$2,300	\$2,300	\$2,300
\$84,000	\$86,000	\$1,700	\$2,300	\$2,300	\$2,300	\$2,300
\$86,000	\$88,000	\$1,600	\$2,300	\$2,300	\$2,300	\$2,300
\$88,000	\$90,000	\$1,500	\$2,300	\$2,300	\$2,300	\$2,300
\$90,000	\$92,000	\$1,400	\$2,300	\$2,300	\$2,300	\$2,300
\$92,000	\$94,000	\$1,300	\$2,300	\$2,300	\$2,300	\$2,300
\$94,000	\$96,000	\$1,300	\$2,200	\$2,300	\$2,300	\$2,300
\$96,000	\$98,000	\$1,300	\$2,100	\$2,300	\$2,300	\$2,300
\$98,000	\$100,000	\$1,300	\$2,100	\$2,300	\$2,300	\$2,300
\$100,000	\$102,000	\$1,300	\$2,000	\$2,300	\$2,300	\$2,300
\$102,000	\$104,000	\$1,300	\$1,900	\$2,300	\$2,300	\$2,300
\$104,000	\$106,000	\$1,300	\$1,800	\$2,300	\$2,300	\$2,300
\$106,000	\$108,000	\$1,300	\$1,600	\$2,300	\$2,300	\$2,300
\$108,000	\$110,000	\$1,300	\$1,500	\$2,300	\$2,300	\$2,300
\$110,000	\$112,000	\$1,300	\$1,400	\$2,300	\$2,300	\$2,300
\$112,000	\$114,000	\$1,300	\$1,300	\$2,300	\$2,300	\$2,300
\$114,000	\$116,000	\$1,300	\$1,200	\$2,300	\$2,300	\$2,300
\$116,000	\$118,000	\$1,300	\$1,200	\$2,200	\$2,300	\$2,300
\$118,000	\$120,000	\$1,300	\$1,200	\$2,100	\$2,300	\$2,300
\$120,000	\$122,000	\$1,300	\$1,200	\$2,000	\$2,300	\$2,300
\$122,000	\$124,000	\$1,300	\$1,200	\$1,900	\$2,300	\$2,300
\$124,000	\$126,000	\$1,300	\$1,200	\$1,800	\$2,300	\$2,300
\$126,000	\$128,000	\$1,300	\$1,200	\$1,700	\$2,300	\$2,300
\$128,000	\$130,000	\$1,300	\$1,200	\$1,600	\$2,200	\$2,300
\$130,000	\$132,000	\$1,300	\$1,200	\$1,500	\$2,200	\$2,300

Federal and Idaho Income Tax Benefit per Exemption*

Status at Calculation Date	Guidelines Income of Parent		1st Child	2nd Child	3rd Child	4th Child	5th Child
	Greater than	& Less than or Equal to					
Single -		\$10,000	\$1,000	\$100	\$0	\$0	\$0
parent does	\$10,000	\$12,000	\$1,100	\$200	\$0	\$0	\$0
not have	\$12,000	\$14,000	\$1,400	\$500	\$0	\$0	\$0
custody	\$14,000	\$16,000	\$1,500	\$1,000	\$0	\$0	\$0
	\$16,000	\$18,000	\$1,600	\$1,300	\$300	\$0	\$0
	\$18,000	\$20,000	\$1,700	\$1,400	\$600	\$0	\$0
	\$20,000	\$22,000	\$1,800	\$1,600	\$1,000	\$100	\$0
	\$22,000	\$24,000	\$1,800	\$1,700	\$1,300	\$300	\$0
	\$24,000	\$26,000	\$1,800	\$1,800	\$1,500	\$700	\$100
	\$26,000	\$28,000	\$1,900	\$1,800	\$1,700	\$1,000	\$300
	\$28,000	\$30,000	\$1,900	\$1,900	\$1,700	\$1,100	\$500
	\$30,000	\$32,000	\$1,900	\$1,900	\$1,700	\$1,200	\$600
	\$32,000	\$34,000	\$1,900	\$1,900	\$1,800	\$1,300	\$700
	\$34,000	\$36,000	\$1,900	\$1,900	\$1,800	\$1,400	\$800
	\$36,000	\$38,000	\$1,900	\$1,900	\$1,800	\$1,500	\$900
	\$38,000	\$40,000	\$1,900	\$1,900	\$1,800	\$1,700	\$1,000
	\$40,000	\$42,000	\$1,900	\$1,900	\$1,800	\$1,800	\$1,300
	\$42,000	\$44,000	\$2,000	\$1,900	\$1,800	\$1,800	\$1,700
	\$44,000	\$46,000	\$2,000	\$1,900	\$1,900	\$1,900	\$1,800
	\$46,000	\$48,000	\$2,100	\$2,000	\$1,900	\$1,900	\$1,800
	\$48,000	\$50,000	\$2,200	\$2,100	\$1,900	\$1,900	\$1,800
	\$50,000	\$52,000	\$2,300	\$2,100	\$1,900	\$1,900	\$1,900
	\$52,000	\$54,000	\$2,200	\$2,100	\$2,100	\$1,900	\$1,900
	\$54,000	\$56,000	\$2,200	\$2,300	\$2,200	\$1,900	\$1,900
	\$56,000	\$58,000	\$2,200	\$2,300	\$2,200	\$2,000	\$1,900
	\$58,000	\$60,000	\$2,200	\$2,300	\$2,200	\$2,100	\$2,000
	\$60,000	\$62,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
	\$62,000	\$64,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
	\$64,000	\$66,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
	\$66,000	\$68,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
	\$68,000	\$70,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
	\$70,000	\$72,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100
	\$72,000	\$74,000	\$2,200	\$2,300	\$2,300	\$2,200	\$2,100

\$74,000	\$76,000	\$2,200	\$2,300	\$2,300	\$2,300	\$2,200
\$76,000	\$78,000	\$2,100	\$2,300	\$2,300	\$2,300	\$2,200
\$78,000	\$80,000	\$2,000	\$2,300	\$2,300	\$2,300	\$2,200
\$80,000	\$82,000	\$1,900	\$2,300	\$2,300	\$2,300	\$2,200
\$82,000	\$84,000	\$1,800	\$2,300	\$2,300	\$2,300	\$2,200
\$84,000	\$86,000	\$1,800	\$2,200	\$2,200	\$2,300	\$2,300
\$86,000	\$88,000	\$1,600	\$2,200	\$2,200	\$2,300	\$2,300
\$88,000	\$90,000	\$1,500	\$2,200	\$2,200	\$2,300	\$2,300
\$90,000	\$92,000	\$1,400	\$2,200	\$2,200	\$2,300	\$2,300
\$92,000	\$94,000	\$1,300	\$2,200	\$2,200	\$2,300	\$2,300
\$94,000	\$96,000	\$1,300	\$2,200	\$2,200	\$2,300	\$2,300
\$96,000	\$98,000	\$1,300	\$2,200	\$2,200	\$2,300	\$2,300
\$98,000	\$100,000	\$1,300	\$2,200	\$2,200	\$2,300	\$2,300
\$100,000	\$102,000	\$1,300	\$2,200	\$2,200	\$2,300	\$2,300
\$102,000	\$104,000	\$1,300	\$2,100	\$2,200	\$2,300	\$2,300
\$104,000	\$106,000	\$1,300	\$2,000	\$2,200	\$2,300	\$2,300
\$106,000	\$108,000	\$1,300	\$1,900	\$2,200	\$2,300	\$2,300
\$108,000	\$110,000	\$1,300	\$1,800	\$2,200	\$2,300	\$2,300
\$110,000	\$112,000	\$1,300	\$1,700	\$2,200	\$2,300	\$2,300
\$112,000	\$114,000	\$1,300	\$1,600	\$2,200	\$2,300	\$2,300
\$114,000	\$116,000	\$1,300	\$1,500	\$2,300	\$2,300	\$2,400
\$116,000	\$118,000	\$1,300	\$1,500	\$2,300	\$2,300	\$2,400
\$118,000	\$120,000	\$1,300	\$1,500	\$2,200	\$2,300	\$2,400
\$120,000	\$122,000	\$1,300	\$1,500	\$2,100	\$2,300	\$2,400
\$122,000	\$124,000	\$1,300	\$1,500	\$2,000	\$2,300	\$2,400
\$124,000	\$126,000	\$1,300	\$1,400	\$1,900	\$2,300	\$2,400

(d) Health insurance premiums and health care expenses not covered by insurance.

(1) For each child support order, consideration should be given to provision of adequate health insurance coverage for the child. Such health insurance should normally be provided by the parent that can obtain suitable coverage through an employer at the lower cost. The actual cost paid by either parent for health insurance premiums or for health care expenses for the children not covered or paid in full by insurance, including, but not limited to, orthodontic, optical, dental, psychological and prescription medication expenses, shall be prorated between the parents in proportion to their Guidelines Income. These payments shall be in addition to basic child support and will be paid directly between the parents; however, the prorata share of the monthly insurance premium may instead be either a credit against or in addition to basic child support.

(2) Any claimed health care expense for the children, whether or not covered by insurance, which would result in an actual out-of-pocket expense to the other parent of over \$500 for the course of treatment, must be approved in advance, in writing, by both parents or by prior court order. Relief may be granted by the Court for failure to comply under extraordinary circumstances, and the Court may in its discretion apportion the incurred expense in some percentage other than that in the existing support order, and in so doing, may consider whether consent was unreasonably requested or withheld.

(e) Disability dependency benefits or retirement dependency benefits.

(1) Any disability dependency benefits or retirement dependency benefits paid to a child support recipient for the benefit of a child due to the disability or retirement of a parent obligated to pay support for the child should be considered in determining a child support award. Unless otherwise stipulated by the parties, the court should order the support payment be reduced by the amount of any dependency benefits paid to the support recipient. Under no circumstances shall the obligated parent be entitled to the reimbursement of any dependency benefits that exceed the support payment amount. Any payments due to the disability of the child shall not be credited against the support obligation of the obligated parent.

**NOTE: These Guidelines attempt to calculate a deduction that is accurate as of the date the chart is implemented; however, the tax laws may change and the court may deviate from these calculations upon a showing that it is not accurate in a particular case. Parties should bear in mind if they wish to contest a calculation that this chart includes tax calculations for a dependency exemption for each dependent and child tax credits, and does not include a calculation for a child care tax credit or an earned income credit.*

For purposes of calculation of the Idaho child support obligation, tax benefit includes both the dependency exemption benefit and the child tax credit benefit. The tax benefit includes the refundable and nonrefundable portion of the child tax credit. The child tax credit of \$1,000 is not available in the year a child turns 17 or thereafter. To determine the tax benefit to a parent with a child over 17, go to the last column to the right for the number of children in the calculation, and use only the amount in that column in excess of \$1,000.

Section 9. Income Verification. In all cases (contested, uncontested, or stipulated), the Affidavit Verifying Income and the Child Support Worksheet shall be provided to the court by the plaintiff or moving party. They shall be in substantially the forms attached as Appendix A and B or C to these Guidelines. The Affidavits Verifying Income and the Child Support Worksheets shall be placed in the court file. The court may order the periodic exchange of documented income information by Affidavit Verifying Income or otherwise in any child support order.

Section 10. Computations.

(a) **Basic Child Support.** The basic child support obligation shall be based upon the Guideline Income of both parents, according to the rates set out in the schedules below: (the amounts are rounded off to the nearest dollar)

One (1) Child		Per Month	Per Year
18%	of the 1st \$ 10,000 of combined Guidelines Income	150	1,800
17%	of the next \$ 10,000 of combined Guidelines Income	142	1,700
15%	of the next \$ 10,000 of combined Guidelines Income	125	1,500
14%	of the next \$ 10,000 of combined Guidelines Income	117	1,400
13%	of the next \$ 10,000 of combined Guidelines Income	108	1,300
12%	of the next \$ 20,000 of combined Guidelines Income	200	2,400
9%	of the next \$ 20,000 of combined Guidelines Income	150	1,800
6%	of the next \$ 20,000 of combined Guidelines Income	100	1,200
5%	of the next \$ 20,000 of combined Guidelines Income	83	1,000
5%	of the next \$ 20,000 of combined Guidelines Income	83	1,000
		1,258	15,100
5% of the next \$150,000 of combined Guideline Income			
Two (2) Children		Per Month	Per Year
26%	of the 1st \$ 10,000 of combined Guidelines Income	217	2,600
25%	of the next \$ 10,000 of combined Guidelines Income	208	2,500
23%	of the next \$ 10,000 of combined Guidelines Income	192	2,300
22%	of the next \$ 10,000 of combined Guidelines Income	183	2,200
20%	of the next \$ 10,000 of combined Guidelines Income	167	2,000
17%	of the next \$ 20,000 of combined Guidelines Income	283	3,400
13%	of the next \$ 20,000 of combined Guidelines Income	217	2,600
9%	of the next \$ 20,000 of combined Guidelines Income	150	1,800
8%	of the next \$ 20,000 of combined Guidelines Income	133	1,600
8%	of the next \$ 20,000 of combined Guidelines Income	133	1,600
		1,883	22,600
8% of the next \$150,000 of combined Guideline Income			

Three (3) Children		Per Month	Per Year
30%	of the 1st \$ 10,000 of combined Guidelines Income	250	3,000
29%	of the next \$ 10,000 of combined Guidelines Income	242	2,900
27%	of the next \$ 10,000 of combined Guidelines Income	225	2,700
26%	of the next \$ 10,000 of combined Guidelines Income	217	2,600
24%	of the next \$ 10,000 of combined Guidelines Income	200	2,400
20%	of the next \$ 20,000 of combined Guidelines Income	333	4,000
16%	of the next \$ 20,000 of combined Guidelines Income	267	3,200
12%	of the next \$ 20,000 of combined Guidelines Income	200	2,400
11%	of the next \$ 20,000 of combined Guidelines Income	183	2,200
11%	of the next \$ 20,000 of combined Guidelines Income	183	2,200
		2,300	27,600
11% of the next \$150,000 of combined Guideline Income			

Four (4) Children	Per Month	Per Year
33% of the 1st \$ 10,000 of combined Guidelines Income	275	3,300
32% of the next \$ 10,000 of combined Guidelines Income	267	3,200
30% of the next \$ 10,000 of combined Guidelines Income	250	3,000
29% of the next \$ 10,000 of combined Guidelines Income	242	2,900
27% of the next \$ 10,000 of combined Guidelines Income	225	2,700
22% of the next \$ 20,000 of combined Guidelines Income	367	4,400
18% of the next \$ 20,000 of combined Guidelines Income	300	3,600
14% of the next \$ 20,000 of combined Guidelines Income	233	2,800
13% of the next \$ 20,000 of combined Guidelines Income	217	2,600
13% of the next \$ 20,000 of combined Guidelines Income	217	2,600
	2,592	31,100
13% of the next \$150,000 of combined Guideline Income		
Five (5) Children	Per Month	Per Year
36% of the 1st \$ 10,000 of combined Guidelines Income	300	3,600
35% of the next \$ 10,000 of combined Guidelines Income	292	3,500
33% of the next \$ 10,000 of combined Guidelines Income	275	3,300
32% of the next \$ 10,000 of combined Guidelines Income	267	3,200
30% of the next \$ 10,000 of combined Guidelines Income	250	3,000
24% of the next \$ 20,000 of combined Guidelines Income	400	4,800
20% of the next \$ 20,000 of combined Guidelines Income	333	4,000
16% of the next \$ 20,000 of combined Guidelines Income	267	3,200
15% of the next \$ 20,000 of combined Guidelines Income	250	3,000
15% of the next \$ 20,000 of combined Guidelines Income	250	3,000
	2,883	34,600
15% of the next \$150,000 of combined Guideline Income		

Samples of these obligations are set forth in the following Basic Monthly Child Support Guidelines Schedule:

**BASIC MONTHLY
CHILD SUPPORT
GUIDELINES
SCHEDULE**

**NUMBER OF
CHILDREN
(PAYMENT AMOUNT BY
MONTH)**

Combined Gross Monthly Income	One	Two	Three	Four	Five	Annual Income
\$500	\$90	\$130	\$150	\$165	\$180	\$6,000
\$600	\$108	\$156	\$180	\$198	\$216	\$7,200
\$700	\$126	\$182	\$210	\$231	\$252	\$8,400
\$800	\$144	\$208	\$240	\$264	\$288	\$9,600
\$900	\$161	\$233	\$269	\$296	\$323	\$10,800
\$1,000	\$178	\$258	\$298	\$328	\$358	\$12,000
\$1,100	\$195	\$283	\$327	\$360	\$393	\$13,200
\$1,200	\$212	\$308	\$356	\$392	\$428	\$14,400
\$1,300	\$229	\$333	\$385	\$424	\$463	\$15,600
\$1,400	\$246	\$358	\$414	\$456	\$498	\$16,800
\$1,500	\$263	\$383	\$443	\$488	\$533	\$18,000
\$1,600	\$280	\$408	\$472	\$520	\$568	\$19,200
\$1,700	\$297	\$433	\$501	\$552	\$603	\$20,400
\$1,800	\$312	\$456	\$528	\$582	\$636	\$21,600
\$1,900	\$327	\$479	\$555	\$612	\$669	\$22,800
\$2,000	\$342	\$502	\$582	\$642	\$702	\$24,000
\$2,100	\$357	\$525	\$609	\$672	\$735	\$25,200
\$2,200	\$372	\$525	\$636	\$702	\$768	\$26,400
\$2,300	\$387	\$548	\$663	\$732	\$801	\$27,600
\$2,400	\$402	\$571	\$690	\$762	\$834	\$28,800
\$2,500	\$417	\$594	\$717	\$792	\$867	\$30,000
\$2,600	\$431	\$617	\$743	\$821	\$899	\$31,200
\$2,700	\$445	\$639	\$769	\$850	\$931	\$32,400
\$2,800	\$459	\$661	\$795	\$879	\$963	\$33,600
\$2,900	\$473	\$683	\$821	\$908	\$996	\$34,800
\$3,000	\$487	\$727	\$847	\$937	\$1,027	\$36,000
\$3,100	\$501	\$749	\$873	\$966	\$1,059	\$37,200
\$3,200	\$515	\$771	\$899	\$995	\$1,091	\$38,400
\$3,300	\$529	\$793	\$925	\$1,024	\$1,123	\$39,600
\$3,400	\$542	\$813	\$949	\$1,051	\$1,153	\$40,800
\$3,500	\$555	\$833	\$973	\$1,078	\$1,183	\$42,000
\$3,600	\$568	\$853	\$997	\$1,105	\$1,213	\$43,200
\$3,700	\$581	\$873	\$1,021	\$1,132	\$1,243	\$44,400
\$3,800	\$594	\$893	\$1,045	\$1,159	\$1,273	\$45,600
\$3,900	\$607	\$913	\$1,069	\$1,186	\$1,303	\$46,800
\$4,000	\$620	\$933	\$1,093	\$1,213	\$1,333	\$48,000
\$4,100	\$633	\$953	\$1,117	\$1,240	\$1,363	\$49,200

Combined Gross Monthly Income	One	Two	Three	Four	Five	Annual Income
\$4,200	\$646	\$972	\$1,140	\$1,266	\$1,391	\$50,400
\$4,300	\$658	\$989	\$1,160	\$1,288	\$1,415	\$51,600
\$4,400	\$670	\$1,006	\$1,180	\$1,310	\$1,439	\$52,800
\$4,500	\$682	\$1,023	\$1,200	\$1,322	\$1,463	\$54,000
\$4,600	\$694	\$1,040	\$1,220	\$1,354	\$1,487	\$55,200
\$4,700	\$706	\$1,057	\$1,240	\$1,376	\$1,511	\$56,400
\$4,800	\$718	\$1,074	\$1,260	\$1,398	\$1,535	\$57,600
\$4,900	\$730	\$1,091	\$1,280	\$1,420	\$1,559	\$58,800
\$5,000	\$742	\$1,108	\$1,300	\$1,442	\$1,583	\$60,000
\$5,100	\$754	\$1,125	\$1,320	\$1,464	\$1,607	\$61,200
\$5,200	\$766	\$1,142	\$1,340	\$1,486	\$1,631	\$62,400
\$5,300	\$778	\$1,159	\$1,360	\$1,508	\$1,655	\$63,600
\$5,400	\$790	\$1,176	\$1,380	\$1,530	\$1,679	\$64,800
\$5,500	\$802	\$1,193	\$1,400	\$1,552	\$1,703	\$66,000
\$5,600	\$814	\$1,210	\$1,420	\$1,574	\$1,727	\$67,200
\$5,700	\$826	\$1,227	\$1,440	\$1,596	\$1,751	\$68,400
\$5,800	\$838	\$1,244	\$1,460	\$1,618	\$1,775	\$69,600
\$5,900	\$848	\$1,259	\$1,477	\$1,637	\$1,797	\$70,800
\$6,000	\$867	\$1,272	\$1,493	\$1,655	\$1,817	\$72,000
\$6,100	\$866	\$1,285	\$1,509	\$1,673	\$1,837	\$73,200
\$6,200	\$875	\$1,298	\$1,525	\$1,691	\$1,857	\$74,400
\$6,300	\$884	\$1,311	\$1,541	\$1,709	\$1,877	\$75,600
\$6,400	\$893	\$1,324	\$1,557	\$1,727	\$1,897	\$76,800
\$6,500	\$902	\$1,337	\$1,573	\$1,745	\$1,917	\$78,000
\$6,600	\$911	\$1,350	\$1,589	\$1,763	\$1,937	\$79,200
\$6,700	\$920	\$1,363	\$1,605	\$1,781	\$1,957	\$80,400
\$6,800	\$929	\$1,376	\$1,621	\$1,799	\$1,977	\$81,600
\$6,900	\$938	\$1,389	\$1,637	\$1,817	\$1,997	\$82,800
\$7,000	\$947	\$1,402	\$1,653	\$1,835	\$2,017	\$84,000
\$7,100	\$956	\$1,415	\$1,669	\$1,853	\$2,037	\$85,200
\$7,200	\$965	\$1,478	\$1,685	\$1,871	\$2,057	\$86,400
\$7,300	\$974	\$1,441	\$1,701	\$1,889	\$2,077	\$87,600
\$7,400	\$983	\$1,454	\$1,717	\$1,907	\$2,097	\$88,800
\$7,500	\$992	\$1,467	\$1,733	\$1,925	\$2,117	\$90,000
\$7,600	\$998	\$1,476	\$1,745	\$1,939	\$2,133	\$91,200
\$7,700	\$1,004	\$1,485	\$1,757	\$1,953	\$2,149	\$92,400
\$7,800	\$1,010	\$1,494	\$1,769	\$1,967	\$2,165	\$93,600
\$7,900	\$1,016	\$1,503	\$1,781	\$1,981	\$2,181	\$94,800
\$8,000	\$1,022	\$1,512	\$1,793	\$1,995	\$2,197	\$96,000
\$8,100	\$1,028	\$1,521	\$1,805	\$2,009	\$2,213	\$97,200
\$8,200	\$1,034	\$1,530	\$1,817	\$2,023	\$2,229	\$98,400
\$8,300	\$1,040	\$1,539	\$1,829	\$2,037	\$2,245	\$99,600
\$8,400	\$1,046	\$1,548	\$1,841	\$2,051	\$2,261	\$100,800
\$8,500	\$1,052	\$1,557	\$1,853	\$2,065	\$2,277	\$102,000
\$8,600	\$1,058	\$1,566	\$1,865	\$2,079	\$2,293	\$103,200
\$8,700	\$1,064	\$1,575	\$1,877	\$2,093	\$2,309	\$104,400
\$8,800	\$1,070	\$1,584	\$1,889	\$2,107	\$2,325	\$105,600
\$8,900	\$1,076	\$1,593	\$1,901	\$2,121	\$2,341	\$106,800
\$9,000	\$1,082	\$1,602	\$1,913	\$2,135	\$2,357	\$108,000
\$9,100	\$1,088	\$1,611	\$1,925	\$2,149	\$2,373	\$109,200
\$9,200	\$1,093	\$1,619	\$1,937	\$2,163	\$2,388	\$110,400
\$9,300	\$1,098	\$1,627	\$1,948	\$2,176	\$2,403	\$111,600
\$9,400	\$1,103	\$1,635	\$1,959	\$2,189	\$2,418	\$112,800
\$9,500	\$1,108	\$1,643	\$1,970	\$2,202	\$2,433	\$114,000
\$9,600	\$1,113	\$1,651	\$1,981	\$2,215	\$2,448	\$115,200
\$9,700	\$1,118	\$1,659	\$1,992	\$2,228	\$2,463	\$116,400

Combined Gross Monthly Income	One	Two	Three	Four	Five	Annual Income
\$9,800	\$1,123	\$1,667	\$2,003	\$2,241	\$2,478	\$117,600
\$9,900	\$1,128	\$1,675	\$2,014	\$2,254	\$2,493	\$118,800
\$10,000	\$1,133	\$1,683	\$2,025	\$2,267	\$2,508	\$120,000
\$10,100	\$1,138	\$1,691	\$2,036	\$2,280	\$2,523	\$121,200
\$10,200	\$1,143	\$1,699	\$2,047	\$2,293	\$2,538	\$122,400
\$10,300	\$1,148	\$1,707	\$2,058	\$2,306	\$2,553	\$123,600
\$10,400	\$1,153	\$1,715	\$2,069	\$2,319	\$2,568	\$124,800
\$10,500	\$1,158	\$1,723	\$2,080	\$2,332	\$2,583	\$126,000
\$10,600	\$1,163	\$1,731	\$2,091	\$2,345	\$2,598	\$127,200
\$10,700	\$1,168	\$1,739	\$2,102	\$2,358	\$2,613	\$128,400
\$10,800	\$1,173	\$1,747	\$2,113	\$2,371	\$2,628	\$129,600
\$10,900	\$1,178	\$1,755	\$2,124	\$2,384	\$2,643	\$130,800
\$11,000	\$1,183	\$1,763	\$2,135	\$2,397	\$2,658	\$132,000
\$11,100	\$1,188	\$1,771	\$2,146	\$2,410	\$2,673	\$133,200
\$11,200	\$1,193	\$1,779	\$2,157	\$2,423	\$2,688	\$134,400
\$11,300	\$1,198	\$1,787	\$2,168	\$2,436	\$2,703	\$135,600
\$11,400	\$1,203	\$1,795	\$2,179	\$2,449	\$2,718	\$136,800
\$11,500	\$1,208	\$1,803	\$2,190	\$2,462	\$2,733	\$138,000
\$11,600	\$1,213	\$1,811	\$2,201	\$2,475	\$2,748	\$139,200
\$11,700	\$1,218	\$1,819	\$2,212	\$2,488	\$2,763	\$140,400
\$11,800	\$1,223	\$1,827	\$2,223	\$2,501	\$2,778	\$141,600
\$11,900	\$1,228	\$1,835	\$2,234	\$2,514	\$2,793	\$142,800
\$12,000	\$1,243	\$1,843	\$2,245	\$2,527	\$2,808	\$144,000
\$12,100	\$1,238	\$1,851	\$2,256	\$2,540	\$2,823	\$145,200
\$12,200	\$1,243	\$1,859	\$2,267	\$2,553	\$2,838	\$146,400
\$12,300	\$1,248	\$1,867	\$2,278	\$2,566	\$2,853	\$147,600
\$12,400	\$1,253	\$1,875	\$2,289	\$2,579	\$2,868	\$148,800
\$12,500	\$1,258	\$1,883	\$2,300	\$2,592	\$2,883	\$150,000
\$12,600	\$1,263	\$1,891	\$2,311	\$2,605	\$2,898	\$151,200
\$12,700	\$1,268	\$1,899	\$2,322	\$2,618	\$2,913	\$152,400
\$12,800	\$1,273	\$1,907	\$2,333	\$2,631	\$2,928	\$153,600
\$12,900	\$1,278	\$1,915	\$2,344	\$2,644	\$2,943	\$154,800
\$13,000	\$1,283	\$1,923	\$2,355	\$2,657	\$2,958	\$156,000
\$13,100	\$1,288	\$1,931	\$2,366	\$2,670	\$2,973	\$157,200
\$13,200	\$1,293	\$1,939	\$2,377	\$2,683	\$2,988	\$158,400
\$13,300	\$1,298	\$1,947	\$2,388	\$2,696	\$3,003	\$159,600
\$13,400	\$1,303	\$1,955	\$2,399	\$2,709	\$3,018	\$160,800
\$13,500	\$1,308	\$1,963	\$2,410	\$2,722	\$3,033	\$162,000
\$13,600	\$1,313	\$1,971	\$2,421	\$2,735	\$3,048	\$163,200
\$13,700	\$1,318	\$1,979	\$2,432	\$2,748	\$3,063	\$164,400
\$13,800	\$1,323	\$1,987	\$2,443	\$2,761	\$3,078	\$165,600
\$13,900	\$1,328	\$1,995	\$2,454	\$2,774	\$3,093	\$166,800
\$14,000	\$1,333	\$2,003	\$2,465	\$2,787	\$3,108	\$168,000
\$14,100	\$1,338	\$2,011	\$2,476	\$2,800	\$3,123	\$169,200
\$14,200	\$1,343	\$2,019	\$2,487	\$2,813	\$3,138	\$170,400
\$14,300	\$1,348	\$2,027	\$2,498	\$2,826	\$3,153	\$171,600
\$14,400	\$1,353	\$2,035	\$2,509	\$2,839	\$3,168	\$172,800
\$14,500	\$1,358	\$2,043	\$2,520	\$2,852	\$3,183	\$174,000
\$14,600	\$1,363	\$2,051	\$2,531	\$2,865	\$3,198	\$175,200
\$14,700	\$1,368	\$2,059	\$2,542	\$2,878	\$3,213	\$176,400
\$14,800	\$1,373	\$2,067	\$2,553	\$2,891	\$3,228	\$177,600
\$14,900	\$1,378	\$2,075	\$2,564	\$2,904	\$3,243	\$178,800
\$15,000	\$1,383	\$2,083	\$2,575	\$2,917	\$3,258	\$180,000
\$15,100	\$1,388	\$2,091	\$2,586	\$2,930	\$3,273	\$181,200
\$15,200	\$1,393	\$2,099	\$2,597	\$2,943	\$3,288	\$182,400
\$15,300	\$1,398	\$2,107	\$2,608	\$2,956	\$3,303	\$183,600

Combined Gross Monthly Income	One	Two	Three	Four	Five	Annual Income
\$15,400	\$1,403	\$2,115	\$2,619	\$2,969	\$3,318	\$184,800
\$15,500	\$1,408	\$2,123	\$2,630	\$2,982	\$3,333	\$186,000
\$15,600	\$1,413	\$2,131	\$2,641	\$2,995	\$3,348	\$187,200
\$15,700	\$1,418	\$2,139	\$2,652	\$3,008	\$3,363	\$188,400
\$15,800	\$1,423	\$2,147	\$2,663	\$3,021	\$3,378	\$189,600
\$15,900	\$1,428	\$2,155	\$2,674	\$3,034	\$3,393	\$190,800
\$16,000	\$1,433	\$2,163	\$2,685	\$3,047	\$3,408	\$192,000
\$16,100	\$1,438	\$2,171	\$2,696	\$3,060	\$3,423	\$193,200
\$16,200	\$1,443	\$2,179	\$2,707	\$3,073	\$3,438	\$194,400
\$16,300	\$1,448	\$2,187	\$2,718	\$3,086	\$3,453	\$195,600
\$16,400	\$1,453	\$2,195	\$2,729	\$3,099	\$3,468	\$196,800
\$16,500	\$1,458	\$2,203	\$2,740	\$3,112	\$3,483	\$198,000
\$16,600	\$1,463	\$2,211	\$2,751	\$3,125	\$3,498	\$199,200
\$16,700	\$1,468	\$2,219	\$2,762	\$3,138	\$3,513	\$200,400
\$16,800	\$1,473	\$2,227	\$2,773	\$3,151	\$3,528	\$201,600
\$16,900	\$1,478	\$2,235	\$2,784	\$3,164	\$3,543	\$202,800
\$17,000	\$1,483	\$2,243	\$2,795	\$3,177	\$3,558	\$204,000
\$17,100	\$1,488	\$2,251	\$2,806	\$3,190	\$3,573	\$205,200
\$17,200	\$1,493	\$2,259	\$2,817	\$3,203	\$3,588	\$206,400
\$17,300	\$1,498	\$2,267	\$2,828	\$3,216	\$3,603	\$207,600
\$17,400	\$1,503	\$2,275	\$2,839	\$3,229	\$3,618	\$208,800
\$17,500	\$1,508	\$2,283	\$2,850	\$3,242	\$3,633	\$210,000
\$17,600	\$1,513	\$2,291	\$2,861	\$3,255	\$3,648	\$211,200
\$17,700	\$1,518	\$2,299	\$2,872	\$3,268	\$3,663	\$212,400
\$17,800	\$1,523	\$2,307	\$2,883	\$3,281	\$3,678	\$213,600
\$17,900	\$1,528	\$2,315	\$2,894	\$3,294	\$3,693	\$214,800
\$18,000	\$1,533	\$2,323	\$2,905	\$3,307	\$3,708	\$216,000
\$18,100	\$1,538	\$2,331	\$2,916	\$3,320	\$3,723	\$217,200
\$18,200	\$1,543	\$2,339	\$2,927	\$3,333	\$3,738	\$218,400
\$18,300	\$1,548	\$2,347	\$2,938	\$3,346	\$3,753	\$219,600
\$18,400	\$1,552	\$2,355	\$2,949	\$3,359	\$3,768	\$220,800
\$18,500	\$1,558	\$2,363	\$2,960	\$3,372	\$3,783	\$222,000
\$18,600	\$1,563	\$2,371	\$2,971	\$3,385	\$3,798	\$223,200
\$18,700	\$1,568	\$2,379	\$2,982	\$3,398	\$3,813	\$224,400
\$18,800	\$1,573	\$2,387	\$2,993	\$3,411	\$3,828	\$225,600
\$18,900	\$1,578	\$2,395	\$3,004	\$3,424	\$3,843	\$226,800
\$19,000	\$1,583	\$2,403	\$3,015	\$3,437	\$3,858	\$228,000
\$19,100	\$1,588	\$2,411	\$3,026	\$3,450	\$3,873	\$229,200
\$19,200	\$1,593	\$2,419	\$3,037	\$3,463	\$3,888	\$230,400
\$19,300	\$1,598	\$2,427	\$3,048	\$3,476	\$3,903	\$231,600
\$19,400	\$1,603	\$2,435	\$3,059	\$3,489	\$3,918	\$232,800
\$19,500	\$1,608	\$2,443	\$3,070	\$3,502	\$3,933	\$234,000
\$19,600	\$1,613	\$2,451	\$3,081	\$3,515	\$3,948	\$235,200
\$19,700	\$1,618	\$2,459	\$3,092	\$3,528	\$3,963	\$236,400
\$19,800	\$1,623	\$2,467	\$3,103	\$3,541	\$3,978	\$237,600
\$19,900	\$1,628	\$2,475	\$3,114	\$3,554	\$3,993	\$238,800
\$20,000	\$1,633	\$2,483	\$3,125	\$3,567	\$4,008	\$240,000
\$20,100	\$1,638	\$2,491	\$3,136	\$3,580	\$4,023	\$241,200
\$20,200	\$1,643	\$2,499	\$3,147	\$3,593	\$4,038	\$242,400
\$20,300	\$1,648	\$2,507	\$3,158	\$3,606	\$4,053	\$243,600
\$20,400	\$1,653	\$2,515	\$3,169	\$3,619	\$4,068	\$244,800
\$20,500	\$1,658	\$2,523	\$3,160	\$3,632	\$4,083	\$246,000
\$20,600	\$1,663	\$2,531	\$3,191	\$3,645	\$4,098	\$247,200
\$20,700	\$1,668	\$2,539	\$3,202	\$3,658	\$4,113	\$248,400
\$20,800	\$1,673	\$2,547	\$3,213	\$3,671	\$4,128	\$249,600
\$20,900	\$1,678	\$2,555	\$3,224	\$3,684	\$4,143	\$250,800

Combined Gross Monthly Income	One	Two	Three	Four	Five	Annual Income
\$21,000	\$1,683	\$2,563	\$3,235	\$3,697	\$4,158	\$252,000
\$21,100	\$1,688	\$2,571	\$3,246	\$3,710	\$4,173	\$253,200
\$21,200	\$1,693	\$2,579	\$3,257	\$3,723	\$4,188	\$254,400
\$21,300	\$1,698	\$2,587	\$3,268	\$3,736	\$4,203	\$255,600
\$21,400	\$1,703	\$2,595	\$3,279	\$3,749	\$4,218	\$256,800
\$21,500	\$1,708	\$2,603	\$3,290	\$3,762	\$4,233	\$258,000
\$21,600	\$1,713	\$2,611	\$3,301	\$3,775	\$4,248	\$259,200
\$21,700	\$1,718	\$2,619	\$3,312	\$3,788	\$4,263	\$260,400
\$21,800	\$1,723	\$2,627	\$3,323	\$3,801	\$4,278	\$261,600
\$21,900	\$1,728	\$2,635	\$3,334	\$3,814	\$4,293	\$262,800
\$22,000	\$1,733	\$2,643	\$3,345	\$3,827	\$4,308	\$264,000
\$22,100	\$1,738	\$2,651	\$3,356	\$3,840	\$4,323	\$265,200
\$22,200	\$1,743	\$2,659	\$3,367	\$3,853	\$4,338	\$266,400
\$22,300	\$1,748	\$2,667	\$3,378	\$3,866	\$4,353	\$267,600
\$22,400	\$1,753	\$2,675	\$3,389	\$3,879	\$4,368	\$268,800
\$22,500	\$1,758	\$2,683	\$3,400	\$3,892	\$4,383	\$270,000
\$22,600	\$1,763	\$2,691	\$3,411	\$3,905	\$4,398	\$271,200
\$22,700	\$1,768	\$2,699	\$3,422	\$3,918	\$4,413	\$272,400
\$22,800	\$1,773	\$2,707	\$3,433	\$3,931	\$4,428	\$273,600
\$22,900	\$1,778	\$2,715	\$3,444	\$3,944	\$4,443	\$274,800
\$23,000	\$1,783	\$2,723	\$3,455	\$3,957	\$4,458	\$276,000
\$23,100	\$1,788	\$2,731	\$3,466	\$3,970	\$4,473	\$277,200
\$23,200	\$1,793	\$2,739	\$3,477	\$3,983	\$4,488	\$278,400
\$23,300	\$1,798	\$2,747	\$3,488	\$3,996	\$4,503	\$279,600
\$23,400	\$1,803	\$2,755	\$3,499	\$4,009	\$4,518	\$280,800
\$23,500	\$1,808	\$2,763	\$3,510	\$4,022	\$4,533	\$282,000
\$23,600	\$1,813	\$2,771	\$3,521	\$4,035	\$4,548	\$283,200
\$23,700	\$1,818	\$2,779	\$3,532	\$4,048	\$4,563	\$284,400
\$23,800	\$1,823	\$2,787	\$3,543	\$4,061	\$4,578	\$285,600
\$23,900	\$1,828	\$2,795	\$3,554	\$4,074	\$4,593	\$286,800
\$24,000	\$1,833	\$2,803	\$3,565	\$4,087	\$4,608	\$288,000
\$24,100	\$1,838	\$2,811	\$3,576	\$4,100	\$4,623	\$289,200
\$24,200	\$1,843	\$2,819	\$3,587	\$4,113	\$4,638	\$290,400
\$24,300	\$1,848	\$2,827	\$3,598	\$4,126	\$4,653	\$291,600
\$24,400	\$1,853	\$2,835	\$3,609	\$4,139	\$4,668	\$292,800
\$24,500	\$1,858	\$2,843	\$3,620	\$4,152	\$4,683	\$294,000
\$24,600	\$1,863	\$2,851	\$3,631	\$4,165	\$4,698	\$295,200
\$24,700	\$1,868	\$2,859	\$3,642	\$4,178	\$4,713	\$296,400
\$24,800	\$1,873	\$2,867	\$3,653	\$4,191	\$4,728	\$297,600
\$24,900	\$1,878	\$2,875	\$3,664	\$4,204	\$4,743	\$298,800
\$25,000	\$1,883	\$2,883	\$3,675	\$4,217	\$4,758	\$300,000

(b) The guidelines income and the children's schedules in these Child Support Guidelines are not limitations on child support for more than five children.

(c) **Proration of Child Support.** Where both parents have Guidelines Income (either actual or potential) the amount of child support awarded shall be prorated between the parents in proportion to their Guidelines Incomes.

Example. *If a couple has two children and the non-custodial parent earns \$25,000 a year and the custodial parent \$10,000 a year, the child support would be based upon their combined \$35,000 of Guideline income at the rates set out above. The first \$10,000 would accrue child support at the two-child 26% rate (\$217 per month), the second \$10,000 would accrue child support at the two-child 25% rate (\$208 per month), the next \$10,000 at the two-third 23% rate (\$192 per month), and \$5,000 at the two-child 22% rate (\$92 per month), for a total child support obligation of \$709 per month. That total amount of child support would be divided between the parents in proportion of their Guideline incomes, 10,000/35,000 and 25,000/35,000. Based on these figures, the non-custodial parent would pay 71%, \$506 per month to the custodial parent.*

(d) **Income over \$300,000.** The Guideline Income schedules are not a limitation on the award of child support for combined Guidelines Income above \$300,000 per year. The support based on the first \$300,000 shall be calculated by these Guidelines in proportion to the relative incomes of the parents. In determining any additional support for Guidelines Income above \$300,000, the court shall consider all relevant factors, which may include:

- (1) The financial resources of the child.
- (2) The financial resources, needs, and obligations of both parents, consistent with Section 6(a)(3).
- (3) The standard of living the child enjoyed during the marriage.
- (4) The physical and emotional condition and needs of the child, including educational needs.
- (5) Any special impairment, limitation or disability of the child and any need for special education.
- (6) Any special ability or talent of the child and the cost of educating or training that ability or talent.
- (7) Any special living conditions that create additional costs for the child.

(e) **"Shared Physical Custody."**

(1) **Determining shared custody.** It is recognized there is an overall increase in child rearing costs created by shared custody. If the child spends more than 25% of the overnights in a year with each parent, an adjustment in the Guidelines amount shall be made.

(2) **Computation.** To compute the adjustment, the Basic Child Support Guideline obligation shall be multiplied by 1.5. The amount is then multiplied by each parent's percentage of income. The resulting amounts are then multiplied by the percentage of time the child spends with the

other parent. The respective child support obligations are then offset, with the parent owing more child support paying the difference between the two amounts. In no event shall a parent be required to pay more support than the parent would have paid had there not been split or shared custody and all children were residing with the other parent. Whenever the guidelines calculation results in a parent having over 50% of the overnights paying child support, that parent may show that such payment is inappropriate considering factors (1) through (7) of Section 10(d) of the Guidelines.

(f) **Extended Visits.** In cases where a parent has 25% or less of the overnights, the Court may reduce the amount of support if a parent has the child for fourteen consecutive days or more. Interim visitation of two days or less with the other parent will not defeat abatement of child support during extended visits. A reasonable reduction would be 50% for the duration of the actual physical custody.

(g) **Split Physical Custody.**

(1) **Adjustment of support.** When each parent has physical custody of at least one child, an adjustment shall be made. Under the Guidelines, the Basic Child Support Obligation is multiplied by 1.5 for an equal number of children in the custody of each parent. Support is calculated without a multiplier for the other child(ren) in the home. The support amount is then determined for each parent for the child(ren) in the custody of the other. The obligations are then offset, with the parent owing the larger amount paying the difference between the two amounts.

(2) **Computation of support.** In determining child support amounts under a split custody arrangement, the support obligations shown in the schedule must be pro-rated among all children in the household, using the multiplier where applicable. For example, if there are three children due support, of which two are with one parent and one is with the other, the Basic Monthly Child Support is divided by three, and that amount is assigned to one of the children in the two-child home. That same amount is multiplied by 1.5 and assigned to one child in each home. Support is then calculated for each parent and the amounts offset. In no event shall a parent be required to pay more support than the parent would have paid had there not been split custody and all children were residing with the other parent.³

Example 1: There are two children living with each parent; Parent One has income of \$3,000 per month, while Parent Two's monthly income is \$1,000. Basic Child Support from the schedule for the four is \$1,173. For each of the two children living with Parent Two we assign one-fourth of that amount, or \$293. For each of them that amount is multiplied by 1.5, which is \$440. The support for each of the children living with Parent One is computed in the same fashion. Parent One is obligated for 75% of the

³ A mathematical disparity may occur when there are five or more children and a substantial difference in incomes. In that case, if one child lives with the higher-income parent the support obligation may be more than if all children lived with the lower-income parent.

support of the children living with Parent Two, because Parent One earns 75% of the total income. That would be $.75 \times 440 \times 2 = \660 . Parent Two is obligated for 25% of the support of the children living with Parent One. That would be $.25 \times 440 \times 2 = \220 . Offsetting the amounts, Parent One would pay Parent Two approximately \$440 per month.

Example 2: There are three children living with Parent Two, and one with Parent One. Incomes: Parent One — \$3,000/month — Parent Two — \$1,000/month. Going to the Basic Child Support Guidelines Schedule, the Basic Child Support for the four is \$1,173 monthly. Dividing by four results in \$293 for each child. For one child in each home that amount is to be multiplied by 1.5, setting the support for each of them at \$440. The other two children in the home of Parent Two are to be supported at the base level. Therefore, the total support amount for the three children living with Parent Two is $440 + (2 \times 293) = \$1,026$. Parent One earns 75 percent of the total income and therefore is obligated for 75 percent of the total support for those children. That would be $.75 \times 1,026 = \$769.50$. Parent Two must provide 25 percent of the total support for the child living with Parent One, or $.25 \times 440 = \$110$. Offsetting the amounts, Parent One should pay Parent Two about \$660 per month.

Section 11. Disability and Retirement Benefits Paid to Child [Repealed.]

Section 12. Expression of Child Support. The court’s order shall state the total monetary support for all children and the total monetary support due the remaining children as each child is no longer entitled to support.

Example: *If there are three children initially, and later one child emancipates, the amount of support will not be reduced by one-third, but will reflect the appropriate amount from the schedule for two children, and later one child.*

[COURT HEADING]

	)	Case No.
)	
Plaintiff,	)	AFFIDAVIT
	)	VERIFYING
	)	INCOME
v.)	
)	
Defendant(s).)	

I hereby state under oath that the following information is true:

A.	GROSS INCOME	FATHER	MOTHER
1.	Wages, salary, commissions, bonuses, etc.	_____	_____
2.	Rent, royalties, trade, or business income, etc.	_____	_____

	(Net of ordinary & necessary expenses)		
	3. Interest, dividends, pensions, annuities, etc.	_____	_____
	4. Social security, worker's compensation, unemployment benefits, disability, veterans' benefits, etc.	_____	_____
	5. Public assistance, welfare for self (not children)	_____	_____
	6. Alimony	_____	_____
	7. Grants, distributions from trusts, etc.	_____	_____
	8. Other	_____	_____
	9. SUBTOTAL	_____	_____
B.	DEDUCTIONS FROM GROSS INCOME (I.C.S.G. Sections 6 and 7)		
	1. Straight line depreciation on assets	_____	_____
	2. One-half of self-employment Social Security taxes	_____	_____
	3. Child support & alimony from another relationship	_____	_____
	4. Support for child of another relationship living in the home	_____	_____
	5. DEDUCTIONS SUBTOTAL	_____	_____
C.	GROSS INCOME, AS ADJUSTED (line B5 subtracted from line A9)	_____	_____
D.	IN-KIND BENEFITS (I.C.S.G. Section 6(b))	_____	_____
	(Housing, food, transportation, recreation)		
E.	POTENTIAL INCOME (I.C.S.G. Section 6(c))	_____	_____
	Potential earned income,		
	Potential unearned income		
F.	GUIDELINES INCOME (C + D + E)	_____	_____
G.	MONTHLY ICSG INCOME (F ÷ 12 months)	_____	_____

Signature of Party Submitting

Subscribed and sworn to before me on _____, ____.

Notary

APPENDIX "B"

IN THE DISTRICT COURT OF THE JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF

Plaintiff,)
vs.) CASE NO: _____
Defendant.)
STANDARD CUSTODY
CHILD SUPPORT WORKSHEET

Children	Date of Birth	Children	Date of Birth
		Plaintiff	Defendant
1. MONTHLY I.C.G.S. INCOME (from Affidavit)		\$	\$
2. PERCENTAGE SHARE OF INCOME (Each parent's income on line 1 divided by Combined Income)		%	%
3. BASIC CHILD SUPPORT OBLIGATION (Apply line 1 Combined to Child Support Schedule.)			\$
4. EACH PARENT'S CHILD SUPPORT OBLIGATION (Multiply line 2 times line 3 for each parent)		\$	\$
5. RECOMMENDED CHILD SUPPORT ORDER (Bring down the amount from Line 4 for the non-custodial parent)			

OTHER COSTS TO BE CONSIDERED BY THE COURT:

a. Work-Related Child Care Cost +

b. Health insurance premiums and uninsured health care expenses +

c. Tax benefit for dependency exemptions +

Comments, calculations, or rebuttals.

PREPARED BY: _____ DATE: _____

APPENDIX C
SHARED, SPLIT, OR MIXED CUSTODY WORKSHEET

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____

Plaintiff
Vs.
Defendant

Case No.

CHILDREN	BIRTH DATE	CHILDREN	BIRTH DATE	CHILDREN	BIRTH DATE					
1.		2.		3.						
4.		5.								
MOTHER FATHER COMBINED										
1. MONTHLY I.C.S.G. INCOME (from Affidavit)			\$	\$	\$					
2. SHARE OF INCOME FOR EACH PARENT (line 1 for each parent divided by Combined Income)										
3. BASIC COMBINED CHILD SUPPORT OBLIGATION (apply line 1 Combined to Child Support Schedule)					\$					
4. EACH PARENT'S CHILD SUPPORT OBLIGATION (line 2 multiplied by line 3 for each parent)			\$	\$						
5. OBLIGATION ALLOCATION (line 4 divided by the number of children)			\$	\$						
6. ALLOCATION TO CHILD For each standard-custody child enter the amount From line 5 For each shared or split-custody child Multiply line 5 by 1.5 and enter in the appropriate box	CHILD 1 Mom Dad		CHILD 2 Mom Dad		CHILD 3 Mom Dad		CHILD 4 Mom Dad		CHILD 5 Mom Dad	
	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
7. PROPORTIONAL OBLIGATION Number of overnights with other parent divided by 365. If ≥ .75, enter 1. If ≤ .25, enter 0. ¹										
8. PARENTS' OBLIGATION Line 6 times line 7 for each child	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
9. EACH PARENT'S TOTAL SUPPORT (total from all boxes)					MOTHER \$			FATHER \$		
10. RECOMMENDED SUPPORT (subtract the lesser amount from the greater in 9 and enter the difference under parent with greater obligation)					\$			\$		

¹ For example, if child 1 lives with Mom 40 % of the time, “.40” goes under “Dad” for child 1 “≥” means “greater than or equal to.”
“≤” means “less than or equal to”

(Adopted February 10, 1993, effective July 1, 1993; amended March 30, 1994, effective July 1, 1994; amended April 19, 1995, effective July 1, 1995; amended February 26, 1997, effective July 1, 1997; amended March 18, 1998, effective July 1, 1998; amended March 9, 1999, effective July 1, 1999; amended March 1, 2000, effective July 1, 2000; amended March 29, 2001, effective July 1, 2001; amended April 19, 2002, effective July 1, 2002; amended April 18, 2003, effective July 1, 2003; amended April 8, 2004, effective July 1, 2004; amended March 24, 2005, effective July 1, 2005; amended April 11, 2006, effective July 1, 2006; amended March 21, 2007, effective July 1, 2007; amended April 4, 2008, effective July 1, 2008; amended April 13, 2010, effective July 1, 2010; amended May 20, 2010, effective July 1, 2010; amended and effective January 3, 2011; amended May 4, 2011, effective July 1, 2011; amended May 13, 2011, effective July 1, 2011; amended June 3, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012.)

STATUTORY NOTES

Compiler's Notes. This Section was formerly compiled as Section 11 and was renu-

bered as Section 12 by Supreme Court Order of March 30, 1994, effective July 1, 1994.

JUDICIAL DECISIONS

ANALYSIS

Additional Support.
Affidavits Not Properly Filed.
Attorney's Average Income.
Child Support Received.
Consideration of New Marital Community Income.
Defenses.
Discretion of Court.
Imputed Income.
Income.
Income from Second Job.
Increase in Income.
Voluntary Underemployment.

Additional Support.

Magistrate erred in applying a cap rather than an evidence-driven standard in determining whether any additional support above the combined guidelines income figure of \$70,000.00 was appropriate in action involving modification of child support; although magistrate increased father's child support under Idaho Child Support Guidelines (guidelines) he inappropriately shifted the burden of proof to mother regarding factors set forth under guidelines instead of analyzing the income of the parties and requirements of the children. *Jensen v. Jensen*, 128 Idaho 600, 917 P.2d 757 (1996).

Affidavits Not Properly Filed.

Trial court did not err in denying a home

health care consultant's motion to reconsider and in striking certain affidavits because the affidavits were not filed with the motion pursuant to Idaho R. Civ. P. 6(d) as required, and thus there was no basis for asking the trial court to reconsider its earlier decision. *Jensen v. State*, 139 Idaho 57, 72 P.3d 897 (2003).

Attorney's Average Income.

Magistrate did not err in using evidence of the average income of attorneys to calculate the child support obligation of defendant, a practicing Idaho attorney with over 20 years experience, found to be father of child in paternity action; magistrate did not have a monthly income figure for defendant or evidence of underemployment. *Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6 (1996).

Child Support Received.

Idaho R. Civ. P. 6(c)(6), Guideline 6(a)(1)(i), provides that child support received is assumed to be spent on the child and is not income of the receiving parent. *Browning v. Browning*, 136 Idaho 691, 39 P.3d 631 (2001).

Language under Idaho R. Civ. P. 6(c)(6), adopting the Idaho Child Support Guidelines, mandated, under § 8(c), that the court allocate a pro rata share of the tax exemption benefit to the parent not receiving the benefit or that it credit the parent's child support obligation; as such, the magistrate did not err in correcting the error with regard to the

father's support obligations pursuant to Idaho R. Civ. P. 60(a). *Silsby v. Kepner*, 140 Idaho 412, 95 P.3d 30 (Ct. App. 2003).

Consideration of New Marital Community Income.

While considering a father's petition for modification of child support, a district court and a magistrate were not required to consider a mother's interest in her new husband's income in computing her share of a child support obligation as no compelling reason for such consideration existed. The disparity between the father's income and that of the mother's new marital community was insufficient, in itself, to constitute a compelling circumstance. *Harris v. Carter*, 146 Idaho 22, 189 P.3d 484 (2008).

Defenses.

Putative father failed to establish prejudice, one of four elements of his defense of laches, in his attempt to defeat state's claim for reimbursement of state's support payments on behalf of his minor daughter, on several grounds; Idaho Child Support Guidelines (ICSG) and § 56-203(b) and this rule take into account factors such as adjustment of payment rate according to income, adjustment for amounts necessary to support current household and other child support obligations and defendant's need of the means of self-support at a minimum subsistence level. *State, Dep't of Health & Welfare ex rel. Washington ex rel. Nicklaus v. Annen*, 126 Idaho 691, 889 P.2d 720 (1995).

Discretion of Court.

In determining an appropriate child support award, trial courts are vested with broad discretion in addressing any combined income over \$150,000. *Kornfield v. Kornfield*, 134 Idaho 383, 3 P.3d 61 (Ct. App. 2000).

Imputed Income.

Assuming the ability to be employed, a parent-student must have some income attributed to him or her, and must be responsible for some allocation of support under the provisions of Guideline 6(c)(i)(b) in subdivision 6(c)(6); full-time employment does not have to be attributed to a student; the factors in the child support guidelines must be considered. A decision as to the amount of income attributed to the full-time student must be determined by the exercise of discretion in the application of the guidelines, and in calculating potential income where a parent is a student, potential monthly income during the school term may be determined by considering student loans from any source. *Browning v. Browning*, 136 Idaho 691, 39 P.3d 631 (2001).

Income.

Business profit that in general parlance would be referred to as "net income" is referred to in the child support guidelines as "gross income." *Olson v. Montoya*, 147 Idaho 833, 215 P.3d 553 (2009).

When calculating the amount of husband's income for purposes of an award of child support to wife, and husband was the sole owner of three business entities, there is no need to consider payments between the companies because a payment constituting a deductible business expense of the payor company also constitutes an includable receipt to the payee company. *Olson v. Montoya*, 147 Idaho 833, 215 P.3d 553 (2009).

Under Idaho R. Civ. P. 6(c)(6) § 6, income from pensions, not the corpus of the retirement account, is to be included in gross income for the purpose of calculating child support; income from a pension is the payments a retiree is receiving from the pension. *Shelton v. Shelton*, 148 Idaho 560, 225 P.3d 693 (2009).

Computation of a father's income under Idaho R. Civ. P. 6(c)(6) was not raised before the magistrate and thus not preserved for review; moreover, the magistrate specifically found that his testimony lacked credibility. *Drinkall v. Drinkall*, 150 Idaho 606, 249 P.3d 405 (2011).

Income from Second Job.

Substantial and material change of circumstances had occurred since the original decree was entered, which justified increasing plaintiff's child support obligation under § 32-709; plaintiff had realized a significant increase in his income due to a salary increase in his primary job and the additional salary from a part-time job. *Noble v. Fisher*, 126 Idaho 885, 894 P.2d 118 (1995).

Increase in Income.

The Supreme Court, in adopting the Idaho Child Support Guidelines, subsection (c)(6) of this section, under the authority of former § 32-706A (now repealed), had the opportunity to establish a rule defining a point at which an increase in income would be substantial per se. Neither the Supreme Court nor the Idaho legislature has elected to adopt such a standard. *Rohr v. Rohr*, 126 Idaho 1, 878 P.2d 175 (Ct. App. 1994).

Voluntary Underemployment.

The order granting the mother's petition to modify child support was proper because the mother's addiction to prescription drugs did not render her underemployment "voluntary" for the purposes of I.R.C.P. § 6(c)(6), so her attributable income for child support calculation purposes was temporarily lower; there

was substantial and competent evidence to support the magistrate's finding that the existing custody arrangement between the parties did not amount to shared physical custody, so the father was not entitled to an

adjustment of child support under Section 10(e) of the guidelines. *Pace v. Pace*, 135 Idaho 749, 24 P.3d 66 (Ct. App. 2001).

Cited in: *Busse v. Busse*, 141 Idaho 566, 113 P.3d 224 (2005).

Rule 6(c)(7). Blood or other genetic tests in paternity actions.

If a blood or other genetic test is used to prove paternity, the blood or other genetic test report shall be served upon the defendant party with the complaint or as soon as it is obtained. The blood or other genetic test report must be served upon the defendant party at least twenty-eight (28) days before the date set for trial together with a notice that the blood or other genetic test will be admitted under this rule if no objection is filed at least twenty-one (21) days in advance of trial. The verified expert's blood or other genetic test report shall be admitted at trial unless a challenge to the testing procedures or the blood or other genetic analysis has been made by a party at least twenty-one (21) days before the date set for trial. (Adopted June 7, 1993, effective July 1, 1993; amended April 3, 1996, effective July 1, 1996.)

JUDICIAL DECISIONS

Timeliness of Results.

Where the evidence was that the defendant received the results of genetic testing at least six months before trial, his claim that he did not receive the results within the statutorily

required twenty-eight day period prior to trial failed. *State Dep't of Health & Welfare ex rel. Oregon v. Conley*, 132 Idaho 266, 971 P.2d 332 (Ct. App. 1999).

Rule 6(d). For motions — Affidavits. [Repealed.]

STATUTORY NOTES

Compiler's Notes. Former Rule 6(d) was repealed by a court order dated April 22, 2004, effective July 1, 2004. For present comparable provisions, see Rule 7(b)(3).

Rule 6(e)(1). Additional time after service by mail.

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

STATUTORY NOTES

Cross References. Enlargement of time, Rule 6(b). Motions and affidavits, Rule 7(b)(3).

JUDICIAL DECISIONS

ANALYSIS

Jurisdiction.
Motion for Summary Judgment.
Prejudice Not Found.

Timely Motion.
Untimely Motion.

Jurisdiction.
The court had jurisdiction to decide the

motion for summary judgment even though the motion and notice of hearing did not allow the minimum time set by the rules for the responsive affidavits. *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (Ct. App. 1986).

Motion for Summary Judgment.

When a motion for summary judgment and supporting documentation are served by mail, they must be mailed at least 31 days in advance of the hearing. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Although plaintiff mailed its summary judgment motion about six weeks in advance of the hearing, it did not mail its supporting affidavit and brief until 28 days before the hearing. Therefore, plaintiff did not allow the minimum time for responsive affidavits and briefing mandated by Rule 56(c). *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Prejudice Not Found.

Where the record clearly demonstrated that defendants in a foreclosure action suffered no prejudice by not having additional time to respond to plaintiff's application for a writ of assistance, where at the hearing the court had before it the defendants' "Items for Judicial Notice and Demand for Jury Trial," where defendants had the opportunity to brief and argue their opposition to the application and where they refused to appear at the hearing, defendants did not establish the loss of any substantial right with regard to the time frame involved. *Federal Land Bank v. Parsons*, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

Timely Motion.

The defendants' motion for automatic disqualification of the judge pursuant to I.C.R. 25(a) was timely where it was filed on the

eighth day following the mailing of notice of the trial setting, since according to this rule, the defendants had three extra days because the notice was served by mail. *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

In an appeal of a County Planning and Zoning Commission's grant of a conditional use permit and zoning certificate for a veterinary clinic, the county's objection to the prevailing parties' motion for costs and attorney fees was timely pursuant to I.R.C.P. 54(d) and 54(e) which, at that time, required that a motion to disallow costs and attorney fees be filed within ten days of service of the memorandum of costs and fees, where the parties were served with the memorandum by mail, and the objection was filed 13 days later under this rule and I.R.C.P. 6(a) allowing a three-day extension where service is by mail and exclusion of the day of service. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990).

Untimely Motion.

Since I.R.C.P. 11(b)(3) allows 20 days for a person to file written notice of how they will represent themselves where their attorney has been permitted to withdraw, and this rule adds three days to the period where an order allowing the withdrawal was served by mail, since 23 days should have elapsed before order of default in child custody and support action was entered the order which was entered 22 days after mailing of the withdrawal order was voidable under I.R.C.P. 60(b)(4). *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Cited in: *Big O Tires of Idaho, Inc. v. Hanley*, 101 Idaho 56, 608 P.2d 413 (1980); *University of Utah Hosp. v. Twin Falls County*, 113 Idaho 447, 745 P.2d 1068 (Ct. App. 1987).

DECISIONS UNDER PRIOR RULE OR STATUTE

Motion to Amend or Alter Judgment.

This rule does not apply to a motion to amend or alter judgment and does not extend the 10 (now 14) day period for filing such

motion prescribed in Rule 59(e). *Williamsen Idaho Equip. v. Western Cas. & Sur. Co.*, 95 Idaho 652, 516 P.2d 1166 (1973).

Rule 6(e)(2). Setting hearings by court.

The court upon its own initiative may notice for hearing any motion, trial or proceeding which is pending before it by notice to all parties in conformance with these rules.

JUDICIAL DECISIONS

Denial Improper.

Where the defendant's motion for hearing was supported by a statement of specific facts to justify his request to appear at trial by telephone, the absence of a notice of hearing from the defendant, standing alone, did not justify denial or disregard of the motion, especially as the magistrate could have scheduled a hearing sua sponte or requested a

written response from the Bureau of Child Support Services. *Bureau of Child Support Servs. v. Garcia*, 132 Idaho 505, 975 P.2d 793 (Ct. App. 1999).

Cited in: *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986); *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

Rule 6(e)(3). Stipulations not binding on court — Continuance of trial or hearing.

The parties to any action may present to the court a stipulation as to any procedural matter involved in any proceeding, including a stipulation to vacate or continue a hearing or trial, but such stipulation shall be considered as a joint motion by the parties to the court for its consideration, and shall not be binding upon the court. The court may approve or disapprove the stipulation in the same manner as the court rules upon a motion. The court may by oral or written notice to the parties limit the time within which a motion or stipulation to vacate or continue a hearing or trial must be made in order to be considered by the court. (Adopted March 30, 1984, effective July 1, 1984.)

RESEARCH REFERENCES

A.L.R. Continuance of Case Because of Illness of Expert Witness. 18 A.L.R.6th 509.

Rule 7(a). Pleadings allowed — Form of motions — Pleadings.

There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14 and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

STATUTORY NOTES

Cross References. Answers or replies, time for serving, Rule 12(a).

Captions, signing and matters relative to form, Rule 7(b)(2).

Counterclaims treated as defenses, Rule 8(c).

Demurrers and special pleas abolished, Rule 7(c).

Motions and other papers, Rule 7(b)(1).

Service and filing of pleadings and other papers, Rule 5(a).

Third-party practice, Rule 14(a).

JUDICIAL DECISIONS

ANALYSIS

Counterclaim.
Motions Distinguished from Pleadings.

Counterclaim.

A counterclaim is not a listed pleading under this rule and, thus, a counterclaim cannot be asserted as an independent pleading but may only be raised as a part of one of the listed pleadings. Accordingly, where a contractor originally filed a counterclaim independent of any listed pleading, it was not properly pleaded and was functionally equivalent to an omitted counterclaim. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Where counterclaim in breach of contract action between landowner and contractor had been filed about two years before trial and pertained to the transaction in litigation between the parties; where striking the counterclaim could put a burden on the contractor in regard to filing another lawsuit; where the contractor's claim might otherwise have been barred by the statute of limitations, and where the owners were unable to show that any prejudice, in the form of surprise or lack of time to prepare, would result from granting leave, after the fact, to file the counterclaim, the judge did not abuse his discretion by denying the owner's motion to strike, thereby effectively granting leave to the filing of the counterclaim, notwithstanding that counter-

claim was improperly filed independently of other proceedings and without leave of court prior to filing. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Motions Distinguished from Pleadings.

This rule limits "pleadings" to a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint, a third party answer and a reply to an answer or a third party answer, if the court allows; motions are not included in the list of pleadings allowed. *O'Neil v. Schuckardt*, 116 Idaho 507, 777 P.2d 729 (1989).

Where defendant had not filed an answer to complaint but only a motion for dismissal for lack of in personam jurisdiction, plaintiff could file an amended complaint without seeking leave of court; rule 15(a) permits a party to file an amended complaint before a responsive pleading is filed and a motion to dismiss is not a pleading under this rule. *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008).

Cited in: *Woodward v. Board of Equalization* (In re Appeal of Woodward), 114 Idaho 882, 761 P.2d 1234 (Ct. App. 1988); *Freeman v. State, Dep't of Cors.*, 115 Idaho 78, 764 P.2d 445 (Ct. App. 1988); *Cox v. Mueller*, 125 Idaho 734, 874 P.2d 545 (1994); *Engleman v. Milanez*, 137 Idaho 83, 44 P.3d 1138 (2002); *O'Guin v. Bingham County*, 139 Idaho 9, 72 P.3d 849 (2003).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Answer.
Counterclaim.
Cross-Complaint.
In General.
Reply.

Answer.

An answer may be adopted by a co-defendant by filing an answer stating that he joins in the answer of his co-defendant. *Collins v. Brown*, 19 Idaho 360, 114 P. 671 (1911).

Answer containing general denial and setting forth new matter should not be stricken. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

Counterclaim.

Defendant's prayer for relief against plaintiff, which was erroneously labeled a cross-complaint, was, for the purpose of former rule 7(a), a "counterclaim denominated as such"

and required a reply because it was in clear and express terms a claim for affirmative relief against an opposing party, and not a counterclaim mistakenly designated as an affirmative defense. *Resource Eng'r, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

Cross-Complaint.

Cross-complaint stands as an independent action, and dismissal by plaintiff of his complaint does not carry with it dismissal of action based on cross-complaint. *Brown v. T.B. Reed & Co.*, 31 Idaho 529, 174 P. 136 (1918).

In General.

The technicalities of pleading under the common law have been dispensed with, and plaintiff need only state his cause of action in ordinary and concise language, without regard to the ancient forms of pleading. *Rauh v. Oliver*, 10 Idaho 3, 77 P. 20 (1904); *Bates v.*

Capital State Bank, 21 Idaho 141, 121 P. 561 (1912).

Reply.

A reply to a pleading designated as a counterclaim is mandatory even though the court

should determine that it is an affirmative defense mistakenly denominated a counterclaim. *State ex rel. Symms v. Thirteenth Judicial Dist.*, 91 Idaho 237, 419 P.2d 679 (1966).

RESEARCH REFERENCES

A.L.R. Propriety of attaching photographs to a pleading. 33 A.L.R.3d 322.

Rule 7(b)(1). Motions and other papers.

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought. A proposed form of order, if included, shall be a separate document. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. (Amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 27, 1997, effective July 1, 1997.)

STATUTORY NOTES

Cross References. Time computation for filing, Rule 6(a).

JUDICIAL DECISIONS

ANALYSIS

Appeal.

Attorney Fees.

Particularity Requirement.

Summary Judgment.

Timeliness of Motion.

Appeal.

Since the propriety of magistrate's order denying wife's motion for summary judgment regarding modification of spousal support was the only issue presented on appeal to the district court, and because the correctness of that order was not a proper subject for review on appeal, the district court did not err in dismissing the appeal. *Keeler v. Keeler*, 124 Idaho 407, 860 P.2d 23 (Ct. App. 1993).

Attorney Fees.

An award of attorney fees was vacated where former wife's request for an award of attorney fees incurred in bringing a motion to comply with a stipulation to a professional evaluation of the functioning of the family system did not specify under which rule or statute it was being filed; likewise the magis-

trate offered no such authority in making the award. *Fournier v. Fournier*, 125 Idaho 789, 874 P.2d 600 (Ct. App. 1994).

Particularity Requirement.

Where instead of filing a motion for summary disposition of defendant's petition for post-conviction relief, State filed an answer, consisting of admissions and denials of the application's allegations, six affirmative defenses and a request to dismiss the petition, such prayer for relief was deficient for not stating its grounds with particularity and for not stating that it was motion for summary disposition and could not be considered a motion that would permit the court to dismiss the petition without 20 days notice to defendant required under subsection (b) of § 19-4906. *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

The defendant's motion to disallow fees did not comply with this rule or I.R.C.P. 54(d)(6) and (e)(6) because the motion did not specify any basis or grounds for the objection. *Nanney v. Linella, Inc.*, 130 Idaho 477, 943 P.2d 67 (Ct. App. 1997).

Summary Judgment.

Where defendants claimed on appeal that they were entitled to summary judgment based on their statute of limitations defense, they were unsuccessful; a denial of a motion for summary judgment is nonappealable and nonreviewable. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Summary judgment may be entered by a court sua sponte or on the grounds other than those raised by the moving party; however, in such event, the party against whom the judgment will be entered must be given adequate notice and an opportunity to demonstrate why summary judgment should not be entered. *Mason v. Tucker & Assocs.*, 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994).

Where the issue of improper equipment as a contributing factor in causing an accident was pled by the plaintiff, and defendant did not specifically address that issue in its motion for summary judgment, mere assertion that the driver was not permitted to drive the vehicle did not adequately address the issue. *Nava v. Toro*, — Idaho —, 264 P.3d 960 (2011).

Timeliness of Motion.

An attempt to piggyback a late-filed motion

for new trial by amending a timely motion for judgment notwithstanding the verdict is not supported by Idaho Rules of Civil Procedure. *O'Neil v. Schuckardt*, 116 Idaho 507, 777 P.2d 729 (1989).

Where a judgment is reinstated as directed by the Supreme Court in an appeal from the granting of a motion notwithstanding the verdict, a motion for new trial based on the reinstated judgment is not timely. *O'Neil v. Schuckardt*, 116 Idaho 507, 777 P.2d 729 (1989).

Cited in: *Rogers v. State*, 98 Idaho 742, 572 P.2d 176 (1977); *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986); *Flahiff Funeral Chapels, Inc. v. Roll*, 125 Idaho 136, 867 P.2d 1010 (Ct. App. 1994); *Hays v. Craven*, 131 Idaho 761, 963 P.2d 1198 (Ct. App. 1998); *Pro Indiviso, Inc. v. Holding Trust*, 131 Idaho 741, 963 P.2d 1178 (1998); *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001); *Engleman v. Milanez*, 137 Idaho 83, 44 P.3d 1138 (2002); *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008); *Nava v. Toro*, — Idaho —, 264 P.3d 960 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Application.
Form of Motion.
Relief Sought.
Res Judicata.
Stating Grounds for Relief.
Where Made.

Application.

While a modification of a divorce decree came under former identical rule, the intent of former rule 52(a) was to require findings of fact and conclusions of law upon which a final order or judgment shall be predicated. *Clark v. Clark*, 89 Idaho 91, 403 P.2d 570 (1965).

Form of Motion.

Motion is not specifically required to be signed, but in our practice motions are usually signed and it is proper practice to have them signed by parties or their counsel. *Nobach v. Scott*, 20 Idaho 558, 119 P. 295 (1911).

A nonresident defendant who files an affidavit of merits and demands in writing that the trial be held in the county of his residence is not required to file a formal motion for change, since the essential facts for the transfer are set forth in the affidavit of merits. *Anderson v. Springer*, 78 Idaho 17, 296 P.2d 1024 (1956).

Relief Sought.

Where the order to show cause why a divorce decree should not be modified as to the care, custody and control of minor children made no mention of respondent's being relieved from paying child support, and there was no mention in the record of the hearing establishing a change in conditions or circumstances of the parties relating to support money, the order modifying the decree as to support money was reversed. *Patton v. Patton*, 88 Idaho 288, 399 P.2d 262 (1965).

Where a divorce defendant's motion asked only for support for children, but her supporting affidavit that defendant be confirmed in her custody and control of the children according to a supplemental agreement of the parties, the question of custody was properly, although imperfectly, presented to the court within the requirements of former identical rule. *Montgomery v. Montgomery*, 89 Idaho 319, 404 P.2d 610 (1965).

Res Judicata.

The doctrine of res judicata, in its strict sense, does not apply to motions made in the course of practice, and the court may, upon a proper showing, allow a renewal of a motion of this kind once decided. But this leave will rarely be given upon the ground that the moving party can produce additional evidence

in support of his motion, unless it also appears that a new state of facts has arisen since the former hearing, or that the then existing facts were not presented by reason of the surprise or excusable neglect of the moving party. *Dellwo v. Petersen*, 34 Idaho 697, 203 P. 472 (1921).

Stating Grounds for Relief.

Where motion to strike from a pleading certain paragraphs on the ground they were insufficient to create an issue did not point out any particular in which such pleading was insufficient, such motion would not be considered. In *re Matthews*, 57 Idaho 75, 62 P.2d 578, 111 A.L.R. 13 (1936).

Where respondents' motion to vacate the judgment was not accompanied with either affidavit establishing the facts outside the record or with any proposed answer showing facts constituting a valid defense, the motion as submitted failed to set forth the particular grounds upon which respondent was relying for relief. *Garren v. Saccomanno*, 86 Idaho 268, 385 P.2d 396 (1963).

Statute requiring that all averments of fraud or mistake to be stated with particularity was not complied with by allegations, in wife's motion to modify trial court's order concerning alimony, that fraud was practiced upon the court; presumptions favor the regularity and validity of trial court action where

the record is silent, and it could not be determined from her motion that such fraud was practiced on the court as would vitiate proceedings had on her husband's original motion for modification. *Jordan v. Jordan*, 87 Idaho 432, 394 P.2d 163 (1964).

A motion to strike a complaint must state with particularity the grounds upon which such relief is sought in order that a complaint may not be dismissed prematurely on vague or improper grounds. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

Where plaintiff appealed only from an order denying her motion for a new trial and not from the final judgment in her action against the personal representative of an estate and where the motion was based solely on the ground of newly-discovered evidence and did not assert that the trial court committed any error either in ruling on the evidence or improper application of a statute, questions presented by plaintiff's claims of error would not be considered on appeal. *Grasser v. First Sec. Bank*, 96 Idaho 754, 536 P.2d 749 (1975).

Where Made.

All motions of which notice must be given and which may be contested must be made and heard in the county in which the action is pending or in any county in the same judicial district. *Callahan v. Dunn*, 30 Idaho 225, 164 P. 356 (1917).

Rule 7(b)(2). Captions, signing and form of motions.

The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

STATUTORY NOTES

Cross References. Caption and names of parties, Rule 10(a)(1).

Form of pleadings, caption, names of parties, Rule 10(a)(1).

Service of pleadings, how made, Rule 5(b).

Signing of pleadings, Rule 11(a)(1).

Summons, form, Rule 4(b).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Signing of Pleadings.

Title of Action.

Verification.

Signing of Pleadings.

Attaching the name of a justice of the Supreme Court to a motion does not provide the signature of a resident attorney. *Roberts v. Wehe*, 53 Idaho 783, 27 P.2d 964 (1933).

All authorities hold that verification by the

attorney is sufficient as subscription. *Updegraff v. Adams*, 66 Idaho 795, 169 P.2d 501 (1946).

Title of Action.

A complaint, besides the title of the action, is required to contain only a concise statement of facts constituting the cause of action in ordinary language, and a demand for relief. *Coleman v. Jaggars*, 12 Idaho 125, 85 P. 894 (1906); *Poncia v. Eagle*, 28 Idaho 60, 152 P.

208 (1915); *Stone v. Bradshaw*, 64 Idaho 152, 128 P.2d 844 (1942).

Verification.

Where the verification of a pleading is not objected to, any defect therein is waived and the pleading cannot be disregarded for want of a proper verification. *Pence v. Durbin*, 1 Idaho 550 (1874).

An attorney may verify a petition for a writ

of review where the petition shows he is better acquainted with the proceedings than the client, and he states in the affidavit that he knows the facts stated in the petition and has examined all the proceedings mentioned therein. *Madison v. Piper*, 6 Idaho 137, 53 P. 395 (1898).

Wherever a verified answer is required, an unverified one tenders no issue. *Craven v. Bos*, 38 Idaho 722, 225 P. 136 (1924).

Rule 7(b)(3). Time limits for filing and serving motions, affidavits and briefs.

Unless otherwise ordered by the court, which order may for cause shown be made on ex parte application, or specified elsewhere in these rules;

(A) A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be filed with the court, and served so that it is received by the parties no later than fourteen (14) days before the time specified for the hearing.

(B) When a motion is supported by affidavits(s), the affidavit(s) shall be served with the motion, and any opposing affidavit(s) shall be filed with the court and served so that it is received by the parties no later than seven (7) days before the hearing.

(C) It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether the party desires to present oral argument or file a brief within fourteen (14) days with the court in support of the motion.

(D) If the moving party does not request oral argument upon the motion, and does not file a brief within fourteen (14) days, the court may deny such motion without notice if the court deems the motion has no merit. If argument has been requested on any motion, the court may, in its discretion, deny oral argument by counsel by written or oral notice to all counsel before the day of the hearing, and the court may limit oral argument at any time.

(E) Any brief submitted in support of a motion shall be filed with the court, and served so that it is received by the parties, at least fourteen (14) days prior to the hearing. Any responsive brief shall be filed with the court, and served so that it is received by the parties, at least seven (7) days prior to the hearing. Any reply brief shall be filed with the court, and served so that it is received by the parties, at least two (2) days prior to the hearing.

(F) If the office of the presiding judge or magistrate in any action is outside of the county in which an action is pending, the party serving any motion, affidavit, or brief shall simultaneously send a copy to the presiding judge or magistrate, which shall be in addition to the filing of the originals with the court of record. (Amended effective July 1, 1977; amended March 24, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983; amended June 15, 1987, effective November 1, 1987; amended April 22, 2004, effective July 1, 2004; amended March 17, 2006, effective July 1, 2006.)

JUDICIAL DECISIONS

ANALYSIS

Jurisdiction.
 Notice Requirements.
 Post-Conviction Relief.
 Tolling of Time for Appeal.

Jurisdiction.

The court had jurisdiction to decide the motion for summary judgment even though the motion and notice of hearing did not allow the minimum time set by the rules for the responsive affidavits. *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (Ct. App. 1986) (decided under prior rule 6(b)).

Notice Requirements.

The notice rules are not jurisdictional and they do not provide grounds for reversal on appeal for a party who has no substantive defense to the motion and who was not prejudiced by an inadequate notice. *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994) (decided under prior rule 6(b)).

Trial court abused its discretion by granting a lessee's motion to voluntarily dismiss a case against its lessor because the lessor was not given 14 days' notice of the motion and there was no indication of whether the lessee

sought oral argument or to file a brief in support of its motion. The lessor suffered prejudiced as it was deprived of the opportunity to argue in favor of an award of attorney fees. *Parkside Sch., Inc. v. Bronco Elite Arts & Ath., LLC*, 145 Idaho 176, 177 P.3d 390 (2008).

Post-Conviction Relief.

Denial of motion to disqualify judge for cause from presiding over inmates claim for post-conviction relief was proper even though no hearing was held. There was no request for a hearing, and no requirement that a hearing be conducted. No notice was required as there was no oral argument scheduled. *Lamm v. State*, 143 Idaho 763, 152 P.3d 634 (Ct. App. 2006).

Tolling of Time for Appeal.

The time for appealing the district court's summary judgment order was tolled by the plaintiff's motion to alter or amend the judgment, even though she did not notice up her motion for hearing and did not file a written memorandum within fourteen days. *Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988).

Cited in: *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

Rule 7(b)(4). Hearings by telephone or video teleconference.

The court may hold the hearing on, (A) any motion, other than motions for summary judgment unless the parties stipulate, (B) any order to show cause, when no oral testimony is to be introduced at such motion hearing or at such show cause hearing, or (C) any pretrial matter by a telephone or video teleconference to which the counsel for each party, the court and any other persons designated by the court are joined. The court shall cause minutes thereof to be prepared, filed in the action and served upon all parties to the action. The telephone conference or video teleconference and such charges may be allowed as discretionary costs to the party paying the same if such party is the prevailing party in the action. The court shall cause the audio of such telephone conference or video teleconference to be recorded electronically with such recording to be made, retained and erased as the court may direct. (Adopted April 11, 1979, effective May 1, 1979; amended March 20, 1985, effective July 1, 1985; amended March 2, 2001, effective April 1, 2001.)

JUDICIAL DECISIONS

Cited in: *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991).

Rule 7(c). Demurrers, pleas and exceptions abolished.

Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

STATUTORY NOTES

Cross References. Another action pending, presentation, Rule 12(b).

Defenses and obligations, manner of presentation, Rule 12(a).

Defenses, how presented, Rule 12(b).

Failure to join indispensable party, presentation, Rule 12(b).

Failure to state claim upon which relief may be granted, presentation, Rule 12(b).

Improper venue, presentation, Rule 12(b).

Insufficiency of process, presentation, Rule 12(b).

Insufficiency of service of process, presentation, Rule 12(b).

Lack of jurisdiction, presentation, Rule 12(b).

Pleading or motion presenting defenses, Rule 12(a).

Rule 8(a)(1). General rules of pleading — Claims for relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) if the court be of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

STATUTORY NOTES

Cross References. Affirmative defenses, Rule 8(c).

Amended and supplemental pleadings, Rule 15(a).

Construction of pleadings, Rule 8(f).

Counterclaim, reply to denominated as such, Rule 7(a).

Defenses, Rule 8(b).

Defenses in law or fact, presentation, Rule 12(b).

Demand for judgment based on, Rule 54(c).

Effect of failure to deny, Rule 8(b).

Form of denials, Rule 8(b).

Form of pleadings, Rule 10(a)(1).

Joinder of claims and remedies, Rule 18(a).

Pleading to be concise and direct, consistency, Rule 8(e)(1).

Signing of pleadings, Rule 11(a)(1).

Supplemental pleadings, Rule 15(d).

Third-party practice, Rule 14(a).

Transfer of actions, Rule 8(a)(2).

Two or more statements of claim or defense in one count, Rule 8(e)(2).

JUDICIAL DECISIONS**ANALYSIS**

Alternative Forms of Relief.

Complaint.

—Leave to Amend.

Issues Not Plead.

Notice.

Post-Conviction Relief.

Sufficiency of Pleading.

—Contract.

—Habeas Corpus.

—Warranty Claim.

Alternative Forms of Relief.

Modern pleading practice no longer prohib-

its parties from seeking alternative forms of relief even if the remedies sought are inconsistent; for example, in an action on contract a plaintiff may claim both damages and restitution, with the ultimate election to be made by the court. *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980).

When plaintiff filed suit for breach of an employment agreement, this rule allowed plaintiff to alternatively plead theories of recovery for breach of written contract, breach of oral contract, quasi-contract, fraud, and unjust enrichment. *Thomas v. Thomas*, 150 Idaho 636, 249 P.3d 829, 32 I.E.R. Cas. (BNA) 695 (2011).

Complaint.

A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief. *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986).

Modern pleading, as reflected by this rule, requires a simple, concise, and direct statement fairly apprising the defendant of the claim and the grounds upon which it rests. *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090 (Ct. App. 1986).

Modern pleading requires only a simple, concise and direct statement fairly apprising the defendants of claims and grounds upon which the claims rest. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

District court erred in dismissing prisoner's pro-se civil complaint for failure to file within the statute of limitations. Although document filed by prisoner within the limitations period was mis-captioned as a "claim" rather than a "complaint," it sufficiently alleged essential facts to state a claim for relief, and sufficed as a complaint. *Hauschulz v. State*, 143 Idaho 462, 147 P.3d 94 (Ct. App. 2006).

—Leave to Amend.

Where a claim for unlawful detainer was brought before the magistrate and subsequently dismissed upon the magistrate's realization that the parties involved in the unlawful detainer action did not have a landlord-tenant relationship as required for such an action, the magistrate's order dismissing the claim, granting leave to file amended complaint which asserted claims of ejectment, trespass, and quiet title, and transferring amended complaint which was beyond the magistrate's authority to the district court was properly within the magistrate's discretion. *Nationsbanc Mtg. Corp. v. Cazier*, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995), cert. denied, 519 U.S. 864, 117 S. Ct. 172, 136 L. Ed. 2d 113 (1996).

Issues Not Pleaded.

In action for breach of employment contract, there was no procedural error in the trial judge's decision to apply subsection 4 of § 45-617, even though it was not pleaded by either party, nor was it otherwise raised as an issue at trial, where the complainant prayed for monetary relief from breach of an employment contract, and this was sufficient to place the employer on notice that unpaid wages, or items analogous to wages, could be awarded. *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

In action by taxpayer for trespass on his

land and unlawful seizure of his property, where, although taxpayer did not cite § 63-3074 in his complaint, the allegations in the complaint clearly stated a cause of action under it; pleadings were sufficient to raise the question of unlawful seizure of the property under § 63-3074, since this rule requires only a simple, concise, and direct statement fairly appraising the defendant of the claims and grounds upon which the claims contained in the complaint rest. *Greenwade v. Idaho State Tax Comm'n*, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991).

Notice.

Complaint put the franchisor on notice that the claimant brought a suit against it, because the franchisor was served, filed an answer, and moved for summary judgment. *Youngblood v. Higbee*, 145 Idaho 665, 182 P.3d 1199 (2008).

Post-Conviction Relief.

An application for post-conviction relief differs from a complaint in an ordinary civil action as application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under this rule; rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached. *January v. State*, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995); *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

An application for post-conviction relief differs from a complaint in an ordinary civil action because an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under this section; rather an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996).

An application for post-conviction relief differs from a complaint in an ordinary civil action because such an application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached or a reason for

their non-inclusion given. *Downing v. State*, 132 Idaho 861, 979 P.2d 1219 (Ct. App. 1999).

Sufficiency of Pleading.

Injured passenger adequately pleaded a cause of action against the Idaho Division of Motor Vehicle Services (DMV) where her amended complaint alleged that by issuing a drunk driver a license during a period of time when his driving privileges should have remained suspended, the DMV acted with gross negligence or recklessly, willfully, and wantonly. *Cafferty v. Dep't of Motor Vehicle Serv.*, 144 Idaho 324, 160 P.3d 763 (2007).

In a case involving a dispute over a duplex sale, a motion filed after the entry of a stipulated dismissal should have been treated as one to alter or amend; moreover, it was an abuse of discretion to deny relief because the motion alerted the district court to the error in its decision relating to the sellers' failure to waive the right to seek costs and fees in the dismissal document. In addition, the pleading standards were met for costs and fees. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

In an action relating to the sale of a duplex, two sellers were still allowed to seek attorney fees and costs, despite a failure to plead such in their answer. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

Where the homeowner alleged that her home was flooded as the result of a road reconstruction project performed by the city, her complaint was not separated into multiple causes of action; the only theory of recovery identified was negligence; because the complaint failed to include a short and plain statement of the claims of nuisance and inverse condemnation as required by Idaho R. Civ. P. 8(a)(1), the district court properly granted summary judgment for the city. *Brown v. City of Pocatello*, 148 Idaho 802, 229 P.3d 1164 (2010).

—Contract.

In its amended complaint, the plaintiffs set out the matters required in this rule and I.R.C.P. 9(f), that is, a statement of jurisdiction, a short statement alleging a contract between the plaintiffs and defendants, the time that the alleged contract was entered into, where the agreement took place, and a demand for relief; therefore the pleadings were sufficient to state a cause of action and to apprise the defendants of the plaintiffs' claim. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

Where plaintiffs' complaint stated that it delivered rough lumber to defendant with instructions to process it into siding, which defendant did, and plaintiff paid the agreed price and instructed defendant to load the

siding on a certain company truck and notwithstanding these instructions defendant loaded the siding onto another company's truck whereby the siding was lost to plaintiff and defendant did not move under I.R.C.P., Rule 12(e) for a more definite statement of claim prior to trial, the complaint was sufficient to fairly appraise defendant of a cause of action for breach of contract. *Quinto v. Millwood Forest Prods., Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997).

When appellant insured's building was destroyed by fire, a dispute ensued over the interpretation of its builder's risk insurance policy sold by respondent insurance company's agent; for purposes of Idaho R. Civ. P. 8(a)(1), appellant did not sufficiently plead a direct breach of contract claim against the insurance company based on a theory of apparent authority arising out of an oral contract. Therefore, the district court did not err by dismissing the claim for breach of an insurance contract. *Villa Highlands, LLC v. Western Cmty. Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010).

—Habeas Corpus.

Although a petition for a writ of habeas corpus was not the proper form of pleading to claim compensation for private property taken by the state, where the defendant's petition set forth, in substance, a claim for compensation arising from an unlawful taking of property by the confiscation of the prisoner's art supplies, which were not returned, the petition alleged facts framing a cognizable claim and should not have been summarily dismissed. *Freeman v. State, Dep't of Cors.*, 115 Idaho 78, 764 P.2d 445 (Ct. App. 1988).

—Warranty Claim.

In an action for damages for breach of warranty brought by purchasers of a mare, where the mare was purchased for breeding purposes but later found to be unable to conceive, the complaint, which did not cite I.C. §§ 28-2-314, 28-2-315 nor use the term 'implied warranty', was adequate to state a cause of action for breach of implied warranty of fitness for a particular purpose since the underlying facts and allegations support this claim. *Whitehouse v. Lange*, 128 Idaho 129, 910 P.2d 801 (Ct. App. 1996).

Cited in: *Dumas v. Ropp*, 98 Idaho 61, 558 P.2d 632 (1977); *Dursteler v. Dursteler*, 108 Idaho 230, 697 P.2d 1244 (Ct. App. 1985); *Dayley v. State, Dep't of Health & Welfare*, 112 Idaho 522, 733 P.2d 743 (1987); *Christensen v. Rice*, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988); *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992); *Heck v.*

Commissioners of Canyon County, 123 Idaho 826, 853 P.2d 571 (1993); Farnworth v. Fleming, 125 Idaho 283, 869 P.2d 1378 (1994); Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 744, 874 P.2d 555 (Ct. App. 1993); Cootz v. State, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996); Taylor v. Browning, 129 Idaho 483, 927 P.2d 873 (1996); Zattiero v. Homedale Sch. Dist. No. 370, 137 Idaho 568, 51 P.3d 382 (2002); Hoyle v. Utica Mut. Ins. Co., 137 Idaho

367, 48 P.3d 1256 (2002); Primary Health Network v. State, 137 Idaho 663, 52 P.3d 307 (2002); Gibson v. Ada County Sheriff's Dep't, 139 Idaho 5, 72 P.3d 845 (2003); Bakker v. Thunder Spring-Wareham, LLC, 141 Idaho 185, 108 P.3d 332 (2005); Baker v. State, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005); Loveland v. State, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005); Heinze v. Bauer, 145 Idaho 232, 178 P.3d 597 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Answers Pleading New Matter. Complaint.

- Attaching Exhibits.
- Contents.
- Dismissal of Count.
- Prayer for Relief.
- Purpose.
- Statement of Cause of Action.
- Cross-Claim.
- Denial.
- In General.
- Matters to Be Pleaded.

- Contracts.
- Dates.
- Facts in Knowledge of Adversary.
- Information and Belief.
- Presumptions or Inferences.
- Sufficiency of Pleading.
- In General.
- In Particular Action.
- Account.
- Attorney's Agreement.
- Bond.
- Conspiracy.
- Contract.
- Corporate Existence.
- Debt.
- Divorce.
- Information and Belief.
- Injunction.
- Negligence.
- Nuisance.
- Payment of Money.
- Real Property.
- Unauthorized Practice of Law.
- Traverse.

Answers Pleading New Matter.

Answers which plead new matter are of two classes: (1) new matter used defensively as a bar to plaintiff's action, and (2) new matter used offensively by setting forth an independent cause of action in favor of a defendant. Lang Co. v. Grandview Mut. Canal Co., 77 Idaho 220, 291 P.2d 297 (1955).

A defense of new matter does not deny any

fact; it assumes the averments of the complaint to be true, and by an express or silent admission, admits the truth of the complaint as far as it goes. Smith v. Marley, 39 Idaho 779, 230 P. 769 (1924).

Complaint.

—Attaching Exhibits.

A contract may be attached as an exhibit to the complaint, and by apt reference and allegation made a part of it with the same effect as though copied into the complaint. Porter v. Allen, 8 Idaho 358, 69 P. 105 (1902).

Pleading an instrument by attaching a copy to the complaint as an exhibit thereto does not tender an issue or involve an assertion of the truth of the statements and recitals contained in the exhibit. In order to tender an issue as to the truth or correctness of statements and recitals contained in such exhibit, it is necessary to plead them in appropriate terms. Sweeney v. Johnson, 23 Idaho 530, 130 P. 997 (1913).

In case of discrepancies between words and figures, the words control, and where an exhibit is attached it will govern over an inconsistent allegation in the pleading. Where there are inconsistencies not such as to destroy each other, the more favorable one to the pleader's adversary will be given effect. Harshbarger v. Eby, 28 Idaho 753, 156 P. 619 (1916).

Attaching an exhibit constitutes an allegation of the existence of the instrument at the time and place and for the purpose alleged. City of Caldwell v. Village of Mt. Home, 29 Idaho 13, 156 P. 909 (1916).

—Contents.

No particular form of complaint is required; it must contain a statement of the facts constituting the cause of action in ordinary and concise language, and when that is done the plaintiff is entitled to whatever relief his allegations and proof show him entitled to, either at law or in equity. Anderson v. War Eagle Consol. Mining Co., 8 Idaho 789, 72 P.

671 (1903); *Poncía v. Eagle*, 28 Idaho 60, 152 P. 208 (1915).

A complaint, besides the title of the action, is required to contain only a concise statement of facts constituting the cause of action in ordinary language, and a demand for relief. *Coleman v. Jagers*, 12 Idaho 125, 85 P. 894 (1906); *Poncía v. Eagle*, 28 Idaho 60, 152 P. 208 (1915); *Stone v. Bradshaw*, 64 Idaho 152, 128 P.2d 844 (1942).

The complaint should contain a statement of the facts constituting the cause of action in ordinary and concise language, and it is necessary to plead the acts complained of in order to advise defendant with what he is charged. *Idaho State Bar v. Meservy*, 79 Idaho 526, 325 P.2d 688 (1958), appeal dismissed, *Idaho State Bar v. Meservy*, 80 Idaho 504, 335 P.2d 62 (1959).

—Dismissal of Count.

Where count was improperly dismissed, fact that one of two counts of plaintiff's complaint remained did not validate the summary dismissal. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

—Prayer for Relief.

The prayer of a complaint is nothing more than a statement of the pleader's opinion of what the facts stated in the complaint entitles him to receive. *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914); *Smith v. Rader*, 31 Idaho 423, 173 P. 970 (1918).

Prayer for relief forms no part of statement of cause of action; facts alleged and not relief demanded are of chief importance. *Dahlquist v. Mattson*, 40 Idaho 378, 233 P. 883 (1925).

The fact that plaintiffs pray for relief beyond that permitted by the law does not justify a denial of that to which they may be able to establish a right and the district court is authorized to grant any relief consistent with the pleadings and evidence. *Jones v. State*, 85 Idaho 135, 376 P.2d 361 (1962).

—Purpose.

The purpose of a complaint is to give defendant information of all the material facts on which plaintiff relies to support his demand, which facts may be stated only in ordinary and concise language. *Fox v. Cosgriff*, 64 Idaho 448, 133 P.2d 930 (1943).

—Statement of Cause of Action.

Plaintiff may recover if complaint states any cause of action entitling him to relief at law or in equity. *Rauh v. Oliver*, 10 Idaho 3, 77 P. 20 (1904); *Casady v. Scott*, 40 Idaho 137, 237 P. 415 (1924); *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

Where a complaint shows any cause of action that will put defendant on his defense

of the alleged wrongful act, it is not insufficient. *Village of Sand Point v. Doyle*, 11 Idaho 642, 83 P. 598 (1905).

It is not sufficient that complaint states cause of action in someone, it must be in plaintiff. *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254 (1926).

In determining whether a complaint does or does not state a cause of action, every reasonable intentment will be made to sustain it. *Curtis v. Siebrand-Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Cross-Claim.

Where a defendant files a cross-claim by way of answer, this, being in the nature of a bill in equity, must contain all the essential and necessary averments of such a bill, and properly pleaded, it makes the party so pleading an actor and plaintiff with respect to all matters alleged in such affirmative defense; and such defense must be of such a character as may call for a decree in such party's favor. *Penninger Lateral Co. v. Clark*, 22 Idaho 397, 126 P. 524 (1912), overruled on other grounds, *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

Cross-claim must be pleaded as fully as original cause of action, and must be sufficient in itself without recourse to other pleadings, unless expressly referred to therein. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

Denial.

A denial when properly pleaded does not state any facts but denies facts. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

In General.

The technicalities of pleading have been dispensed with and the plaintiff need only state his cause of action in ordinary concise terms, whether it be in assumpsit, trespass or ejectment, without regard to the ancient forms of pleadings. A plaintiff can be sent out of court only when, upon the facts pleaded, he is entitled to no relief either in law or equity. *Rauh v. Oliver*, 10 Idaho 3, 77 P. 20 (1904); *Bates v. Capital State Bank*, 21 Idaho 141, 121 P. 561 (1912); *Poncía v. Eagle*, 28 Idaho 60, 152 P. 208 (1915); *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 154 P. 985 (1916).

The character of a pleading is to be determined from the nature and substance of the facts therein alleged, and not from what the pleader may have called it. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

Matters to Be Pleaded.

—Contracts.

A contract may be pleaded in haec verba or

according to its legal effect. *Porter v. Allen*, 8 Idaho 358, 69 P. 105 (1902).

—**Dates.**

Where the date of accrual of a cause of action is material, it must be positively alleged. *Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 P. 226 (1904).

—**Facts in Knowledge of Adversary.**

It is generally held that facts peculiarly in the knowledge of the adverse party need not be pleaded, but it must appear that such is the case with respect to the possession of such knowledge. *Grimsmoe v. Kendrick*, 42 Idaho 491, 247 P. 746 (1926).

—**Information and Belief.**

The averment should not be in such form as to merely tender an issue as to whether or not the litigant had been informed and believed such information, but the pleading should aver that the facts were in accord with the litigant's information and belief. *Swank v. Sweetwater Irrigation & Power Co.*, 15 Idaho 353, 98 P. 297 (1908).

—**Presumptions or Inferences.**

Presumptions and inferences, whether of law or fact, need not be pleaded. *Bates v. Capital State Bank*, 18 Idaho 429, 110 P. 277 (1910).

Sufficiency of Pleading.

—**In General.**

A pleading should contain a positive statement of the essential facts, and is insufficient where it merely states that such facts are alleged to exist. *Holton v. Sand Point Lumber Co.*, 7 Idaho 573, 64 P. 889 (1901).

The sufficiency of the pleading must be determined from the facts pleaded rather than upon any name given to the pleading or the cause of action. *Bates v. Capital State Bank*, 18 Idaho 429, 110 P. 277 (1910).

—**In Particular Action.**

—**Account.**

In an action on an account, a complaint which fails to allege, except by way of recital, that there is a certain amount due the plaintiff is insufficient. *Holton v. Sand Point Lumber Co.*, 7 Idaho 573, 64 P. 889 (1901).

—**Attorney's Agreement.**

A pleading, based upon an attorney's agreement, failing to allege that such agreement was filed with the clerk or was entered upon the minutes of the court, does not state facts sufficient to constitute a cause of action, since this is the statutory requirement to make an attorney's agreement effectual. *Idaho Gold*

Dredging Corp. v. Boise Payette Lumber Co., 62 Idaho 683, 115 P.2d 401 (1941).

—**Bond.**

Where a county sued its sheriff alleging that he had received money from the warden of the state penitentiary for transporting the county's prisoners to the state penitentiary, and the county sought to recover such money from the sheriff and the sureties on his bond, the complaint was not insufficient on the grounds that he did not collect the money for transporting the prisoners officially, and that such transportation was not part of his official duties. *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933).

In an action for damages against a sheriff and the surety on his official bond, a complaint was held sufficient which alleged that the sheriff levied on property under an execution, that third party claims were filed, that the sheriff instituted interpleader proceedings which were determined in favor of the execution plaintiff and that a goodly portion of the property had slipped from the sheriff's control, but not because he considered himself not further bound to keep the property for failure of execution plaintiff to give an indemnity bond. *Aker v. Coleman*, 60 Idaho 118, 88 P.2d 869 (1939).

—**Conspiracy.**

A complaint alleging a conspiracy is insufficient unless it alleges an overt act. *Dahlquist v. Mattson*, 40 Idaho 378, 233 P. 883 (1925).

—**Contract.**

Complaint in action for contract price of four bulls was sufficient, though not alleging that claim was due when suit was brought. *McMaster v. Dunn*, 49 Idaho 241, 287 P. 201 (1930).

In an action for four months' rent on a building, the complaint was not insufficient on the ground that the rental agreement was not alleged to be in writing, where there was nothing in the complaint to indicate that the agreement was for a renting of a building for more than from month to month. *Winter v. Bens*, 62 Idaho 250, 109 P.2d 890 (1941).

A complaint based on a contract is generally held to be sufficient if it states the making thereof, the obligations thereby assumed, and the breach; and the contract, in such case, contains the primary right of the plaintiff and in the obligation assumed by the defendant is found his duty, and his failure to comply therewith constitutes the breach, and when these statements are supplemented with the statement of the amount claimed and the prayer for judgment, the complaint is com-

plete. *Stone v. Bradshaw*, 64 Idaho 152, 128 P.2d 844 (1942).

In a real estate broker's action for commission, a complaint pleading the contract of employment equally susceptible of construction that the commissions were to be charged to the purchaser and to landowners was sufficient. *Stone v. Bradshaw*, 64 Idaho 152, 128 P.2d 844 (1942).

In suit by buyer of automobile to recover statutory penalty for usury against finance company to whom sales contract had been assigned by used car company where complaint merely alleged that defendant financed transaction and failed to allege that prior to time of execution of sales agreement that parties solicited defendant to make a loan but did not disclose that defendant had anything to do with transaction until after agreement was consummated, complaint was insufficient since transaction alleged did not come under usury laws. *Bell v. Idaho Fin. Co.*, 73 Idaho 560, 255 P.2d 715 (1953).

A cross-complaint sufficiently stated facts to constitute a cause of action where it alleged facts of note in question, agreement on part of plaintiff to sell harvester-thresher, opportunity and failure of plaintiff to sell equipment and depreciated loss thereafter suffered by defendant. *John Hoene Implement, Inc. v. Peters*, 80 Idaho 160, 327 P.2d 362 (1958).

— —Corporate Existence.

An allegation that the defendant is a corporation organized and existing by virtue of the law and doing business in a certain county is a sufficient allegation of corporate existence. *Jones v. Pacific Dredging Co.*, 9 Idaho 186, 72 P. 956 (1903).

— —Debt.

A complaint alleging generally an indebtedness for a balance due for goods, wares and merchandise sold and delivered is sufficient. *C.R. Shaw Lumber Co. v. Manville*, 4 Idaho 369, 39 P. 559 (1895).

The common counts, otherwise known at common law as *indebitatus assumpsit*, are generally held sufficient. *Dittemore v. Cable Milling Co.*, 16 Idaho 298, 101 P. 593 (1909); *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 133 P. 929 (1913). However, see *Moser v. Pugh-Jenkins Furn. Co.*, 31 Idaho 438, 173 P. 639 (1918).

— —Divorce.

A complaint, in a divorce action, not alleging the name of the person with whom the defendant committed adultery, is not by reason thereof insufficient. *Rice v. Rice*, 46 Idaho 418, 267 P. 1076 (1928).

— —Information and Belief.

An allegation "that your affiant is informed

and believes and therefore alleges the fact to be that," then stating the facts alleged upon information and belief is sufficient. In re *Matthews*, 57 Idaho 75, 62 P.2d 578, 111 A.L.R. 13 (1936).

—Injunction.

A complaint seeking to enjoin the use of a name "United American Benefit Association, Inc." by the defendant on the ground that the name was deceptively similar to the name "American Home Benefit Association, Inc." used by the plaintiff was not insufficient because of the absence of an allegation of fraud or design of injuring the plaintiff. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

— —Negligence.

In an action for the negligent killing of an animal, the complaint must contain a statement of the facts constituting the negligent killing, in ordinary, concise language. *King v. Oregon S. L. Ry.*, 6 Idaho 306, 55 P. 665 (1898).

In an action against a carrier for personal injuries to a passenger, it is sufficient to allege in general terms that the injury complained of was occasioned by the negligence of the servant of the carrier, without further alleging that the servant was acting within the scope of his employment. *Lindsay v. Oregon S. L. R.R.*, 13 Idaho 477, 90 P. 984 (1907).

In an action for the death of a boy shot by another boy with ammunition purchased at the defendant's store, the facts set forth in the pleading, when distinguished from conclusions, were insufficient to show negligence, so that evidence thereunder was properly excluded. *Carron v. Guido*, 54 Idaho 494, 33 P.2d 345 (1934).

In complaint to recover damages for alleged negligence of railroad in crossing accident, plaintiff did not have to allege freedom from contributory negligence. *Webb v. Union Pac. R.R.*, 72 Idaho 387, 241 P.2d 1177 (1952).

— —Nuisance.

A complaint which charged the defendant with facts constituting a nuisance was sufficient to put defendant on notice that plaintiffs were demanding relief for a nuisance maintained by defendant even though the complaint was not so captioned. *Archer v. Shields Lumber Co.*, 91 Idaho 861, 434 P.2d 79 (1967).

— —Payment of Money.

Except where otherwise provided by statute, one cannot, either by set-off or counterclaim, or by a direct action, recover money which he has voluntarily paid with full knowledge of all facts and without any fraud, duress, or extortion, although no obligation to

make such payment existed, and where a complaint so shows it states no cause of action. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

— **Real Property.**

Complaint to quiet title which alleged in ordinary and concise language the necessary ultimate facts of ownership, possession, payment of taxes and adverse claim was sufficient. *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006 (1953).

Complaint by remaindermen against co-remaindermen to recover proportionate share of proceeds of sale of right of way stated a cause of action in assumpsit for money had and received. *Woodland v. Spillman*, 75 Idaho 286, 271 P.2d 819 (1954).

— **Unauthorized Practice of Law.**

Complaint alleging unauthorized practice of law, wherein it was stated that the defen-

dant had prepared and drafted legal documents and instruments for many purposes, expressly or impliedly representing to plaintiffs that he was qualified to prepare the same and to advise with respect to the legal effect thereof, was held insufficient as not advising defendant with reasonable certainty what act or acts constituted the unauthorized practice of law so as to enable him to prepare his defense. *Idaho State Bar v. Meservy*, 79 Idaho 526, 325 P.2d 688 (1958), appeal dismissed, *Idaho State Bar v. Meservy*, 80 Idaho 504, 335 P.2d 62 (1959).

Traverse.

It is not necessary that a traverse be expressed in negative words. The averment of the contrary of what is alleged in the complaint is equivalent to an ordinary denial. *Nesbitt v. Demasters*, 44 Idaho 143, 255 P. 408 (1927).

RESEARCH REFERENCES

A.L.R. Liability of owner or operator of self-service laundry for personal injury or damages to patron or frequenter of premises from defect in premises or appliances. 23 A.L.R.3d 1246.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Construction and application of provision in health or hospitalization policy excluding or postponing coverage of illness originating

prior to issuance of policy or within stated time. 94 A.L.R.3d 990.

Breach of contract, pleading in action for procuring. 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Pleading with respect to notice of accident, claim, etc., or with respect to forwarding suit papers. 32 A.L.R.4th 141.

Actionable nature of advertising impugning quality or worth of merchandise or products. 42 A.L.R.4th 318.

Rule 8(a)(2). Transfer.

In an action brought in the magistrate division of the district court, in the event the claim, counterclaim, cross-claim or third-party claim tendered for filing is in excess of the jurisdictional amount or otherwise beyond the jurisdiction of said court, upon the payment of any fees required by statute, or rule, the action shall be transferred to the district court of the county in which pending to be there considered and tried as if the same had been there originally filed.

STATUTORY NOTES

Cross References. Counterclaim and cross-claim, Rule 13(a).

Intervention, Rules 24(a)-24(c).

Permissive counterclaims, Rule 13(b).

Third-party practice, Rules 14(a), 14(b).

JUDICIAL DECISIONS

Discretion of Magistrate.

Where a claim for unlawful detainer was brought before the magistrate and subsequently dismissed upon the magistrate's realization that the parties' involved in the unlawful detainer action did not have a landlord-tenant relationship as required for such an action, the magistrate's order dismissing the claim, granting leave to file amended complaint which asserted claims of

ejection, trespass and quiet title, and transferring amended complaint which was beyond the magistrate's authority to the district court was properly within the magistrate's discretion. Nationsbanc Mtg. Corp. v. Cazier, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995), cert. denied, 519 U.S. 864, 117 S. Ct. 172, 136 L. Ed. 2d 113 (1996).

Cited in: Whitehouse v. Lange, 128 Idaho 129, 910 P.2d 801 (Ct. App. 1996).

Rule 8(b). Defenses — Form of denials.

A party shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

STATUTORY NOTES

Cross References. Defenses in law or fact, presentation, Rule 12(b).
Form of pleadings, Rule 10(a)(1).

Rules of pleading, Rule 8(a)(1).
Signing of pleadings, Rule 11(a)(1).

JUDICIAL DECISIONS

Appearance.

The filing of a motion to dismiss or for summary judgment not only constituted an appearance but also extended the 20 day answer period. Conley v. Looney, 117 Idaho 627, 790 P.2d 920 (Ct. App. 1989).

Cited in: Woodward v. Board of Equalization (In re Appeal of Woodward), 114 Idaho 882, 761 P.2d 1234 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Affirmative Defense.
Answers in Two Classes.
Contents of Answer.
Cross-Complaints.

Defense of New Matter.
Defenses — Number.
Denial of Conclusion.
Information and Belief.
Negative Pregnant.

Proof of Pleading.
Sufficiency of Denial.

Affirmative Defense.

Allegations contained in affirmative defense are deemed denied by the plaintiff. *Raff v. Baird*, 76 Idaho 422, 283 P.2d 927 (1955).

Answers in Two Classes.

Answers are separated by Code into two classes: those which consist of denials, and therefore serve the purpose of raising direct issue upon plaintiff's allegations; and those which state new matter — that is, facts different from those averred by plaintiff and not embraced within judicial inquiry into their truth. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

There are two types of answers under the Code; (1) answers which consist of denials, and (2) answers which plead new matter. *Lang Co. v. Grandview Mut. Canal Co.*, 77 Idaho 220, 291 P.2d 297 (1955).

Answers which plead new matter are of two classes: (1) new matter used defensively as a bar to plaintiff's action, and (2) new matter used offensively by setting forth an independent cause of action in favor of a defendant. *Lang Co. v. Grandview Mut. Canal Co.*, 77 Idaho 220, 291 P.2d 297 (1955).

Contents of Answer.

An answer should properly deny every material allegation of the complaint but it is unnecessary to deny mere matters of surplusage. *Pence v. Durbin*, 1 Idaho 550 (1874); *Swanholm v. Reeser*, 3 Idaho 476, 31 P. 804 (1892).

Cross-Complaints.

A cross-complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect the action to which it relates, but need not necessarily seek relief against all or any of the original plaintiffs or defendants. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

Where copy of contract is attached to answer, failure to deny due execution by affidavit does not admit same when answer and contract construed together do not constitute defense founded upon written instrument, but set up matters proper for cross-complaint. *Citizens Bank & Trust Co. v. Pocatello Milling & Elevator Co.*, 41 Idaho 403, 240 P. 186 (1925).

Cross-demand must be pleaded as fully as original cause of action, and must be sufficient in itself without recourse to other pleadings, unless expressly referred to therein. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

Defense of New Matter.

In an action of claim and delivery, a defense based on possession by virtue of a lien is not new matter which must be affirmatively pleaded, but may be shown in evidence under denials in the answer. *Lindsay v. Wyatt*, 1 Idaho 738 (1878).

A defense of new matter does not deny any fact; it assumes the averments of the complaint to be true, and by an express or silent admission, admits the truth of the complaint as far as it goes. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

Answer containing general denial and setting forth new matter should not be stricken. *Peterson v. Bell*, 50 Idaho 521, 298 P. 379 (1931).

Defenses — Number.

The defendant may set up as many defenses or counterclaims as he may have, but they must be separately stated in separate counts. *Jones v. Caldwell*, 20 Idaho 5, 116 P. 110 (1911).

The statute not only permits but requires a defendant to set up any and all defenses he may have, whether legal or equitable in character, by answer in the original action. *Naccarato v. Village of Priest River*, 68 Idaho 368, 195 P.2d 370 (1948).

Denial of Conclusion.

A denial of indebtedness without a denial of the facts pleaded to show the existence of the indebtedness is a denial of a conclusion of law and raises no issue of fact. *Swanholm v. Reeser*, 3 Idaho 476, 31 P. 804 (1892).

Information and Belief.

Matters of public record must be denied positively; denials on information and belief are insufficient. *Simpson v. Remington*, 6 Idaho 681, 59 P. 360 (1899); *Work v. Kinney*, 7 Idaho 460, 63 P. 596 (1900); *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 P. 789 (1908); *Vadney v. State Bd. of Medical Exmrs.*, 19 Idaho 203, 112 P. 1046 (1911); *First Nat'l Bank v. Walker*, 27 Idaho 199, 148 P. 46 (1915).

It is not permissible to deny on information and belief a matter appearing on the records of the probate court (now magistrates' division) in the same county wherein the action in which such denial is filed is pending. *Sneddon v. Birch*, 39 Idaho 720, 230 P. 29 (1924). See, however, *Dittemore v. Cable Milling Co.*, 16 Idaho 298, 101 P. 593 (1909).

The rule prohibiting denial on information and belief of matters on record should not be extended to the length of requiring a defendant to inform himself as to the files and records of referees in bankruptcy in the fed-

eral courts in Idaho, and in bankruptcy courts generally wherein the proceedings are chiefly had before a referee, to which proceeding defendant was not a party. *Dittemore v. Cable Milling Co.*, 16 Idaho 298, 101 P. 593 (1909).

It is proper to deny on information and belief matters of record before boards and departments of government, to which the pleader is not a party. *Dittemore v. Cable Milling Co.*, 16 Idaho 298, 101 P. 593 (1909).

If the pleader avers that he has no knowledge or information sufficient to form a belief of the truthfulness of an allegation, it is sufficient averment that he has no belief, and is a good basis for his denial. *Golden v. Spokane & I. E. R.R.*, 20 Idaho 526, 118 P. 1076 (1911).

A denial on information and belief when the truth of the allegations attempted to be denied may be easily or readily obtained by the defendants is not sufficient. *First Nat'l Bank v. Callahan Mining Co.*, 28 Idaho 627, 155 P. 673 (1916).

An allegation "that your affiant is informed and believes, and therefore alleges the fact to be that," then followed with the matter alleged is sufficient denial on information and belief or a sufficient allegation on information and belief, while an allegation that a litigant is informed and believes certain facts, without charging that such are the facts, is insufficient. *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936); *In re Matthews*, 57 Idaho 75, 62 P.2d 578, 111 A.L.R. 13 (1936).

Negative Pregnant.

A negative pregnant is a literal denial of the allegations in the complaint in the exact language of the complaint itself, which is insufficient to tender an issue or, in truth and in fact, fails to constitute a denial at all. *Bell v. Stadler*, 31 Idaho 568, 174 P. 129 (1918).

Where the complaint in an action on a promissory note alleges that \$100.00 is a reasonable attorney fee, and the answer denies that \$100.00 is a reasonable attorney fee, this is a negative pregnant and tenders no issue. *Craven v. Bos*, 38 Idaho 722, 225 P. 136 (1924).

Proof of Pleading.

Admissions made in pleadings are not required to be supported by evidence on the part of the adverse party. Such admissions are taken as true against the party making them, without further proof or controversy. On the other hand, plaintiff is deemed to have denied

all allegations of new matter contained in the answer, but such statutory denials do not impose upon plaintiff the necessity of proving any such allegations, in the event he desires to rely on or avail himself of any admissions therein contained. *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 217, 101 P. 81 (1908), reversed on other grounds, *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 235, 101 P. 81 (1909).

Sufficiency of Denial.

Where a verified complaint alleges the possession by plaintiff of land traversed by a watercourse; that defendants built a dam across the watercourse a little below plaintiff's land, thereby causing the water to flow back over plaintiff's land, causing him damage, an answer, not denying the existence of the watercourse but merely denying building a dam across the same, is evasive and bad. *Norris v. Glenn*, 1 Idaho 590 (1875).

A denial of the correctness of an account is not a sufficient denial of a complaint on a balance of account due. *Swanholm v. Reeser*, 3 Idaho 476, 31 P. 804 (1892).

A denial of the allegations of a complaint which is otherwise sufficient is not rendered objectionable because it concludes with the words, "other than as hereinafter set forth," although the pleader does not thereafter refer to the same. *Anderson v. War Eagle Consol. Mining Co.*, 8 Idaho 789, 72 P. 671 (1903).

A denial of each and every of the allegations contained in certain specified paragraphs is a sufficient denial. *Joyce v. Rubin*, 23 Idaho 296, 130 P. 793 (1913).

Denials in an answer to an action on super-seedeas bond that defendants had failed to comply with the judgment or that they had breached the contract in a manner and form alleged by the plaintiff is sufficient to raise an issue as to whether there had been a breach. *Coeur d'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307 (1936).

A denial of an allegation in a complaint that plaintiff was authorized to do business in the state was insufficient, in the absence of an allegation that it was doing business in the state, to require plaintiff to prove that it had complied with the constitution and statutes dealing with the regulation of foreign corporations doing business in the state. *Perry v. Reynolds*, 63 Idaho 457, 122 P.2d 508 (1942).

An answer denying "each and every allegation" contained in a cross complaint was held sufficient. *Metzker v. Lowther*, 69 Idaho 155, 204 P.2d 1025 (1949).

Rule 8(c). Affirmative defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory or comparative negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

STATUTORY NOTES

Cross References. Counterclaim, reply to denominated as such, Rule 7(a).

Pleading special matters, Rule 9(a).
Signing of pleadings, Rule 11(a)(1).

JUDICIAL DECISIONS**ANALYSIS**

Affirmative Defense.
Burden of Proof.
Compulsory Counterclaims.
Constitutionality of a Statute.
Defense of Agency.
Failure to Amend Answer.
Issue Not Plead.
Purpose.
Statute of Frauds.
Statute of Limitations.
Sufficiency of Pleading.

Affirmative Defense.

Where the defendant knew of the affirmative defenses, they were raised before any trial of the cause on its merits, and the defendant was given time to argue against their application, raising the affirmative defenses for the first time in a motion for summary judgment did not constitute a waiver. *Callenders, Inc. v. Beckman*, 120 Idaho 169, 814 P.2d 429 (Ct. App. 1991).

District court did not err in treating respondents' answer as a counterclaim because it specifically denied the claims and prayed for relief that the trial court enter an order quieting title to the land identified in the answer in their favor, and that said decree declare and adjudge that respondents own in fee simple and were entitled to the quiet and peaceful possession of the real property identified in the answer. *Kiebert v. Goss*, 144 Idaho 225, 159 P.3d 862 (2007).

Burden of Proof.

Defendants pleading statute of limitations in a medical malpractice case had the burden of going forward with uncontradicted evi-

dence showing that the tumor which appeared on X-rays taken in excess of two years prior to commencement of action was progressive or otherwise dangerous to the health of the plaintiff, in order to establish that the plaintiff had incurred some damage at that time. *Hawley v. Green*, 117 Idaho 498, 788 P.2d 1321 (1990).

Compulsory Counterclaims.

The claim of a tenant to a refund of a security deposit may be subject to an offset for damages allowed to the landlord. Indeed, such a counterclaim — if it arose from the same transaction, i.e., the tenancy agreement, which forms the basis for a dispute over the security deposit — would be a compulsory one which could not be raised in a separate, independent action. *Fleming v. Hathaway*, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984), review denied, 116 Idaho 466, 776 P.2d 828 (1984).

Constitutionality of a Statute.

Since the constitutionality of a statute is not ordinarily an issue upon which evidence must be presented at trial or about which one must be forewarned in order to prepare evidence for trial, the defense of unconstitutionality of a statute need not ordinarily be pleaded. *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976).

Defense of Agency.

In an action for failure to provide insurance, the defense that the defendant agents bound an insurance company and were not personally liable was an affirmative defense depending on proof of matters unrelated to the allegations of the complaint and notice of

this defense should have been given in the pleadings. *Keller Lorenz Co. v. Insurance Assocs. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977).

Failure to Amend Answer.

Where defendant admitted all elements necessary to establish plaintiff's right to relief and failed to amend its answer to set forth affirmative defense of fraud as ordered by court, trial court properly granted summary judgment under I.R.C.P. 56(c), since it was proper for trial court to condition denial of summary judgment upon defendant's amending answer within ten days and since record did not indicate that the failure to amend the answer was due to inadvertence or excusable neglect. *McKee Bros. v. Mesa Equip., Inc.*, 102 Idaho 202, 628 P.2d 1036 (1981).

Issue Not Plead.

The plaintiff's failure to cite the particular statute of limitations upon which it relied as a defense to the defendant's counterclaim would normally result in the waiver of the defense of the statute of limitations; however, where the evidence showed that the statute of limitations issue was not only tried by consent of the parties, but it was actually conceded by the defendant to be valid, it should be deemed to have been raised in the pleadings. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984).

Purpose.

The purpose of this rule requiring affirmative defenses to be pleaded is to alert the parties concerning the issues of fact to be tried and to afford them an opportunity to present evidence to meet those defenses. *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976).

Statute of Frauds.

The statute of frauds defense is an affirmative defense which must be specifically raised by the pleadings and where it was first raised on appeal at oral argument, it came much too late to be available to support the trial court's judgment for the defendant on appeal. *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 588 P.2d 939 (1978).

Even though it would have been a better practice for the plaintiff lessee to have raised the affirmative defense of the statute of frauds in her reply to the defendant lessor's counterclaim or to have requested an amendment, where the defendant knew of the affirmative defense and was given time to present argument in opposition to the defense, the lessee did not waive her right to raise the statute of frauds defense by first raising it in a summary judgment motion. *Bluestone v.*

Mathewson, 103 Idaho 453, 649 P.2d 1209 (1982).

Although a court is not obliged to consider the statute of frauds if not pleaded, the court is not prohibited from considering the statute. *Good v. Hansen*, 110 Idaho 953, 719 P.2d 1213 (Ct. App. 1986).

Because the statute of frauds is an affirmative defense that must be pled, where the defendants did not list the threshold issue of waiver with respect to their statute of frauds defense as an issue on appeal or otherwise address the issue in their opening brief, the issue was not preserved on appeal. *Rowley v. Fuhrman*, 133 Idaho 105, 982 P.2d 940 (1999).

Statute of Limitations.

The affirmative defense of the statute of limitation, and the particular statute which is applicable, must be asserted in a responsive pleading. *Modern Mills, Inc. v. Havens*, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Where the defendant raised the oral-contract statute of limitation in his answer to the claim, nothing more was required to prove the defense, as the plaintiff's case-in-chief included evidence of the date of each item charged; therefore, the issue was not barred from consideration on appeal. *Modern Mills, Inc. v. Havens*, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

In an appeal from a magistrate's entry of summary judgment for payment of delinquent property taxes, a taxpayer did not waive the defense of time limitation where, although the defense was not pled in the magistrate proceeding, a copy of the limitations statute was introduced in the hearing for summary judgment which was tried by consent of the parties. *Childers v. Wolters*, 115 Idaho 527, 768 P.2d 790 (Ct. App. 1988).

The statute of limitations is an affirmative defense which must be pleaded and proved by the defendant and the defendant has the burden of proving every element necessary to establish such a defense. *Hawley v. Green*, 117 Idaho 498, 788 P.2d 1321 (1990).

Sufficiency of Pleading.

In determining the adequacy of allegations of fraud that are considered in opposition to a motion for summary judgment, the trial court must consider both the nonmoving party's pleadings and any affidavits of the nonmoving party filed in opposition to the motion for summary judgment. *First Sec. Bank v. Webster*, 119 Idaho 262, 805 P.2d 468 (1991).

Cited in: *Gardner v. Hollifield*, 96 Idaho 609, 533 P.2d 730 (1975); *Johnston v. Pierce Packing Co.*, 550 F.2d 474 (9th Cir. 1977); *Beare v. Stowes' Bldrs. Supply, Inc.*, 104 Idaho 317, 658 P.2d 988 (Ct. App. 1983); *Fairchild v.*

Fairchild, 106 Idaho 147, 676 P.2d 722 (Ct. App. 1984); Wing v. Hulet, 106 Idaho 912, 684 P.2d 314 (Ct. App. 1984); Herrmann v. Wood-

ell, 107 Idaho 916, 693 P.2d 1118 (Ct. App. 1985); Nguyen v. Bui, 146 Idaho 187, 191 P.3d 1107 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Affirmative Defense Designated Counter-claim.

Amendment After Trial.

Answers in Two Classes.

Bankruptcy.

Chattel Mortgage.

Confession and Avoidance.

Construction.

Contributory Negligence.

Defense of New Matter.

Equitable Right of Action.

Failure of Consideration.

Fraud.

Lack of Bond.

Proof.

Res Judicata.

Statute of Limitations.

Title to Property.

Waiver of Defenses.

Affirmative Defense Designated Counter-claim.

Former similar rule did not relieve a plaintiff from replying to a pleading designated as a counterclaim even though the court should determine that it is an affirmative defense mistakenly denominated a counterclaim. *State ex rel. Symms v. Thirteenth Judicial Dist.*, 91 Idaho 237, 419 P.2d 679 (1966).

Amendment After Trial.

Under former similar rule the defendants were required to plead in the first instance the defenses of the statute of limitations, the statute of frauds, and that they had acquired title by adverse possession, which they sought to incorporate in their answer by amendment after the trial. *Dickerson v. Brewster*, 88 Idaho 330, 399 P.2d 407 (1965).

Answers in Two Classes.

Answers were separated by Code into two classes: those which consist of denials, and therefore serve the purpose of raising direct issue upon plaintiff's allegations; and those which state new matter — that is, facts different from those averred by plaintiff and not embraced within judicial inquiry into their truth. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

There were two types of answers under the Code; (1) answers which consist of denials, and (2) answers which plead new matter. *Lang Co. v. Grandview Mut. Canal Co.*, 77 Idaho 220, 291 P.2d 297 (1955).

Answers which plead new matter are of two classes: (1) new matter used defensively as a bar to plaintiff's action, and (2) new matter used offensively by setting forth an independent cause of action in favor of a defendant. *Lang Co. v. Grandview Mut. Canal Co.*, 77 Idaho 220, 291 P.2d 297 (1955).

Bankruptcy.

Allegation of defendant's discharge in bankruptcy and that he listed the items of indebtedness alleged in plaintiff's complaint in his schedule of obligations was insufficient without allegation that plaintiff had notice or actual knowledge of the bankruptcy proceeding in time to have filed a claim. *Bullock v. Jaeger*, 92 Idaho 271, 441 P.2d 720 (1968).

Chattel Mortgage.

In an action on a note secured by a chattel mortgage, the mortgagee is not required to allege that the note was secured by a mortgage originally and then avoid this effect by averment that it had become valueless where this did not appear from the face of the complaint; and the court erred in refusing plaintiff's proof that the security had become valueless, since plaintiff was not required to reply to the affirmative defense set up in an answer, the rule being that advantage of any affirmative matter which would tend to avoid affirmative defense set up in the answer could be taken advantage of as fully as if plaintiff were permitted to specifically plead his matter in defense thereto. *Edminster v. Van Eaton*, 57 Idaho 115, 63 P.2d 154 (1936).

Confession and Avoidance.

New matter may be introduced under general denial, if in aid of controverting cause of action alleged by plaintiff, but if in aid of confession and avoidance, then it cannot be introduced unless it is pleaded affirmatively. *Boise City v. Better Homes, Inc.*, 72 Idaho 441, 243 P.2d 303 (1952).

In an action for the repair of a truck, a defendant who alleged in his answer that such repairs were necessitated by the plaintiff's negligence in previous repairs had the burden of proof as to such affirmative defense. *Dick v. Reese*, 90 Idaho 447, 412 P.2d 815 (1966).

Construction.

Although former similar section enumerated 19 affirmative defenses, the listing was

not intended to be exhaustive or exclusive. *Garren v. Butigan*, 95 Idaho 355, 509 P.2d 340 (1973).

Contributory Negligence.

Contributory negligence is a matter of defense in this state. The burden of proving contributory negligence rests on the defendant. *Carscallen v. Coeur d'Alene & St. Joe Transp. Co.*, 15 Idaho 444, 98 P. 622 (1908); *Graves v. Northern Pac. Ry.*, 30 Idaho 542, 166 P. 571 (1917); *Hard v. Spokane Int'l Ry.*, 41 Idaho 285, 238 P. 891 (1925); *Madron v. McCoy*, 63 Idaho 703, 126 P.2d 566 (1942).

A plaintiff who would cast on defendant the burden of pleading and proving contributory negligence must be careful not to disclose his own contributory negligence either in his pleading or by his proof, and where plaintiff's pleading or proof, or both, show contributory negligence on his part so conclusively that reasonable minds could not differ with respect thereto, then defendant may avail himself thereof without pleading the same. *Goure v. Storey*, 17 Idaho 352, 105 P. 794 (1909); *Stanger v. Hunter*, 49 Idaho 723, 291 P. 1060 (1930); *Polly v. Oregon Short Line R.R.*, 51 Idaho 453, 6 P.2d 478 (1931); *Pipher v. Carpenter*, 51 Idaho 548, 7 P.2d 589 (1932).

Contributory negligence is a defense to be pleaded and proved by defendant; but that does not alter the rule that, where the complaint itself shows that the negligence of plaintiff was one of the contributing causes of the injury, plaintiff cannot recover. *Goure v. Storey*, 17 Idaho 352, 105 P. 794 (1909).

Insofar as the defense of contributory negligence is concerned, it is, in effect, a plea in avoidance. *Hard v. Spokane Int'l Ry.*, 41 Idaho 285, 238 P. 891 (1925).

Contributory negligence is a matter of defense and it is not necessary that the plaintiff plead or prove the negative thereof. *Burns v. Getty*, 53 Idaho 347, 24 P.2d 31 (1933).

If contributory negligence is treated by the parties as one of the issues at the trial and they introduce evidence thereon without objection, the irregularity of the manner in which the issue was raised by the pleadings will be regarded thereafter as waived. *French v. Tebben*, 53 Idaho 701, 27 P.2d 474 (1933).

The burden of proving contributory negligence rests on the party who sets up such a defense. *Cogswell v. C.C. Anderson Stores Co.*, 68 Idaho 205, 192 P.2d 383 (1948).

Contributory negligence is a matter of defense and its absence need not be negated in the complaint. *Splinter v. Nampa*, 70 Idaho 287, 215 P.2d 999, 17 A.L.R.2d 665 (1950).

Contributory negligence is a matter of defense, and the burden of proving such rests on

the defendant. *Hooton v. Burley*, 70 Idaho 369, 219 P.2d 651 (1950).

Party pleading contributory negligence as a defense has the burden of proving the defense. *Larsen v. Jerome Coop. Creamery*, 76 Idaho 439, 283 P.2d 1096 (1955).

The burden of proving contributory negligence on the part of an attendant of stock barn, who was electrocuted upon going into the barn, was on the party pleading it as defense unless it is made to appear from the evidence introduced by the plaintiff. *Russell v. Idaho Falls*, 78 Idaho 466, 305 P.2d 740 (1956).

Contributory negligence is a matter of defense and the burden is upon defendant to prove same unless such negligence appears from the complaint or from the evidence of plaintiff. *Hubble v. Record*, 80 Idaho 403, 331 P.2d 270 (1958).

Where appellants plead the affirmative defense of contributory negligence, they have the burden of proof on this issue; for them to prevail in this defense, they have to prove such defense by a preponderance of the evidence for if the evidence is in equipoise, the law requires a decision against the party having the burden of proof. *Van v. Union P.R.R.*, 83 Idaho 539, 366 P.2d 837 (1961).

Contributory negligence having been an integral part of the law since early time, it is considered a defense in an intersection collision case. *Drury v. Palmer*, 84 Idaho 558, 375 P.2d 125 (1962).

Where the pretrial conference order stated that respondent was contending that appellant was guilty of contributory negligence and also stated that such order supersedes all pleadings in the case, a new issue was introduced into the action, such order in effect constituting an amendment raising a new issue, and a written demand for a trial by jury upon the issue of contributory negligence could be made within ten days after the service of such order. *Lehman v. Bair*, 85 Idaho 59, 375 P.2d 714 (1962).

The burden of proof of the affirmative defense of contributory negligence is upon the party pleading such defense unless it appears from the evidence introduced by plaintiff. *Riley v. Larson*, 91 Idaho 831, 432 P.2d 775 (1967).

Defense of New Matter.

The true test of whether matter relied on in defense is new, in the sense that it must be affirmatively pleaded, is whether it merely controverts the original cause of action, tendering no new issue, in which case it is simply a traverse, or whether it raises a new issue or involves the introduction of a new ingredient as the basis of such an issue, by way of

confession and avoidance, then it is new matter and must be pleaded affirmatively. *Lindsay v. Wyatt*, 1 Idaho 738 (1878).

A defense of new matter does not deny any fact; it assumes the averments of the complaint to be true, and by an express or silent admission, admits the truth of the complaint as far as it goes. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

Equitable Right of Action.

An equitable right of action which might be brought as an independent right of action may be interposed as a defense in a cross-complaint in an action involving the same subject-matter. *Penninger Lateral Co. v. Clark*, 22 Idaho 397, 126 P. 524 (1912), overruled on other grounds, *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

Failure of Consideration.

Contention to appellants that trial court committed error in sustaining respondent's objection to a question propounded to appellant whereby the witness was asked to explain what consideration was paid him by the corporation for the execution of the note and mortgage involved in this suit, such objection being that an attempt was being made to alter a written instrument by parol evidence was not sustained in view of the fact that there was no issue under the pleadings regarding the consideration for either instrument nor was anything pleaded by either party claiming want or failure of consideration or fraud on the part of any party. *Rosenberry v. Clark*, 85 Idaho 317, 379 P.2d 638 (1963).

Under certain conditions parol evidence may be introduced to show the true consideration or want of consideration for a promissory note or other instrument. However, the supreme court has consistently held that the defense of want or failure of consideration are affirmative defenses to be pleaded. *Rosenberry v. Clark*, 85 Idaho 317, 379 P.2d 638 (1963).

Fraud.

In spite of buyer's contention that her signature to the purchase agreement was obtained by fraud on the part of the seller, evidence of fraud was not admissible because fraud was not alleged. *Commercial Credit Equip. Corp. v. Knowlton*, 86 Idaho 314, 386 P.2d 370 (1963).

Action of trial court in entering judgment enforcing equipment lease contract against the lessee was tantamount to finding against him on the issue of fraud, which he claimed was presented at the trial, although fraud was not pleaded by lessee and trial court made no finding thereon. *C.I.T. Corp. v. Hess*, 88 Idaho 1, 395 P.2d 471 (1964).

An insurer defendant, having filed an answer charging fraud on the part of the insured in his application for the policy, may be permitted to present evidence of fraudulent collusion between the insured and the agent. *Matthews v. New York Life Ins. Co.*, 92 Idaho 372, 443 P.2d 456 (1968).

Lack of Bond.

Objection to lack of bond required under § 6-610 is a matter of avoidance or affirmative defense and defendant waived right to assert bonding requirement where he raised the issue of lack of bond only after his answer. *Garren v. Butigan*, 95 Idaho 355, 509 P.2d 340 (1973).

Proof.

In order for a defendant to take advantage of an affirmative defense, he must specifically allege it or his proof will not be admitted. But plaintiff may take advantage of any affirmative matter which would tend to avoid the affirmative matter set forth in defendant's answer as fully as if he were permitted to specifically plead his matter defensive thereto. *Pettengill v. Blackman*, 30 Idaho 241, 164 P. 358 (1917); *Edminster v. Van Eaton*, 57 Idaho 115, 63 P.2d 154 (1936).

Res Judicata.

Objection that first divorce suit was a bar to the maintenance of the second came too late where no objection of another cause pending was raised by answer to such second divorce suit but was raised on appeal from order vacating divorce decree granted in second suit. *Bedwell v. Bedwell*, 68 Idaho 405, 195 P.2d 1001 (1948).

Statute of Limitations.

Where a defendant did not plead the statute of limitations as a bar to a cause of action, the defense must be deemed to have been waived. *Rogers v. Oregon-Washington Ry. & Nav. Co.*, 28 Idaho 609, 156 P. 98 (1916).

The affirmative defense of the statute of limitations must be asserted in a responsive pleading if one is required. *Resource Eng'r, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

Where defendant did not mention defense of statute of limitations in his motion for dismissal under former Rule 12(b)(6), but did submit memoranda on the defense, this defense was properly presented and was not waived. *Cook v. Soltman*, 96 Idaho 187, 525 P.2d 969 (1974).

The requirement that statute of limitation defenses be affirmatively asserted is applicable to petitions to intervene. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974), *aff'd*, 98 Idaho 379, 565 P.2d 572 (1977).

Title to Property.

Where a complaint alleges the sale and delivery of property, an answer denying the purchase of or receiving the property does not authorize defendant to show illegality of the contract or failure of title, but such matters must be affirmatively pleaded. *Miller v. Donovan*, 11 Idaho 545, 83 P. 608 (1905).

Waiver of Defenses.

Failure of an executrix to plead failure of a plaintiff to present a claim to the estate precludes the urging of such defense on appeal. *Frasier v. Carter*, 92 Idaho 79, 437 P.2d 32 (1968).

In an action for the pasturing of cattle, in which the defendant cross-complained for alleged breaches of the pasturing agreement by the defendant waived the failure of plaintiff to plead accord and satisfaction amounting to waiver of any breaches in the contract by permitting evidence of notice to defendant's agent of necessity of moving the cattle, moving of cattle from one pasture to another, and defendant's delivery to plaintiff of a check for the amount claimed for pasture, upon which he later stopped payment, to be introduced without objection. *Copenhaver v. Lavin*, 92 Idaho 681, 448 P.2d 774 (1968).

Rule 8(d). Effect of failure to deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading, except those necessary to sustain an action for divorce. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

STATUTORY NOTES

Cross References. Divorce and related proceedings, Rule 65(g).

JUDICIAL DECISIONS**Petition for Writ of Habeas Corpus.**

A petition for a writ of habeas corpus is not to be treated as a complaint which requires a responsive pleading, for the sole function of

the petition is to secure the issuance of the writ. *Jacobsen v. State*, 99 Idaho 45, 577 P.2d 24 (1978).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Denial Presumed.
Distinction Between Parties.
Waiver.

Denial Presumed.

Any affirmative matter which must be pleaded as a defense is deemed denied. *Allen v. Phoenix Assurance Co.*, 12 Idaho 653, 88 P. 245 (1906); *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

Allegations contained in affirmative defense are presumed denied by plaintiff. *Raff v. Baird*, 76 Idaho 422, 283 P.2d 927 (1955).

Distinction Between Parties.

There is a distinction between the situation of defendant who fails to plead matters relied upon as an affirmative defense and of the plaintiff attacking affirmative matter pleaded as new matter in the answer. *Pettengill v. Blackman*, 30 Idaho 241, 164 P. 358 (1917).

Waiver.

Where defendants fail to deny an allegation of the complaint, they waive their right to proof thereof and plaintiff is justified in not tendering his testimony in support of the same. *Burke v. McDonald*, 2 Idaho 679, 33 P. 49 (1890).

Rule 8(e)(1). Pleading to be concise and direct — Consistency.

Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

JUDICIAL DECISIONS

Inferences.

Although the pleading was not at the apex of clarity, the court was allowed to draw all plain inferences from the facts pled when determining the question of sufficiency and

the plaintiff's pleading was sufficient to state a claim and to notify the defendant of plaintiff's contentions. *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 766 P.2d 1243 (1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Bill of Particulars.

Inferences.

Motion to Make More Definite.

Statement of Essential Facts.

Bill of Particulars.

A plaintiff may be required by a motion for a bill of particulars to furnish the name of defendant's servant responsible for the plaintiff's damage. *Union Cent. Life Ins. Co. v. Nielson*, 62 Idaho 483, 114 P.2d 252 (1941).

Inferences.

The allegations in pleadings must be alleged directly and positively, and not left to be deduced from inference or argument, but it must not be assumed that in no case are inferences permissible to be drawn from facts alleged, for it is a rule of pleading to draw plain inferences from well-pleaded facts, and this will be done to sustain a pleading. Pleader must state facts positively and not

leave it to argument or inference. *Nielson v. Board of Directors*, 63 Idaho 108, 117 P.2d 472 (1941).

Motion to Make More Definite.

Where careful reading of complaint convinces appellate court that defendant clearly understood what he would be called upon to meet, it will find no error in denying motion to make complaint more definite and certain. *Tsuboi v. Cohn*, 40 Idaho 102, 231 P. 708, 39 A.L.R. 851 (1924).

Statement of Essential Facts.

The pleading should contain a positive statement of the essential facts, and is insufficient where it merely states that such facts are alleged to exist. *Holton v. Sand Point Lumber Co.*, 7 Idaho 573, 64 P. 889 (1901).

In determining whether a complaint does or does not state a cause of action, every reasonable intentment will be made to sustain it. *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Rule 8(e)(2). Two or more statements of claim or defense permissible.

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

STATUTORY NOTES

Cross References. Joinder of claims and remedies, Rule 18(a).

Signing of pleadings, Rule 11(a)(1).

JUDICIAL DECISIONS

ANALYSIS

Alternative Forms of Relief.
 Attorney Fees.
 Consistency of Actions.
 Separate Complaints.
 Untrue Facts.

Alternative Forms of Relief.

Modern pleading practice no longer prohibits parties from seeking alternative forms of relief even if the remedies sought are inconsistent; for example, in an action on contract a plaintiff may claim both damages and restitution, with the ultimate election to be made by the court. *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980).

Plaintiffs in an action to enjoin defendant from obstructing a roadway and underpass were not required to elect between their inconsistent theories, on the one hand, that they were entitled to use the underpass as a public road and, on the other, that they had a right to use it as a prescriptive easement. *Evans v. Jensen*, 103 Idaho 937, 655 P.2d 454 (Ct. App. 1982).

Attorney Fees.

It was inappropriate to award attorney fees under § 12-121 solely on the basis of pleading "alternative and contradictory facts". *Murr v. Odmark*, 112 Idaho 606, 733 P.2d 827 (Ct. App. 1987).

Consistency of Actions.

Under the circumstances of this case, for-

mer wife's action with regard to an alleged breach of a contract to pay child support was not inconsistent with or repugnant to her action for child support. *Bondy v. Levy*, 119 Idaho 961, 812 P.2d 268 (1991).

Separate Complaints.

This rule permitting the pleading of inconsistent claims contemplates the claims being filed in the same complaint. Where a claim for monies due under a contract for child support was filed in a separate complaint, along with a claim filed with the court to enter an order awarding child support, both of which were filed on the same date, filing in separate actions by separate complaints made one or the other amenable to dismissal under I.R.C.P. 12(b)(8) which authorizes a motion to dismiss because another action is pending between the same parties for the same cause. *Bondy v. Levy*, 119 Idaho 961, 812 P.2d 268 (1991).

Untrue Facts.

The right to plead alternative or inconsistent facts under this rule does not include a right to plead a set of facts known to be untrue. *Murr v. Odmark*, 112 Idaho 606, 733 P.2d 827 (Ct. App. 1987).

Cited in: *Keese v. Fetzek*, 106 Idaho 507, 681 P.2d 600 (Ct. App. 1984); *Maxson v. Farmers Ins. of Idaho, Inc.*, 107 Idaho 1043, 695 P.2d 428 (Ct. App. 1985); *Associates N.W. v. Beets*, 112 Idaho 603, 733 P.2d 824 (Ct. App. 1987).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Consistency of Defenses.
 Election of Remedies.
 Multiple Defenses.
 Statement of Cause of Action.

Consistency of Defenses.

A defendant may set forth in his answer as many defenses and counterclaims as he may have, and such defenses, to a certain extent, may be inconsistent with each other, but they must not be so inconsistent that the proof of one would necessarily disprove the other. *Murphy v. Russell*, 8 Idaho 133, 67 P. 421 (1901); *Harshbarger v. Eby*, 28 Idaho 753, 156 P. 619 (1916); *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927); *Fenton v. King Hill Irrigation Dist.*, 67 Idaho 456, 186 P.2d 477 (1947).

A complaint alleging a boundary by acquiescence, the elements of an action to quiet title, and calling upon the defendant to set

forth any claim he may have was sanctioned by former identical rule and the claims in the complaint are not inconsistent. *Dickerson v. Brewster*, 88 Idaho 330, 399 P.2d 407 (1965).

Election of Remedies.

Action based on breach of contract to maintain partition fence and damage to property as result of such failure may be set forth in separate counts and plaintiff will not be required to elect on which count he will proceed. *Tsuboi v. Cohn*, 40 Idaho 102, 231 P. 708, 39 A.L.R. 851 (1924).

Dismissal of plaintiffs' complaint for failure to elect between rescission of an alleged fraudulent contract and damages for the alleged fraud was error. *Moon v. Brewer*, 89 Idaho 59, 402 P.2d 973 (1965).

Multiple Defenses.

Whether a complaint states more than one cause of action is determined by its substance

and not by its form. *Dahlquist v. Mattson*, 40 Idaho 378, 233 P. 883 (1925).

The statute not only permits but requires the defendant to set up any and all defenses he may have, whether legal or equitable in character by answer in the original action. *Naccarato v. Village of Priest River*, 68 Idaho 368, 195 P.2d 370 (1948).

Statement of Cause of Action.

In determining whether a complaint does or does not state a cause of action, every reasonable intendment will be made to sustain it. *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Rule 8(f). Construction of pleadings.

All pleadings shall be so construed as to do substantial justice.

JUDICIAL DECISIONS

ANALYSIS

Counterclaim.
Default Cases.
Notice.

Counterclaim.

District court did not err in treating respondents' answer as a counterclaim because it specifically denied the claims and prayed for relief that the trial court enter an order quieting title to the land identified in the answer in their favor, and that said decree declare and adjudge that respondents own in fee simple and were entitled to the quiet and peaceful possession of the real property identified in the answer. *Kiebert v. Goss*, 144 Idaho 225, 159 P.3d 862 (2007).

Default Cases.

The command of this rule that "All pleadings shall be so construed as to do substantial justice" applies to pleadings in default cases

as well and they are to be construed no more restrictively than pleadings suggestive of other judgment. *Johnson v. Hartford Ins. Group*, 99 Idaho 134, 578 P.2d 676 (1978).

Notice.

Complaint put the franchisor on notice that the claimant brought a suit against it, because the franchisor was served, filed an answer, and moved for summary judgment. *Youngblood v. Higbee*, 145 Idaho 665, 182 P.3d 1199 (2008).

Cited in: *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984); *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090 (Ct. App. 1986); *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 759 P.2d 905 (Ct. App. 1988); *Farnworth v. Femling*, 125 Idaho 283, 869 P.2d 1378 (1994); *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 108 P.3d 332 (2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Caption.
Clerical Error.
Doubts As to Validity.
Liberal Construction.
Purpose.
Specific Performance.

Caption.

A complaint which charged the defendant with facts constituting a nuisance was sufficient to put defendant on notice that plaintiffs were demanding relief for a nuisance maintained by defendant even though the complaint was not so captioned. *Archer v. Shields Lumber Co.*, 91 Idaho 861, 434 P.2d 79 (1967).

Clerical Error.

A pleading should be so construed as to allege all of the facts that can be implied by fair and reasonable intendment from the facts

expressly alleged. Where a clerical mistake is made in a date and the whole pleading taken together clearly shows the correct date, this is sufficient. *McCormick v. Smith*, 23 Idaho 487, 130 P. 999 (1913).

Doubts As to Validity.

Doubts concerning the validity or sufficiency of a complaint must be resolved in favor of the complainant. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

Liberal Construction.

For the purpose of determining the effect of a pleading, its allegations must be liberally construed with the view to substantial justice between the parties. *Cantwell v. McPherson*, 3 Idaho 721, 34 P. 1095 (1893); *Fox v. Cosgriff*, 64 Idaho 448, 133 P.2d 930 (1943).

Judgment will not be reversed for errors in pleading which do not affect substantial right

of the parties. *Schultz v. Rose Lake Lumber Co.*, 27 Idaho 528, 149 P. 726 (1915).

A pleading should be construed so as to allege all facts that can be implied by fair and reasonable intentment from the facts expressly stated. *Fox v. Cosgriff*, 64 Idaho 448, 133 P.2d 930 (1943).

In determining whether a complaint does or does not state a cause of action, every reasonable intentment will be made to sustain it. *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Purpose.

The purpose and object of the code of pro-

cedure is to have actions tried upon their merits and not to have them dismissed on mere technicalities. *Nobach v. Scott*, 20 Idaho 558, 119 P. 295 (1911).

Specific Performance.

A demand for damages in the amount of the contract purchase price for the sale of real estate coupled with a tender of the deed to the court is substantially equivalent to a plea of specific performance and a literal prayer for specific performance in the complaint is unnecessary. *Tew v. Manwaring*, 94 Idaho 50, 480 P.2d 896 (1971).

Rule 9(a). Pleading special matters — Capacity.

It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except that when persons are made parties by the designation of unknown owners or unknown heirs or devisees of any deceased person, the pleader shall briefly allege such matters as are within the pleader's knowledge to identify such unknown parties and their possible connection in the claim set forth. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

STATUTORY NOTES

Cross References. Affirmative defenses, pleading, Rule 8(c).

Conditions precedent, pleading, Rule 9(c).

Fraud, mistake, condition of the mind, Rule 9(b).

Heirs as parties, Rule 17(d).

Incompetents, capacity, Rule 17(c).

Infants, capacity, Rule 17(c).

Judgment, pleading, Rule 9(e).

Libel or slander actions, facts to be set out, Rule 9(i).

Official document or act, Rule 9(d).

Public records, authentication, I.R.E. 901, 902.

Real property, description of, Rule 9(j).

Special damage, specifically stating, Rule 9(g).

Statute of limitations, pleading, Rule 9(h).

Substitution of parties, incompetency, Rule 25(b).

Time and place, materiality, Rule 9(f).

Unknown owners as parties, Rule 17(d).

JUDICIAL DECISIONS

Cited in: *W.L. Scott, Inc. v. Madras Aero-tech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Waiver of Defects.

Want of Capacity to Sue.

Waiver of Defects.

Where incompetency of plaintiff to sue appeared on face of complaint and objection was not raised or answered, it was deemed to be waived. *Valley Lbr. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 P. 24 (1907); *Marshall Field & Co. v. Houghton*, 35 Idaho 653, 208 P. 851 (1922); *Farmers' & Mechanics' Bank v. Gallaher Inv. Co.*, 43 Idaho 496, 253 P. 383 (1927); *Gallafent v. Tucker*, 48 Idaho 240, 281 P. 375 (1929); *Shaw Supply Co. v. Morgan*, 48 Idaho 412, 282 P. 492 (1929).

The objection that a person who has been appointed executor of the estate of a deceased person by a court of a foreign state, and who commences an action in this state to collect a debt due the estate, cannot maintain the action without first being appointed by a court of this state to represent the estate is waived if not raised by answer. *Anthes v. Anthes*, 21 Idaho 305, 121 P. 553 (1912).

Having failed to timely object to respondent's capacity to sue, appellants thereby waived any objection on that ground. *Farmers' & Mechanics' Bank v. Gallaher Inv. Co.*, 43 Idaho 496, 253 P. 383 (1927).

Want of Capacity to Sue.

Objection that plaintiff is without legal capacity to sue is waived if not taken by answer. *Thelen v. Thelen*, 32 Idaho 755, 188 P. 40 (1920).

Where noncompliance with statute requiring filing of certificate showing true names and trade names of persons doing business appears on face of complaint, objection may be

raised for want of capacity. *Shillingford v. Benewah County*, 48 Idaho 447, 282 P. 864 (1929).

An objection that the plaintiff has no legal capacity to sue does not include the objection that the action is not brought in the name of the real party in interest. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

In view of the mandatory nature of the act directing public liability insurance on state vehicles, the issue of want of undertaking for costs was properly raised by motion to strike rather than by demurrer for want of capacity to sue. *Pigg v. Brockman*, 79 Idaho 233, 314 P.2d 609 (1957).

Defendant's mere allegation in his counterclaim that plaintiff was a foreign corporation doing business in Idaho was insufficient to raise the issue of plaintiff's lack of capacity to sue in the courts of Idaho under § 30-504 (now repealed). *Dairy Equip. Co. v. Boehme*, 92 Idaho 301, 442 P.2d 437 (1968).

In an action to contest a will, the burden of proving capacity and standing to sue is upon the party initiating the action, not upon the petitioner for letters of administration to prove lack of standing and capacity on the part of the persons initiating the action. *Miller v. Martin*, 93 Idaho 924, 478 P.2d 874 (1970).

Where, in motion to dismiss contest, petitioner for letters of administration alleged that the contestants lacked interest to contest will, the burden of supporting such negative averment was met by filing a brief in connection with the motion to dismiss, setting out argument and authority supporting such contention. *Miller v. Martin*, 93 Idaho 924, 478 P.2d 874 (1970).

RESEARCH REFERENCES

A.L.R. Materiality of testimony forming basis of perjury charge as question for court or jury in state trial. 37 A.L.R.4th 948.

Rule 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.

In all averments of fraud or mistake, or violation of civil or constitutional rights, the circumstances constituting fraud or mistake, or violation of civil or constitutional rights shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. (Amended March 30, 1984, effective July 1, 1984.)

JUDICIAL DECISIONS

ANALYSIS

Adequacy of Allegations.
Appeal.
Elements of Fraud.
Failure to Plead.

Adequacy of Allegations.

In determining the adequacy of allegations of fraud that are considered in opposition to a motion for summary judgment, the trial court must consider both the nonmoving party's pleadings and any affidavits of the nonmoving party filed in opposition to the motion for summary judgment. *First Sec. Bank v. Webster*, 119 Idaho 262, 805 P.2d 468 (1991).

Where the only evidence concerning fraud came from plaintiff's own deposition where he stated that he had heard from others that defendant was exerting undue influence over original payor and that he knew original payor was tight and would not lend \$10,000 to anyone, and where the only evidence presented linking defendant to any possible fraud was that she was daughter of original payor's personal caretaker whom she had met several times, such evidence was not sufficient to satisfy the particularity requirement of this rule or to demonstrate that an issue of fraud existed. *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

Trial court did not err in granting summary judgment to a lender where the borrower's argument that the lender's assurances were misrepresentation in the inducement were, at best, promises of future performance and as such did not raise a genuine issue of material fact precluding summary judgment. *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp.* Idaho, 139 Idaho 492, 80 P.3d 1093 (2003).

Complaint that merely alleged the elements of a prima facie case of fraud, but which failed to outline the alleged fraudulent acts of a trust and its trustees with particularity, was insufficient under this rule and was properly dismissed for failure to state a cause of action. *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 106 P.3d 449 (2005).

Where a terminated employee sued his employer for breach of contract and alleged that his employer made false statements, the district court determined that the employee failed to plead with particularity the required elements of fraud. The district court denied the employee's motion to amend the complaint because the proposed amended complaint still lacked specificity. *Jenkins v. Boise*

Cascade Corp., 141 Idaho 233, 108 P.3d 380 (2005).

In dispute between siblings over a failed business partnership, brother failed to state a cause of action for fraud based on sister's false statement that her husband would commit suicide if plaintiffs sued them, because it was too vague and insubstantial to constitute duress, there was opportunity to determine the reality of the threat, the brother was represented by counsel, and the threats of suicide were not representations upon which he could justifiably rely. *Country Cove Dev., Inc. v. May*, 143 Idaho 595, 150 P.3d 288 (2006).

Where the homeowner alleged that her home was flooded as the result of a road reconstruction project performed by the city, her complaint was not separated into multiple causes of action; the only theory of recovery identified was negligence; because the complaint failed to include a short and plain statement of the claims of nuisance and inverse condemnation as required by Idaho R. Civ. P. 8(a)(1) and did not meet Idaho R. Civ. P. 9(b)'s particularity requirement, the district court properly granted summary judgment for the city. *Brown v. City of Pocatello*, 148 Idaho 802, 229 P.3d 1164 (2010).

Appeal.

Where appellant appealed the district court's grant of summary judgment in favor of appellee as it applied to appellant's fraud claim, the Court of Appeals noted that because the district court initially found that the requirements of this rule had not been complied with, in that the fraud claim was not pled with specificity, and defendant did not challenge this rule dismissal in his appeal; and the district court also found that the applicable statute of limitations for fraud, § 5-218, had expired, it would be inappropriate for the Court of Appeals to review the trial court's action when the action was not listed as an issue on appeal, and no argument or authority on the issue was contained in the brief on appeal. *MacLeod v. Reed*, 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995).

Elements of Fraud.

The elements of fraud are: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that the representation will be acted upon in a reasonably contemplated manner; (6) the listener's ignorance of its falsity; (7) the listener's reliance on the truth of the representation; (8) the listener's right to rely on the truth of the representation; and (9) the listener's consequent and

proximate injury. *Strate v. Cambridge Tel. Co.*, 118 Idaho 157, 795 P.2d 319 (Ct. App. 1990).

As to a fraud claim asserted in a case alleging sexual molestation of children, two daughters failed to plead with the particularity required in that they did not plead any false representations by the father. In any event, the claim would have been time barred. *Glaze v. Deffenbaugh*, 144 Idaho 829, 172 P.3d 1104 (2007).

Failure to Plead.

Where plaintiffs and vendor of defendant had orally agreed to sale of disputed property, plaintiffs had taken possession of the disputed land, exercised control over it for approximately three years, made substantial improvements thereon, and paid vendor \$1,200 of the \$1,500 sale price, and where the actual parties to the agreement testified to its essential terms, the description of the land was certain and based on uncontradicted testimony and after the second payment of \$600

vendor gave plaintiffs a receipt stating who the parties were and that \$1,200 was received in payment for the disputed land leaving a balance of \$300 to be paid, and evidence showed that defendant had knowledge of the agreement and had stated that he would take care of conveying title to the plaintiffs, failure of plaintiffs to plead misrepresentation on part of defendant as required by this rule did not preclude court from finding fraud on part of defendant. *Mikesell v. Newworld Dev. Corp.*, 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992).

Cited in: *Theriault v. A.H. Robins Co.*, 108 Idaho 303, 698 P.2d 365 (1985); *Galaxy Outdoor Adv., Inc. v. Idaho Transp. Dep't*, 109 Idaho 692, 710 P.2d 602 (1985); *Anderson-Blake, Inc. v. Los Caballeros, Ltd.*, 120 Idaho 660, 818 P.2d 775 (Ct. App. 1991); *Kepler v. WHW Mgt., Inc.*, 121 Idaho 466, 825 P.2d 1122 (Ct. App. 1992); *Estes v. Barry*, 132 Idaho 82, 967 P.2d 284 (1998); *Hoover v. Hunter*, 150 Idaho 658, 249 P.3d 851 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Agency.

Averments.

Inconsistent Allegations.

Judgment.

Stating Particular Circumstances.

Agency.

Evidence of fraudulent representations made by an agent acting within the scope of his authority is admissible under allegations in the complaint that such allegations were made by the principal. *Callahan v. Wolfe*, 88 Idaho 444, 400 P.2d 938 (1965).

Averments.

Statute requiring that all averments of fraud or mistake be stated with particularity was not complied with by allegations, in wife's motion to modify trial court's order concerning alimony, that fraud was practiced upon the court; presumptions favor the regularity and validity of trial court action where the record is silent, and it could not be determined from her motion that such fraud was practiced on the court as would vitiate proceedings had on her husband's original motion for modification. *Jordan v. Jordan*, 87 Idaho 432, 394 P.2d 163 (1964).

Inconsistent Allegations.

In case of discrepancies between words and figures, the words control, and where an exhibit is attached it will govern over an inconsistent allegation in the pleading. Where

there are inconsistencies not such as to destroy each other, the more favorable ones to the pleader's adversary will be given effect. *Harshbarger v. Eby*, 28 Idaho 753, 156 P. 619 (1916).

Judgment.

Action of trial court in entering judgment enforcing equipment lease contract against the lessee was tantamount to finding against him on the issue of fraud, which he claimed was presented at the trial, although fraud was not pleaded by lessee and trial court made no finding thereon. *C.I.T. Corp. v. Hess*, 88 Idaho 1, 395 P.2d 471 (1964).

Stating Particular Circumstances.

A common-law count for money had and received, without alleging the facts creating the indebtedness, is insufficient to state a cause of action for fraud. *Moser v. Pugh-Jenkins Furn. Co.*, 31 Idaho 438, 173 P. 639 (1918).

In a suit to enjoin the defendant's use of the name "United American Benefit Association, Inc." on the ground that it was deceptively similar to the name "American Home Benefit Association, Inc." used by the plaintiff, the plaintiff was not required to plead especially specific instances of deception and confusion resulting from the defendant's use of its name. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

RESEARCH REFERENCES

A.L.R. Mistake relied on to avoid release of claim for personal injuries, necessity of plead-

ing. 48 A.L.R. 1530, 71 A.L.R.2d 82, 13 A.L.R.4th 686.

Rule 9(c). Conditions precedent.

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

JUDICIAL DECISIONS**ANALYSIS**

Motion for Dismissal.
Tort Claims Act.

Motion for Dismissal.

Although the defendant lessee argued that the plaintiff lessor's action should have been dismissed, in that the lessor failed to plead and prove satisfaction of a condition precedent in the lease agreement, to the effect that the lease would become effective upon written acceptance signed at the lessor's office by an authorized employee, the trial court did not err in denying the lessee's motion for

dismissal, where the record revealed that even if that clause was a condition precedent, the evidence clearly showed that the condition was met. *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982).

Tort Claims Act.

The pleading requirements set forth in this rule do not apply to the Idaho Tort Claims Act, § 6-901 et seq. A cause of action exists as long as notice of the claim was delivered to the secretary of state's office in a timely manner. *Smith v. Mitton*, 140 Idaho 893, 104 P.3d 367 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Action on Contract.
Affirmative Defense.
Foreclosure of Carey Act Lien.
Part Performance of Lease.

Action on Contract.

In action on contract it is open to defendant to show that plaintiff did not perform his part of contract within time or in reasonably satisfactory manner, and in such case burden is upon plaintiff to establish facts showing such performance. *Dewar v. Taylor*, 43 Idaho 111, 249 P. 773 (1926).

Affirmative Defense.

Plaintiff's contention that failure to comply with condition in agreement of sale as to securing a new loan was not asserted as an affirmative defense by the purchasers in their pleadings and therefore could not be considered, was not sustained by the court which

held that the question was properly at issue before the trial court, both parties having fully developed their evidence as to whether such loan application was accepted; such loan being a condition precedent to an obligation arising under the agreement to purchase, the contract was unenforceable. *McMinn v. Holley*, 86 Idaho 186, 384 P.2d 229 (1963).

Foreclosure of Carey Act Lien.

In a suit to foreclose a Carey Act lien it is not strictly necessary to allege that the requirement of the federal statute has been complied with, but it would be the better practice to do so. *Idaho Irrigation Co. v. Pew*, 26 Idaho 272, 141 P. 1099 (1914).

Part Performance of Lease.

Part performance of a lease was not sufficiently set forth where the terms of the lease were not stated. *Fry v. Weyen*, 58 Idaho 181, 70 P.2d 359 (1937).

Rule 9(d). Official document or act.

In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law. In pleading

any public or private statute of the state of Idaho or of the United States, or any ordinance of a city or village of the state of Idaho, it is sufficient to refer to such statute or ordinance by the appropriate designation in the official or the recognized compilation thereof.

STATUTORY NOTES

Cross References. Public records, authentication, I.R.E. 901, 902.

Public records, method of proving, I.R.E., Rule 1005.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Judicial Notice.
Private Statute or Ordinance.

Judicial Notice.

The Supreme Court will take judicial notice of the contents of the journals of the Idaho legislature. *State v. Witzel*, 79 Idaho 211, 312 P.2d 1044 (1957).

The judicial notice taken by the courts of this state of the public and private official acts of the executive department of the state government includes the "Idaho Drivers Handbook" published under the authority of the department of law enforcement and the "Manual on Uniform Traffic Control Devices for Streets and Highways" prepared by the "American Association of State Highways Of-

ficials, Institute of Traffic Engineers, and National Conference on Street and Highway Safety," adopted by the Idaho board of highway directors. *Howard v. Missman*, 81 Idaho 82, 337 P.2d 592 (1959).

Private Statute or Ordinance.

Where appellants did not plead the existence of any private statute or ordinance referred to in the requested instruction as required by statute when it was requested that the court instruct pursuant to sections of the revised code of the city of Idaho Falls that it was the duty of the city to inspect all the electric wiring and apparatus installed in premises in the city, such failure to so plead precluded the giving of such instruction. *Russell v. Idaho Falls*, 78 Idaho 466, 305 P.2d 740 (1956).

RESEARCH REFERENCES

A.L.R. Judicial notice as to blood group test. 43 A.L.R.4th 579.

Rule 9(e). Judgment.

In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adjudication of Bankruptcy.
Allegation of Judicial Sale.
Conclusiveness of Judgment.
Order of Commitment to State Institution.
Statutory Method Optional.

Adjudication of Bankruptcy.

Allegation that one was duly adjudged a bankrupt is equivalent to allegation that or-

der was duly given and made adjudging him a bankrupt. *Evans v. Wood*, 41 Idaho 679, 241 P. 609 (1925).

Allegation of Judicial Sale.

In an action against a bidder at an administrator's sale to recover the difference between the amount of the bid and the sum realized at a resale, an allegation that the sale was made by virtue of an order of sale duly made by the probate court (now magis-

trates' division) is equivalent to a complete statement of all the facts which conferred jurisdiction upon the court to make the order of sale. *Ethell v. Nichols*, 1 Idaho 741 (1879), overruled on other grounds, *Clark v. Rossier*, 10 Idaho 348, 78 P. 358 (1904).

Conclusiveness of Judgment.

The rule established by the Supreme Court of the United States and followed in Idaho is that the judgment upon question directly involved in one suit is conclusive as to that question in another suit between same parties; but to thus operate it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there is any uncertainty on this head in record, the whole subject-matter of the action will be at large and open to new contention unless this uncertainty be removed by extrinsic evidence showing precise point involved and determined. *Russell v. Place*, 94 U.S. 606,

24 L. Ed. 214 (1877); *Mason v. Ruby*, 35 Idaho 157, 204 P. 1071 (1922); *Jensen v. Berry & Ball Co.*, 37 Idaho 394, 216 P. 1033 (1923).

Order of Commitment to State Institution.

In action by parents to recover child committed to state institution, parents may traverse statement in return that child is retained under order of commitment duly made, and if such issue be raised, defendant must show jurisdictional facts in proceedings that resulted in commitment. *Martin v. Vincent*, 34 Idaho 432, 201 P. 492 (1921).

Statutory Method Optional.

Party was not required, under former statute, to follow statutory method of pleading judgment, but if he elected to state facts instead of following statutory plan, he must set out all facts necessary to confer jurisdiction. *Jensen v. Berry & Ball Co.*, 37 Idaho 394, 216 P. 1033 (1923).

Rule 9(f). Time and place.

For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

STATUTORY NOTES

Cross References. Motion for judgment on pleadings, Rule 12(c).

Presentment of defenses, Rule 12(b).

JUDICIAL DECISIONS

Sufficiency of Pleadings.

In its amended complaint, the plaintiffs set out the matters required in I.R.C.P. 8(a)(1) and this rule, that is, a statement of jurisdiction, a short statement alleging a contract between the plaintiffs and defendants, the time that the alleged contract was entered

into, where the agreement took place, and a demand for relief; therefore the pleadings were sufficient to state a cause of action and to apprise the defendants of the plaintiffs' claim. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Special Limitations.
Statute of Limitations.

Special Limitations.

Where special limitation is pleaded by answer, the question as to whether defendant is not estopped from raising that question may be determined without pleading estoppel in

complaint. *Powell-Sanders Co. v. Carssow*, 28 Idaho 201, 152 P. 1067 (1915).

Statute of Limitations.

Where an answer interposes the statute of limitations as a defense, the matter therein stated is deemed to be denied, and it is error to render judgment on the pleadings in favor of a defendant. *Alspaugh v. Reid*, 6 Idaho 223, 55 P. 300 (1898).

Rule 9(g). Damages.

When items of special damage are claimed, they shall be identified by category and the specific dollar amount may be stated. When items of general damage or punitive damages are claimed, no dollar amount or figure shall be included in the complaint beyond a statement reciting that the jurisdictional amount established for filing the action is satisfied. (Adopted June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS**ANALYSIS**

Dismissal of Claim.

New Trial.

Reconciliation with Other Sections.

Dismissal of Claim.

Where a claim for punitive damages was improper as a matter of law because it claimed a dollar amount but neither party had requested a hearing on a motion to dismiss that claim, it was not necessary for the district court to hold a hearing on the motion to dismiss. *Harwood v. Talbert*, 136 Idaho 672, 39 P.3d 612 (2001).

Although a district court had the option to strike the portion of a counterclaim that improperly stated the amount of punitive damages requested, the court also had the option to grant a motion to dismiss the entire counterclaim. *Harwood v. Talbert*, 136 Idaho 672, 39 P.3d 612 (2001).

New Trial.

A new trial is not necessary merely because

the jury did not award all of the special damages supported by the testimony of the doctors who treated the injured party, even though this testimony was not contradicted by other expert testimony. *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991).

Reconciliation with Other Sections.

Although the language of § 12-120(1) seems to conflict with § 5-335 and this rule, these statutes and rule should be reconciled, if possible, so that the provisions of each will not be nullified. This rule and § 5-335 suggest a way to do this. According to the rule, "no dollar amount or figure should be included in the complaint beyond a statement reciting that the jurisdictional amount established for filing the action is satisfied;" a similar general pleading should suffice to support a claim for attorney fees under § 12-120(1). *Czerwinsky v. Lieske*, 122 Idaho 96, 831 P.2d 564 (Ct. App. 1992).

Cited in: *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE**Use of Similar Name.**

In a suit to enjoin the defendant's use of the name "United American Benefit Association, Inc." on the ground that it was deceptively similar to the name "American Home Benefit Association, Inc." used by the plaintiff, the

plaintiff was not required to plead especially specific instances of deception and confusion resulting from the defendant's use of its name. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

RESEARCH REFERENCES

A.L.R. Sufficiency of showing of actual damages to support award of punitive damages. 40 A.L.R.4th 11.

Rule 9(h). Limitations.

In pleading the statute of limitations it is sufficient to state generally that the action is barred, and allege with particularity the Session Law or the section of the Idaho Code upon which the pleader relies.

JUDICIAL DECISIONS

ANALYSIS

Issue Tried by Consent.
 No Waiver of Defense.
 Not Citing Section.
 Pleading Statute Necessary.
 Pleadings Sufficient.

Issue Tried by Consent.

The plaintiff's failure to cite the particular statute of limitations upon which it relied as a defense to the defendant's counterclaim would normally result in the waiver of the defense of the statute of limitations; however, where the evidence showed that the statute of limitations issue was not only tried by consent of the parties, but it was actually conceded by the defendant to be valid, it should be deemed to have been raised in the pleadings. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984).

No Waiver of Defense.

In an appeal from a magistrate's entry of summary judgment for payment of delinquent property taxes, a taxpayer did not waive the defense of time limitation where, although the defense was not pled in the magistrate proceeding, a copy of the limitations statute was introduced in the hearing for summary judgment which was tried by

consent of the parties. *Childers v. Wolters*, 115 Idaho 527, 768 P.2d 790 (Ct. App. 1988).

Not Citing Section.

Since the particular section of the statute of limitations upon which defendant relied was not designated in the trial court, the availability of I.C. § 5-218 as a defense was not considered on appeal. *Transamerica Ins. Co. v. Widmark*, 116 Idaho 7, 773 P.2d 275 (1989).

Pleading Statute Necessary.

The defendant bears the burden of establishing the applicability of the statute of limitation but the answer need only assert a bar by the particular section. *Modern Mills, Inc. v. Havens*, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Pleadings Sufficient.

Where the defendant raised the oral-contract statute of limitation in his answer to the claim, nothing more was required to prove the defense, as the plaintiff's case-in-chief included evidence of the date of each item charged; therefore, the issue was not barred from consideration on appeal. *Modern Mills, Inc. v. Havens*, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987).

Cited in: *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Citing Wrong Section.
 Counterclaims.
 Estoppel.
 Judgment on Pleadings.
 Pleading Statute Necessary.
 Support Proceedings.
 Want of Knowledge — Pleading in Bar.

Citing Wrong Section.

If the pleader, in his answer, cites the wrong section of the statute of limitations he cannot urge the question on appeal unless he amended in the court below. *Tritthart v. Tritthart*, 24 Idaho 186, 133 P. 121 (1913).

Counterclaims.

A counterclaim is subject to the operation of the statute of limitations. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

Estoppel.

Where statute of limitations is pleaded by answer, the question as to whether defendant is not estopped from raising that question may be determined without pleading estoppel

in complaint. *Powell-Sanders Co. v. Carssow*, 28 Idaho 201, 152 P. 1067 (1915).

Judgment on Pleadings.

Where an answer interposes the statute of limitations as a defense, the matter therein stated is deemed to be denied, and it is error to render judgment on the pleadings in favor of the defendant. *Alspaugh v. Reid*, 6 Idaho 223, 55 P. 300 (1898). This is the rule even though the complaint shows on its face that the action is barred. *Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 P. 226 (1904).

Pleading Statute Necessary.

The statute of limitations must be pleaded. *Frantz v. Idaho Artesian Well & Drilling Co.*, 5 Idaho 71, 46 P. 1026 (1896).

Where it does not clearly appear on the face of the complaint that the cause of action is barred by the statute of limitations, the plea of the statute must be taken by answer, and, if this is not done, the statute must be regarded as abandoned, and cannot be taken advantage of on objection to the admissibility of evidence. *McLeod v. Rogers*, 28 Idaho 412,

154 P. 970 (1916). To same effect, *Kraft v. Greathouse*, 1 Idaho 254 (1869); *Kelly v. Leachman*, 3 Idaho 629, 33 P. 44 (1892); *Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 P. 226 (1904); *Rogers v. Oregon-Washington Ry. & Nav. Co.*, 28 Idaho 609, 156 P. 98 (1916).

An allegation that defendant's claims were outlawed by the statute of limitations was not sufficient under the provisions of former identical rule 9(h) which required the pleading of the particular section of the statute of limitations relied upon. *Resource Eng'r, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

Support Proceedings.

Husband in suit by wife to determine amount due on support decree could not rely on defense of statute of limitations where he failed to assert defense on the pleadings. *Despain v. Despain*, 78 Idaho 185, 300 P.2d 500 (1956).

Want of Knowledge — Pleading in Bar.

If want of knowledge of one's right of action is pleaded as bar to the running of statute of limitations, it must be shown that such knowledge was not within reach. *Coe v. Sloan*, 16 Idaho 49, 100 P. 354 (1909).

RESEARCH REFERENCES

A.L.R. What statute of limitations governs damage action against attorney for malpractice. 2 A.L.R.4th 284.

Rule 9(i). Libel or slander.

In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff. In such an action, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages.

DECISIONS UNDER PRIOR RULE OR STATUTE

Publication.

It is the publication of a libelous article which gives rise to a cause of action and not

its preparation. *O'Malley v. Statesman Printing Co.*, 60 Idaho 326, 91 P.2d 357 (1939).

RESEARCH REFERENCES

A.L.R. Venue of action for libel in newspaper. 15 A.L.R.3d 1249.

Imputation of allegedly objectionable politi-

cal or social beliefs or principles as defamation. 62 A.L.R.4th 314.

Rule 9(j). Description of real property.

In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

DECISIONS UNDER PRIOR RULE OR STATUTE

Description of Mining Claim.

A cross-complaint which described a mining claim as located on the Red Rock Lode mining claims in the Mineral Hill Mining District, Blaine County, Idaho, and recited that the

claim was duly located and recorded with the County Recorder of Blaine County on Nov. 18, 1931, "reference to the records of which are hereby made for a more detailed description of said mining claim," failed to contain a

sufficient description to give the trial court jurisdiction to enter a decree in quieting the title to the mining claim in the cross-com-

plaint. *Norrie v. Fleming*, 62 Idaho 381, 112 P.2d 482 (1941).

Rule 10(a)(1). Form of pleadings — Caption — Name of parties.

Every pleading, motion, notice, or judgment or order of the court shall be typed with black ribbon or produced by a computer or word processor type printer of letter quality on white paper and contain a caption setting forth the names of the parties, the title of the district court, together with the assigned number of the action, the designation of the document or pleading and the names, addresses and phone numbers of the attorneys appearing of record for the party filing the document or pleading and the typewritten name of the person signing the pleading. All pleadings, motions, notices, judgments, or other documents filed with the court shall be typed on 8 1/2 x 11 inch paper. The body of all such documents may be typed with double line spacing or one-and-one-half (1 1/2) line spacing with pica standard typing of not more than 10 letters to the inch. Every pleading shall have the name or designation thereof typed at the bottom of each page, and all attached exhibits must be legible and subject to reproduction by copying processes or be accompanied by a typewritten duplicate, and all handwritten exhibits shall be accompanied by a typewritten duplicate. In the complaint the title of the action shall include the names of all of the parties, but in subsequent pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of the other parties. The title of the court shall commence four (4) inches from the top of the first page. The name, address and telephone number of the attorney, or person appearing in propria persona, shall be typewritten or printed above the title of the court in the space to the left of the center of the page and beginning at least two (2) inches below the top edge thereof. The currently valid Idaho State Bar Number of the attorney shall be typewritten or printed immediately below the attorney's telephone number. Pleadings or motions requiring filing fees shall also contain designations of the category of the action, the nature of the document and filing fee category and filing fee prescribed by Appendix "A" to these rules. Prisoners incarcerated or detained in a state prison or county jail may file documents under this rule that are legibly hand-printed in black ink, in whole or in part, that otherwise conform to the requirement of this rule. This rule does not apply to printed forms approved by the Supreme Court or the Administrative District Judge or distributed through the Court Assistance Office in the county where the lawsuit is pending. Such forms may be completed by legibly hand-printing in black ink or by typing. (Amended July 2, 1976, effective October 1, 1976; amended March 24, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 9, 1999, effective July 1, 1999; amended March 1, 2000, effective July 1, 2000; amended April 22, 2004, effective July 1, 2004.)

STATUTORY NOTES

Cross References. Adoption by reference, Rule 10(c).

Captions, signing and other matters, rules applicable, Rule 7(b)(2).

Commencement of action, Rule 3(a).

Construction of rules, Rule 1(a).

Designation of unknown persons, Rule 10(a)(5).

Exhibits, Rule 10(c).

Form of action, Rule 2.

Language, abbreviation and numbers, Rule 10(a)(3).

Lost papers, Rule 10(a)(2).

Paragraphs, Rule 10(b).

Process issued after filing complaint, Rule 4(a).

Separate statements, Rule 10(b).

Unknown party, Rule 10(a)(4).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Caption.

Requisites As to Complaint.

Caption.

A complaint which charged the defendant with acts constituting a nuisance was sufficient to put defendant on notice that plaintiffs were demanding relief for a nuisance maintained by defendant even though the complaint was not so captioned. *Archer v. Shields Lumber Co.*, 91 Idaho 861, 434 P.2d 79 (1967).

Requisites As to Complaint.

A complaint decides the title of the action and is required to contain only a concise statement of facts constituting the cause of action in ordinary language, and a demand for relief. *Coleman v. Jagers*, 12 Idaho 125, 85 P. 894 (1906); *Poncia v. Eagle*, 28 Idaho 60, 152 P. 208 (1915); *Stone v. Bradshaw*, 64 Idaho 152, 128 P.2d 844 (1942).

Rule 10(a)(2). Lost papers.

If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Alias Summons.

Copies of Original Instruments.

Alias Summons.

A court has control over its process, and where proper jurisdictional facts empowering the court to act are established to its satisfaction, such process may be delayed but not defeated by mishaps occurring while in the hands of the person by whom service is to be made. It is within the power of the court to

order a lost alias summons to be replaced by another upon being satisfied of such loss. *Elliott & Healy v. Wirth*, 34 Idaho 797, 198 P. 757 (1921).

Copies of Original Instruments.

Authority to determine whether or not paper tendered as a copy of original instrument is a true copy of such instrument is vested in district court alone; clerk of district court has no power to determine that matter as a prerequisite to entering default. *Leonard v. Brady*, 27 Idaho 78, 147 P. 284 (1915).

Rule 10(a)(3). Language, abbreviation and numbers.

Pleadings shall be in the English language. Such abbreviations as are in common use may be used, and numbers may be expressed by words or numerals in the customary manner. (Amended December 19, 1975, effective to January 1, 1976.)

Rule 10(a)(4). Unknown party.

When a party does not know the true name of the adverse party, that fact may be stated in the pleadings and the adverse party designated by any

name and the words, "whose true name is unknown," and when the true name is discovered the pleading must be amended accordingly.

STATUTORY NOTES

Cross References. Designation of unknown persons, Rule 10(a)(5).

Unknown owners or heirs as parties, Rule 17(d).

JUDICIAL DECISIONS

ANALYSIS

Fictitious Name.

Relation Back of Amendment.

Fictitious Name.

A party simply cannot call an adverse party any name it chooses, without a designation that the chosen name is fictitious, and later amend the complaint to use the party's true name, expecting that amendment to relate back to the initial complaint. *Watts v. Lynn*, 125 Idaho 341, 870 P.2d 1300 (1994).

Relation Back of Amendment.

Any amendment applied to fictitious party pleadings filed under this rule will relate back to the date of the original filing only if the notice requirements of I.R.C.P. 15(c) are complied with. *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986).

An amendment to a pleading designating the true name of a previously fictitiously described party shall relate back to the date of the filing of the original pleading in those circumstances where, after a factual hearing conducted by the trial court, the trial court finds that (1) the party seeking to amend can establish that just cause existed for not earlier determining the name of the fictitiously described party; (2) that after filing the complaint or other pleading designating a ficti-

tious party, the filing party proceeds with due diligence to discover the true identity of the party or parties described fictitiously and to expeditiously amend the pleadings to identify the true party and effect service of process upon the true party; and (3) that no prejudice is shown to the defendant by the late service of summons and complaint after the statute of limitations has run. *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986).

Since it was the established practice to allow the amendment of a complaint designating the true name of a fictitiously described party to relate back to the filing of the original complaint without meeting the notice requirements of I.R.C.P. 15(c), if it could be established that the amending party proceeded with due diligence to discover the true identity of the fictitious party and promptly moved to amend and serve process upon the previously fictitiously described party, the rule that the notice requirements of I.R.C.P. 15(c) must be satisfied is to be applied prospectively. *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986).

Regardless of whether this rule allows a party to designate a fictitious name, I.R.C.P. 15(c), being more specific, controls on the issue of whether an amended complaint relates back to the initial filing. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Rule 10(a)(5). Designation of unknown.

When persons are made parties by the designation of unknown owners, there shall be added to such designation a brief description of the property of which such persons are claimed or supposed to be unknown owners. When persons are made parties by the designation of unknown heirs or devisees, there shall be added to such designation the name of the deceased person of whom they shall be claimed or supposed to be the heirs or devisees.

STATUTORY NOTES

Cross References. Unknown owners or heirs as parties, Rule 17(d).

Rule 10(a)(6). Filing fee — Waiver.

The filing fee prescribed by Appendix "A" to these rules must be paid before the filing of a pleading or motion listed in the filing fee schedule. Any waiver of the filing fee shall be made by the court upon verified application of a party which shall require no filing fee. Provided, the filing fees shall be automatically waived in any case in which a party is represented by an attorney under the Idaho Law Foundation Volunteer Lawyers Program, the University of Idaho Legal Clinic, the Idaho Legal Aid Program, or an attorney under a private attorney contract with Legal Aid. (Adopted April 3, 1996, effective July 1, 1996; amended March 1, 2000, effective July 1, 2000.)

Rule 10(b). Paragraphs — Separate statements.

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Defenses or Counterclaims.
Motion to Separately State Causes.
Reference to Preceding Count.
Single Claim in Several Counts.
Uniting Separate Claims.
Uniting Several Causes.

Defenses or Counterclaims.

The defendant may set up as many defenses or counterclaims as he may have, but they must be separately stated in separate counts. *Jones v. Caldwell*, 20 Idaho 5, 116 P. 110 (1911).

Motion to Separately State Causes.

Where two or more causes of action are improperly united and commingled in one count in the complaint, the proper procedure to reach the defect is by motion to require the plaintiff to separately state his several causes of action in different counts. *Darknell v. Coeur d'Alene & St. Joe Transp. Co.*, 18 Idaho 61, 108 P. 536 (1910).

Where the complaint mingled two causes of action, not inconsistent, in one count, the proper procedure was a motion to require plaintiff to separately state his causes, and not by motion to strike out or compel the pleader to elect. *Labonte v. Davidson*, 31 Idaho 644, 175 P. 588 (1918).

Reference to Preceding Count.

Where several causes of action are united in one complaint, it is not necessary to rewrite in each count, after the first, all the allegations, but it is sufficient if apt and express reference is made in each subsequent count to each preliminary allegation stated in the first, thus making them a part thereof. *Aulbach v. Dahler*, 4 Idaho 654, 43 P. 322 (1896).

Single Claim in Several Counts.

When a plaintiff has two or more distinct and separate reasons for the right to the relief he asks, or when there is some uncertainty as to the ground of recovery, the complaint may set forth a single claim in several distinct counts. *Spotswood v. Morris*, 10 Idaho 129, 77 P. 216 (1904).

Uniting Separate Claims.

Although the plaintiff's complaint mingled a claim for recovery on a partnership contract with a claim for unjust enrichment, the complaint was sufficient to apprise the defendant of the nature of the claims against him since at no time did the defendant move for a more definite statement of the issues, even though the claims could have been presented in a clearer manner by stating each claim in a separately numbered count. *Nelson v. Gish*, 103 Idaho 57, 644 P.2d 980 (Ct. App. 1982).

Uniting Several Causes.

A complaint alleging in one paragraph an indebtedness on a balance of account for money loaned, services performed, goods furnished and money paid, states but one cause of action and it is not bad for failing to separately state the different amounts due on each item separately. *Mills v. Glennon*, 2 Idaho 105, 6 P. 116 (1885).

Action based upon a defective condition in a sidewalk, claimed to have been negligently created and maintained by the city, was not required to be separately stated as a cause of action for creating the defect and another cause for the continued negligent maintenance of it. *Butland v. Caldwell*, 51 Idaho 483, 6 P.2d 493 (1931).

Rule 10(c). Adoption by reference — Exhibits.

Statements in pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. All exhibits to pleadings must be legible, distinct and subject to clear copying by reproduction processes; and all exhibits not meeting this requirement, as well as all hand written exhibits, must be accompanied by a typewritten duplicate thereof at the time of filing.

JUDICIAL DECISIONS

Cited in: *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976).

Rule 11(a)(1). Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Cross References. Change of attorney,
Rule 11(b)(1).

Signing, Rule 7(b)(2).
Verification of pleadings, Rule 11(c).

JUDICIAL DECISIONS

ANALYSIS

Agent's Signature.
Construction with Other Law.
Failure to Raise Issue in Trial Court.
Harassment.
Identification of Defendants.
In General.
Intent of Rule.
Purpose of Rule.
Reasonable Expenses.
—Attorney's Fees.
Reasonableness Standard.
Sanctions.
—Award in Error.
—Award Proper.
—Scope of Conduct.
Standard of Review.

Agent's Signature.

Pursuant to the signature requirements of Idaho R. Civ. P. 11(a)(1), an agent cannot sign a complaint on behalf of unrepresented parties, and where the original complaint was thus signed it was in violation of rule 11, and the amended complaint did not relate back in time as a cure to the previous complaint because the complaint was signed in violation of rule 11. Thus, the complaint was time barred because the subsequent complaint filing occurred beyond the 90-day statute of limitations period. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 81 P.3d 416 (2003).

Where attorney signed complaint as an agent for unrepresented parties, even if the cure provision in Idaho R. Civ. P. 11(a)(1) was applicable, because there was no explicit authority for the Washington attorney to sign as his clients' agent, he should have been on notice of a defect; therefore, the time period began to run at the time of filing the original complaint and where he took 64 days to cure the defective complaint, the amended complaint was not prompt. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 81 P.3d 416 (2003).

Construction with Other Law.

This rule does not duplicate § 12-121, and the circumstances that justify an award of fees under that statute do not necessarily call for imposition of sanctions under this rule. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

Neither Idaho R. Civ. P. 11(a)(1) nor Idaho

case law defines "promptly"; as such, federal case law may provide some persuasive authority to interpret Idaho rule 11(a)(1) because the federal and Idaho rules are substantially similar. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 81 P.3d 416 (2003).

Fed. R. Civ. P. 11, does not have a separate provision describing the available sanction for pleadings signed in violation of the rule, therefore, it is reasonable to conclude the Idaho and Federal rules differ because the federal cure provision applies equally to unsigned complaints and complaints signed in violation of Fed. R. Civ. P. 11, whereas Idaho R. Civ. P. 11 cure provision only applies to unsigned complaints. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 81 P.3d 416 (2003).

Failure to Raise Issue in Trial Court.

Where the issue of whether an attorney signed a complaint was not raised in the trial court, the Supreme Court would not address the award of attorney fees and costs against the attorney. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

Harassment.

A court may take into consideration the relief requested or offer made by a party in relation to the ultimate relief granted in reaching its determination as to whether an attorney or party made reasonable inquiry or acted in a manner as to harass or to cause unnecessary delay. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

Identification of Defendants.

In suit for personal injuries as a result of injury at concert, fact that plaintiff's attorney did not make reasonable inquiry into facts as to whether defendant was a sponsor of the concert, and therefore liable, before filing the complaint — did not make him liable for sanctions under this rule, since pre-filing inquiry of a prospective adversary, to which responses might be self-serving and less than candid, is no substitute for an opportunity for formal discovery where answer must be provided under oath and relevant documentary evidence produced. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

In General.

This rule applies only to the signing of a

pleading, motion, or other paper, and its central feature is the certification established by the signature; an attorney is required to perform a pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by this rule and reasonableness under the circumstances, and a duty to make reasonable inquiry prior to filing a pleading or other paper, is the appropriate standard to apply when evaluating an attorney's conduct. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

Intent of Rule.

This rule is not a broad compensatory law. It is a court management tool, and the power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit; it is not the type of "rule of court" the legislature intended to displace with I.C. § 6-918A. *Kent v. Pence*, 116 Idaho 22, 773 P.2d 290 (Ct. App. 1989).

Purpose of Rule.

This rule does not exist to duplicate § 12-121, which has long been construed to authorize an attorney fee award in any civil case brought frivolously, unreasonably, or without foundation. Rather, the rule serves a separate, cognizable purpose, focusing upon discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit. *State of Alaska ex rel. Sweat v. Hansen*, 116 Idaho 927, 782 P.2d 50 (Ct. App. 1989).

In an appeal by the defendant in a paternity suit where the state did not contend that the defendant was involved in any litigative misconduct, but it simply argued the defendant's appeal was meritless, the state was awarded attorney fees under § 12-121 rather than under this rule. *State of Alaska ex rel. Sweat v. Hansen*, 116 Idaho 927, 782 P.2d 50 (Ct. App. 1989).

Reasonable Expenses.

Filing fees, copying fees and long distance telephone costs were reasonable expenses incurred because of filing of an amended complaint. *Stevens v. Fleming*, 116 Idaho 523, 777 P.2d 1196 (1989).

Amount of sanctions against the developers was reasonable based upon the parties' conduct and the total expenses paid by respondents in fighting the developers' confirmed arbitration award; the amount of attorney fees and computer-aided research costs incurred by the aggrieved party may serve as a guide for determining an amount of sanctions and was not an abuse of discretion under

Idaho R. Civ. P. 11(a)(1). *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005).

Where a city did not prevail in a declaratory judgment action against several presenters regarding a proposed marijuana initiative, it was not entitled to attorney fees; moreover, the presenters were not entitled to such fees on appeal either because the appeal had a reasonable basis since a pivotal case on the issue had not yet been decided. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006).

—Attorney's Fees.

An order granting a wrongful death defendant attorney fees and costs under this rule was proper where plaintiffs' attorney failed to make proper inquiry into both the facts and the law involved in suing a governmental entity. *Stevens v. Fleming*, 116 Idaho 523, 777 P.2d 1196 (1989).

No attorney fees were awarded in a case that raised issues of first impression to the Supreme Court of Idaho regarding whether, pursuant to signature requirements of Idaho R. Civ. P. 11(a)(1), an agent could sign a complaint on behalf of unrepresented parties; where the original complaint was thus signed. Where there was no consensus as to how other courts had treated those issues, the arguments presented were reasonable and not frivolous. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 81 P.3d 416 (2003).

The district court did not err in denying the company an award of attorney fees in the wife's action claiming that the company was obligated to make a cash payment to her for her community property interest in the 80 shares of stock that the husband held in the company; R. 11(a)(1) was not a basis for an overall award of attorney fees and the same analysis was applicable to claims based on § 12-121 and I.R.C.P. 54(e); further, given the district court's analysis under § 12-121, the same result would follow under I.R.C.P. 11(a)(1) and § 12-123 if they were applicable. *Tolley v. THI Co.*, 140 Idaho 253, 92 P.3d 503 (2004).

Where a city did not prevail in a declaratory judgment action against several presenters regarding a proposed marijuana initiative, it was not entitled to attorney fees; moreover, the presenters were not entitled to such fees on appeal either because the appeal had a reasonable basis since a pivotal case on the issue had not yet been decided. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006).

Where sister attempted to probate her mother's alleged holographic will, and then later withdrew it, it was undisputed that brother could have sought attorney fees in the probate proceedings as a result of the sister's conduct, but brother could not initiate an

independent action to recover those attorney fees. *Losser v. Bradstreet*, 145 Idaho 670, 183 P.3d 758 (2008).

Reasonableness Standard.

Reasonableness under the circumstances, and a duty to make a reasonable inquiry prior to filing an action, is the appropriate standard to apply under this rule, and a showing of subjective bad faith is no longer necessary for the imposition of sanctions. *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990).

It is not required that an attorney perform a complete background investigation of their clients prior to representation, but Rule 11 mandates an attorney conduct at least a reasonable inquiry into the facts of the case prior to filing a complaint. *Koehn v. Riggins*, 126 Idaho 1017, 895 P.2d 1210 (1995).

Whether a pleading, or motion or other signed document is sanctionable under this rule must be based on an assessment of the knowledge of the relevant facts and law that reasonably could have been acquired at the time the document was submitted to the court. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

Sanctions.

Sanctions pursuant to this rule should not be applied to make a lump-sum compensatory attorney fee award. *Conley v. Looney*, 117 Idaho 627, 790 P.2d 920 (Ct. App. 1989).

The reasons for which attorney fees may be awarded pursuant to § 12-121 and I.R.C.P. 54(e)(1) are not reasons that will support an award of sanctions pursuant to this rule. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

The trial court's imposition of sanctions without finding a lack of a reasonable inquiry into the facts and legal theories supportive of plaintiff's claims, was not an adequate analysis under this rule because the trial court must determine whether the litigant made a proper investigation upon reasonable inquiry. *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991).

The trial court applied the correct standard and did not abuse its discretion in denying sanctions pursuant to this rule, where the affidavit of the attorney showed that the attorney met the "minimum requirement of 'reasonable inquiry'" and had a "good faith argument" for his view of what the law was, or should be, in a dispute over water rights. *Durrant v. Christensen*, 120 Idaho 886, 821 P.2d 319 (1991).

Appellate court will not overrule magistrate's denial of plaintiff's motion for Rule 11 sanctions absent an abuse of discretion. *Bell*

v. Bell, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

In divorce action, plaintiff's contentions that actions of counsel for defendant wife, by arguing that husband had incurred large amount of debt during the marriage without apparent intention of liquidating the debt, that he had committed adultery evidenced through romantic letters to a woman in Germany, and that he had been evasive in disclosing his financial status, were false, libelous, defamatory and in violation of Rule 11, and further that defendant counsel's actions in filing affidavit for attorney fees in relation to husband's motion for Rule 11 sanctions was a harassing tactic and counsel's motion to reopen the case for additional evidence was a most serious violation of Rule 11, did not amount to violations of Rule 11 where plaintiff failed to show that the magistrate abused his discretion in denying plaintiff's motion for such Rule 11 sanctions. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

Attorney represented family in an action for a prescriptive easement for the use of a roadway. The district court which based its Rule 11 sanctions on the attorney's conduct in filing the complaint properly concluded that the attorney failed to "make a reasonable inquiry to determine whether or not the allegations in the complaint were well grounded in fact and whether or not the relief requested was warranted by existing law or a good faith argument for the modification thereof." *Young v. Williams*, 122 Idaho 649, 837 P.2d 324 (Ct. App. 1992).

A court's imposition of Rule 11 sanctions is limited by two factors: sanctions may be imposed on an attorney only if the attorney actually signed a pleading, motion, or other paper; and sanctions may be imposed only if the attorney's actions failed to comply with the rule at the time the document was signed. *Young v. Williams*, 122 Idaho 649, 837 P.2d 324 (Ct. App. 1992).

Where attorney failed to perform even a cursory investigation into accidents which he knew occurred and instead relied on client's statements, had prior information of client's driving record and another accident, but did not look at police reports from the other accident, and did not inquire into client's medical history, Rule 11 sanctions were properly imposed on attorney by the lower court. *Koehn v. Riggins*, 126 Idaho 1017, 895 P.2d 1210 (1995).

District court did not abuse its discretion in denying the parent attorney fees under I.R.C.P. 11 where, while the charter school's claims were frivolous in part for the purposes of § 12-121, the district judge correctly deter-

mined this was not misconduct under Rule 11 because the charter school presented a good faith argument that it was not a public entity and conducted a reasonable inquiry into the supporting facts. *Nampa Charter Sch., Inc. v. Delapaz*, 140 Idaho 23, 89 P.3d 863 (2004).

Issuing sanctions against the developers was not an abuse of discretion under Idaho R. Civ. P. 11(a)(1) where the developers had submitted their petition for arbitration for an improper purpose and the only purpose of the sham arbitration was to use courts to circumvent the rights of others; the actions of the parties tampered with the administration of justice. *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005).

District court properly imposed sanctions against the attorney because Idaho R. Civ. P. 11(a)(1) was specifically designed to be a management tool by which the district court could, among other things, punish actions such as the attorney's evasive discovery answering, which constituted litigative misconduct. The attorney's interrogatory answer violated his certification that his discovery response was warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law. *Lester v. Salvino*, 141 Idaho 937, 120 P.3d 755 (Ct. App. 2005).

—Award in Error.

Where the district court incorrectly held that the principles of partnership applied to the underlying cause of action and where the Supreme Court reversed the district court's entry of summary judgment based on the doctrine of *res judicata*, the rationale behind the district court's exercise of discretion was eliminated and the award of Rule 11 sanctions was in error. *Gubler ex rel. Gubler v. Brydon*, 125 Idaho 112, 867 P.2d 986 (1994).

District court abused its discretion by acting beyond the scope of its authority by imposing sanctions against the attorney for his conduct in proceedings before the supreme court and not for his conduct in proceedings before the district court. *Curzon v. Hansen*, 137 Idaho 420, 49 P.3d 1270 (Ct. App. 2002).

—Award Proper.

Where a district court found that the plaintiffs' motion to disqualify the defendants' counsel was not grounded in fact or warranted by existing law, and was interposed for the sole purpose of harassing the defendants,

the district court did not abuse its discretion in imposing sanctions upon the plaintiffs under this rule. *Chapple v. Madison County Officials*, 132 Idaho 76, 967 P.2d 278 (1998).

Where an attorney commenced an action against the city and county, without a reasonable inquiry into the facts or the law, for a cause of action that was not recognized in Idaho, the district court was justified in imposing sanctions under Idaho R. Civ. P. 11. *Hagy v. State*, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002).

District court did not abuse its discretion in imposing I.R.C.P. 11 sanctions because the attorney's contentions were not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, the attorney did not exercise reasonableness in asserting that a third-party had a direct claim against an insurance company, and the effort to rely upon an unrelated use of the term "claim" to validate the effort in the client's case was unreasonable. *Slack v. Anderson (In re Summer)*, 140 Idaho 38, 89 P.3d 878 (2004).

—Scope of Conduct.

When determining whether Rule 11 sanctions should be imposed, the trial court must only consider the attorney's conduct in the filing of pleadings, motions or other papers and not acts which are part of the trial itself. *Koehn v. Riggins*, 126 Idaho 1017, 895 P.2d 1210 (1995).

Standard of Review.

The abuse-of-discretion standard is more compatible with the Supreme Court's view of the appropriate role of Idaho appellate courts in reviewing the award of sanctions under this rule than is *de novo* review. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

Cited in: *Murr v. Odmarr*, 112 Idaho 606, 733 P.2d 827 (Ct. App. 1987); *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987); *State v. Williams*, 120 Idaho 386, 816 P.2d 342 (1991); *Burggraf v. Chaffin*, 121 Idaho 171, 823 P.2d 775 (1991); *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 896 P.2d 949 (1995); *Branson v. Higginson*, 128 Idaho 274, 912 P.2d 642 (1996); *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997); *Lorca-Merono v. Yokes Wash. Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002); *Silva v. Silva*, 142 Idaho 900, 136 P.3d 371 (Ct. App. 2006); *Heinze v. Bauer*, 145 Idaho 232, 178 P.3d 597 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Default for Neglect of Attorney.
Justice of Supreme Court.
Verification.

Default for Neglect of Attorney.

Where a foreign corporation had knowledge of the death of the resident attorney in ample time to have procured representation by counsel before default was entered, and the default was entered after a demurrer and demand for a change of place of trial which were filed by a Utah attorney were stricken because not signed by an attorney admitted to practice in Idaho, and the failure to procure Idaho counsel was due to gross negligence of the corporation's officers, the corporation was not entitled to have the judgment set aside.

Cleek v. Virginia Gold Mining & Milling Co., 63 Idaho 445, 122 P.2d 232 (1942).

Justice of Supreme Court.

Attaching the name of a justice of the Supreme Court to a motion does not provide the signature of a "resident attorney." Roberts v. Wehe, 53 Idaho 783, 27 P.2d 964 (1933).

Verification.

All authorities hold that verification by the attorney is sufficient as subscription under the requirements of the statute. Updegraff v. Adams, 66 Idaho 795, 169 P.2d 501 (1946).

A pleading signed by the plaintiff's attorney as required by this rule was not required to comply with § 5-508 as to verification and affidavit in order to obtain service upon a nonresident. B.B.P. Ass'n v. Cessna Aircraft Co., 91 Idaho 259, 420 P.2d 134 (1966).

Rule 11(a)(2). Successive applications for orders or writs — Motions for reconsideration.

(A) Successive Applications. In any action, if an application by any party to the judge of a court for the issuance of an order or writ is denied in whole or in part by such judge, neither the party nor the party's attorney shall make any subsequent application to any other judge except by appeal to a higher court; provided that a second application may be made for a constitutional writ after a disclosure of the first application has been made to the second judge. Any writ or order obtained in violation of this section shall be immediately vacated by the judge issuing the same upon discovery of the prior application to another judge, and the party and the attorney shall be subject to such costs and sanctions as the court may determine in its discretion. Nothing in this rule shall prevent a party or the attorney from renewing a motion or an application to the same judge, or a newly appointed judge, in an action after such motion or application was originally denied; but this provision and this rule shall not create the right to file a motion for reconsideration except as provided in subsection (B) of this rule. Nothing in this rule shall prevent a party or an attorney from renewing a motion or an application for a constitutional writ to the same judge, or a newly appointed judge, in an action after such motion or application was originally denied.

(B) Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b). (Adopted June 15, 1987, effective November 1, 1987; amended March 20, 1991, effective July 1, 1991.)

JUDICIAL DECISIONS

ANALYSIS

Appealable Order.**Construction with Other Rules.****Motions for Reconsideration.**

- Evidence
- New or Additional Facts.
- Replacement Judge.
- Timeliness.

Time for Appeal.**Appealable Order.**

Until a judgment had been entered or a certificate granted by the trial court pursuant to I.R.C.P. 54(b), the order dismissing a counterclaim was not final and appealable. Therefore, trial court should have considered new facts upon motion for reconsideration of order. *Idaho First Nat'l Bank v. David Steed & Assocs., Inc.*, 121 Idaho 356, 825 P.2d 79 (1992).

District court did not err in sua sponte reversing its grant of partial summary judgment to the farm where the farm was not bound by the individual owners of the farm's actions; subsequent to the deeds to the farm, the individuals reaffirmed their mortgage with the property owners and extended it. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 69 P.3d 1035, cert. denied, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 410 (2003).

Construction with Other Rules.

Subdivision (a)(2)(B) of this rule provides the authority for a district court to reconsider and vacate interlocutory orders like the one in instant case under IRCP 4(a)(2) so long as final judgment has not yet been ordered. *Telford v. Neibaur*, 130 Idaho 932, 950 P.2d 1271 (1998).

Motions for Reconsideration.

There is no exception in rule 13(b) granting the district court power to entertain its own motion to reconsider an order granting a new trial and this is particularly the case given the prohibition in subsection (B) of this rule. *Syth v. Parke*, 121 Idaho 156, 823 P.2d 760 (1991).

This rule, both before and after its 1987 amendment, clearly disallows a motion to reconsider an order granting or denying a motion for new trial under Rule 59; plaintiff's motion for reconsideration brought pursuant to Rule 59(e) was properly denied by the trial court because it is a motion specifically excluded from reconsideration by this rule. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Trial court did not err in denying a home

health care consultant's motion to reconsider and in striking certain affidavits because the affidavits were not filed with the motion pursuant to Idaho R. Civ. P. 6(d) as required, and thus there was no basis for asking the trial court to reconsider its earlier decision. *Jensen v. State*, 139 Idaho 57, 72 P.3d 897 (2003).

Fraud case against an attorney was properly dismissed based on a failure to serve a complaint and summons within 6 months, because no good cause was shown by the mailing of the documents after filing or by the lack of prejudice; moreover, there was no request to refrain from serving process, despite discussions regarding the need for extra time. Since there was no good cause for failing to serve, a district court did not abuse its discretion by reconsidering an earlier decision to allow late service. *Campbell v. Reagan*, 144 Idaho 254, 159 P.3d 891 (2007).

In a case involving a dispute over a duplex sale, a motion filed after the entry of a stipulated dismissal should have been treated as one to alter or amend; moreover, it was an abuse of discretion to deny relief because the motion alerted the district court to the error in its decision relating to the sellers' failure to waive the right to seek costs and fees in the dismissal document. In addition, the pleading standards were met for costs and fees. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

— Evidence

In a motion to reconsider summary judgment in a slip and fall case, absent an objection to the admissibility of a store manager's affidavit, the court could consider the affidavit even if the manager lacked personal knowledge. *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 251 P.3d 602 (2011).

— New or Additional Facts.

On a motion for reconsideration of the specification of facts deemed established pursuant to IRCP 56(d), the trial court should reconsider those facts in light of any new or additional facts that are submitted in support of the motion. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

When considering a motion for reconsideration of an interlocutory order pursuant to subsection (B) of this section, the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order; the burden is on the moving party to bring the trial court's attention to the new facts, and the trial court is not required to search the record to determine if there is any new infor-

mation that might change the specification of facts deemed to be established. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

A party making a motion for reconsideration under this section is permitted to present new evidence, but not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

In a wife's action to annul a marriage, a magistrate court erred in refusing to allow the husband to submit an affidavit on a motion for reconsideration describing his intent in executing a quitclaim deed to the wife. *Barmore v. Perrone*, 145 Idaho 340, 179 P.3d 303 (2008).

— Replacement Judge.

Magistrate judge who succeeded trial judge when trial judge was placed on administrative leave had the authority to reconsider rulings made by trial judge before the entry of final judgment. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

— Timeliness.

Where the motion to reconsider was filed after an appeal was issued reversing the final judgment, reversal of the judgment on appeal entirely rescinded that judgment; thus, there was no final judgment when the motion to reconsider was filed and the motion was timely. *Devil Creek Ranch, Inc. v. Cedar Creek Reservoir & Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994).

Time for Appeal.

A trial court cannot restart the time for appeal by the mere expedient of entering a second judgment identical to the first. *Spreader Specialists, Inc. v. Monroc, Inc.*, 114 Idaho 15, 752 P.2d 617 (Ct. App. 1987), overruled on other grounds, *Walton, Inc. v.*

Jensen, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

The notice of appeal from the district court's order dismissing the defendant's petition as untimely was filed on February 4, 1992, which was beyond the 42-day time limit within which to file an appeal from a final order. The time for filing the appeal, however, was extended by the filing of defendant's motion to reconsider the dismissal which was timely filed within 14 days of the order to be reconsidered. *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992).

Defendant's motion to "reinstate" his appeal essentially constituted a petition for rehearing, which was timely and extended the period within which to seek further appellate review of the district court's dismissal decision, until 42 days following determination of the motion for reinstatement of the appeal from the magistrate division. *Dieziger v. Pickering*, 122 Idaho 718, 838 P.2d 321 (Ct. App. 1992).

A Rule 59 motion to amend the judgment or a Rule 11(a)(2)(B) motion for reconsideration, if timely made, tolls the time to file a notice of appeal, however, the filing of such motions 17 days after entry of judgment did not enlarge the period of time for the direct appeal from an order on summary judgment. *Ade v. Batten*, 126 Idaho 114, 878 P.2d 813 (Ct. App. 1994).

Cited in: *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987); *Syth v. Parke*, 121 Idaho 162, 823 P.2d 766 (1991); *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997); *Castle v. Hays*, 131 Idaho 373, 957 P.2d 351 (1998); *Dunlap v. Cassia Mem. Hosp. & Med. Ctr.*, 134 Idaho 233, 999 P.2d 888 (2000); *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 212 P.3d 982 (2009), opinion withdrawn.

Rule 11(a)(3). Withdrawal of files.

No paper, record or file in any action or proceeding shall be removed from the custody of the clerk except that such papers, records and files may be withdrawn for the use of the court. (Amended March 1, 2000, effective July 1, 2000.)

JUDICIAL DECISIONS

Cited in: *PHH Mortg. Servs. Corp. v. Pereira*, 146 Idaho 631, 200 P.3d 1180 (2009).

Rule 11(b)(1). Change of attorneys.

The attorney of record of a party to an action may be changed or a new attorney substituted by notice to the court and to all parties signed by both

the withdrawing attorney and the new attorney without first obtaining leave of the court. If a new attorney appears in an action, the action shall proceed in all respects as though the new attorney of record had initially appeared for such party, unless the court finds good cause for delay of the proceedings. (Adopted effective January 1, 1975; amended March 31, 1978, effective July 1, 1978.)

STATUTORY NOTES

Cross References. Change of attorney,
§ 3-203.

Written appearances, service of, Rule 5(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal.
Notice.

Appeal.

After final judgment, the party who appeals may employ new counsel or change his attorney without notice. *Lydon v. Piper*, 5 Idaho 541, 51 P. 101 (1897).

Notice.

After withdrawal of answer and appearance of attorney for one of the defendants, plaintiff cannot, without taking action to substitute other counsel or notifying defendant to do so, obtain judgment against such defendant. *Bogue Supply Co. v. Davis*, 36 Idaho 249, 210 P. 577 (1922).

Notice in accordance with statutes is sufficient. *Peters v. Walker*, 37 Idaho 195, 215 P. 845 (1923).

Where adverse party had personal knowl-

edge that appellant's attorney had withdrawn, law requiring the giving of notice of such withdrawal to the adverse party had no application. *Smith-Nieland v. Reed*, 39 Idaho 788, 231 P. 102 (1924).

Where attorneys representing respondent withdrew and appellant caused written notice and demand to be served on such respondent in accordance with the statute requiring that respondent employ counsel to represent her on such appeal, said notice being served and allowing an intervening period of sixteen days until the date set for argument before this court, but respondent failed and refused to comply with such notice, further not showing any excuse for not employing another counsel or appearing in person, notice was held to be sufficient and the respondent was held to have had reasonable time under the circumstances to comply with the notice served. *Application of Paul*, 78 Idaho 370, 304 P.2d 641 (1956).

Rule 11(b)(2). Withdrawal of attorney.

Except as otherwise provided in this Rule 11(b) and its subsections, or by stipulation and order of the court, no attorney may withdraw as an attorney of record for any party to an action without first obtaining leave and order of the court upon a motion filed with the court, and a hearing on the motion after notice to all parties to the action, including the client of the withdrawing attorney. Leave to withdraw as a counsel of record may be granted by the court for good cause and upon such conditions or sanctions as will prevent any delay in determination and disposition of the pending action and the rights of the parties. Provided, that at the time judgment is entered in any action, or at any time thereafter, an attorney who desires to withdraw as attorney of record for a party may give notice thereof in the judgment, or may file a notice of withdrawal at the time of entry of the judgment, or at any time thereafter, but such notice of withdrawal shall not become effective until the time for appeal from the final judgment has expired and there are no proceedings pending. The attorney shall provide the last known address

of the client in any notice of withdrawal. (Amended January 8, 1976, effective March 1, 1976; amended March 31, 1978, effective July 1, 1978; amended March 20, 1991, effective July 1, 1991; amended effective September 25, 1995.)

JUDICIAL DECISIONS

Cited in: Fish Haven Resort, Inc. v. Arnold,
121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991).

Rule 11(b)(3). Leave to withdraw — Notice to client.

If an attorney is granted leave to withdraw, the court shall enter an order permitting the attorney to withdraw and directing the attorney's client to appoint another attorney to appear, or to appear in person by filing a written notice with the court stating how the client will proceed without an attorney, within 20 days from the date of service or mailing of the order to the client. After the order is entered, the withdrawing attorney shall forthwith, with due diligence, serve copies of the same upon the client and all other parties to the action and shall file proof of service with the court. The withdrawing attorney may make such service upon the client by personal service or by certified mail to the last known address most likely to give notice to the client, which service shall be complete upon mailing. Upon the entry of an order granting leave to an attorney to withdraw from an action, no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service or mailing of the order of withdrawal to the party. If such party fails to file and serve an additional written appearance in the action either in person or through a newly appointed attorney within such 20 day period, such failure shall be sufficient ground for entry of default and default judgment against such party or dismissal of the action of such party, with prejudice, without further notice, which shall be stated in the order of the court. The attorney shall provide the last known address of the client in any notice of withdrawal. (Amended March 24, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983; amended March 30, 1994, effective July 1, 1994.)

JUDICIAL DECISIONS

ANALYSIS

Construction.
Default Judgment.
—Setting Aside.
Extended Deadlines.
Failure to Appear.
Failure to Warn of Consequences.
Lack of Prejudice.
Mailing Withdrawal Order.
Notice.
Presumption From Noncompliance.
Strict Compliance.

Construction.

In the context of this particular rule, reference to entry of "default" includes entry of "default judgment" and the fact that this rule explicitly states that no further notice is necessary clearly indicates that "default" in the context of this rule includes "default judgment," since the entry of the default alone, under I.R.C.P., Rule 55(a)(1), requires no notice. The explicit provision in this rule that no further notice is necessary would be superfluous if the rule was intended to apply only to entry of "default," and not to entry of "default

judgment.” *Sherwood & Roberts, Inc. v. Ripplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

This rule provides a readily identifiable, straightforward requirement for counsel and the courts to satisfy; compliance with the rule obviates any need for judges to weigh conflicting evidence of actual notice or to speculate concerning a litigant’s state of mind. An entitlement to relief from a default judgment as a matter of law produces consistent, predictable results, unaffected by the varying philosophies that underlie exercises of discretion by individual judges. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

Default Judgment.

This rule, unlike its statutory predecessor § 3-206 (repealed), clearly permits the entry of default without the further three-day notice under I.R.C.P., Rule 55(b)(2), as long as the notice so states. *Sherwood & Roberts, Inc. v. Ripplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

Where the court order which granted the defendant’s attorney’s motion to withdraw as counsel unambiguously apprised the defendant of the consequences of failing to appear, and the defendant admitted that he timely received a copy of that order along with the notice from his withdrawing attorney, the subsequent entry of a default judgment without further notice to the defendant did not violate his due process rights under the fourteenth amendment. *Sherwood & Roberts, Inc. v. Ripplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

Where plaintiff-lessees were not diligent in pursuing their case by timely obtaining new counsel, the appropriate sanction for their tardiness would have been to enter default judgment on the bank’s counterclaim, under this rule, and not to bar plaintiffs from asserting, as an affirmative setoff to the counterclaim, the value of improvements which they made to the property. *Hobbs v. First Interstate Bank*, 109 Idaho 990, 712 P.2d 691 (Ct. App. 1985).

—Setting Aside.

Where counsel for defendant withdrew and defendant subsequently failed to appear either in person or through new attorney with the result that a default judgment was entered against defendant, defendant was entitled to have the default judgment set aside pursuant to I.R.C.P., Rule 55(c), and I.R.C.P., Rule 60(b) in light of the fact that the order of withdrawal failed to mention that (1) default could be taken “without further notice” to the defendant, (2) the defendant received no notice of the default proceedings, (3) the require-

ment in the order requiring defendant to appear in 20 days could have been interpreted as requiring an answer, which had already been filed, (4) the default was not sought for 27 months and (5) during that time plaintiff kept sending defendant various communications related to the case. *Omega Alpha House Corp. v. Molander Assocs.*, 102 Idaho 361, 630 P.2d 153 (1981).

Where district court granted defense counsel’s motion to withdraw pursuant to this rule, which precludes any action in the proceeding that would adversely affect the withdrawing attorney’s client for a period of twenty days, and district court mistakenly entered plaintiff’s motion for default judgment under I.R.C.P. 55, only 10 days after the order for withdrawal of defendant’s attorney, Court of Appeals granted defendant’s motion to set aside the default judgment. *State, Dep’t of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

Extended Deadlines.

Where appellant insured filed suit against respondent insurance companies for breach of an insurance contract, the district court did not err by refusing to vacate the trial under Idaho R. Civ. P. 11(b)(3) after appellant’s counsel withdrew; the district court worked with appellant in extending deadlines. *Villa Highlands, LLC v. Western Cmty. Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010).

Failure to Appear.

Where a court order granting the defendant’s attorney’s motion to withdraw also unambiguously required a written notice of how the defendant intended to represent himself, the defendant’s telephonic communication with a clerk of the court, in which the clerk did nothing more than advise the defendant that he should decide as soon as possible how he intended to proceed and then notify the court, was insufficient to relieve the defendant of the requirement of filing a written notice as set forth in both this rule and the order of the court. Thus, the defendant’s oral communication with the clerk of the court did not constitute an appearance. *Sherwood & Roberts, Inc. v. Ripplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

Failure to Warn of Consequences.

Where the district court entered an order authorizing withdrawal of plaintiff’s counsel, which order failed to advise the plaintiff that his claim was subject to dismissal with prejudice, without further notice, if plaintiff failed within 20 days to have other counsel appear or to appear in person as required by this

rule, and some months later the plaintiff's complaint was dismissed with prejudice for his failure to comply with this rule, the district court erred in refusing to set aside the dismissal because the prior order for withdrawal did not inform plaintiff of the possible consequences for failure to either appoint new counsel or notify the court he would represent himself. *Lundstrom v. Southern Idaho Pipe & Steel Co.*, 107 Idaho 189, 687 P.2d 579 (Ct. App. 1984).

Where, although the phrase "such further relief" in the attorney's withdrawal order arguably was sufficient to warn of possible dismissal of the party's counterclaim, the notice said nothing about the judgment being entered with prejudice or without further notice, such defects were not cured by the party's refusal of service; therefore, the withdrawal order did not contain a notice sufficient under this rule, and thus failed to establish the necessary legal foundation for a valid default judgment. *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct. App. 1988).

Where order granting withdrawal failed to state that a failure to comply with the requirement to appear personally or through a new attorney in a timely manner would result in both the entry of a default and the entry of a default judgment, this failure to comply strictly with the requirements of this rule rendered the judgment voidable under Rule 60(b)(4). *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Lack of Prejudice.

Strict compliance with this rule is required to obtain a valid judgment. However, where a party fails to demonstrate prejudice stemming from alleged inadequate notice of a hearing on his attorney's motion to withdraw, the district court did not abuse its discretion in denying a Rule 60(b)(1) motion for relief. *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009).

Mailing Withdrawal Order.

Since this rule allows 20 days for a person to file written notice of how they will represent themselves where their attorney has been permitted to withdraw, and I.R.C.P. 6(e)(1) adds three days to the period where an order allowing the withdrawal was served by mail, since 23 days should have elapsed before order of default in child custody and support action was entered the order which was entered 22 days after mailing of the withdrawal order was voidable under I.R.C.P. 60(b)(4). *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Notice.

Where plaintiff became aware of notice of

withdrawal of counsel on August 15 and counsel's letter received on September 12 also advised her to file a notice of appearance immediately, but plaintiff did not follow the instructions in the notice or counsel's advice and the suit was dismissed a week later, plaintiff received adequate prior notice of the dismissal and the dismissal did not violate her right to due process. *Bull v. Leake*, 109 Idaho 1044, 712 P.2d 745 (Ct. App. 1986).

A legally sufficient notice is a necessary predicate for entering a default judgment under this rule, and when the predicate does not exist, the judgment is voidable under I.R.C.P. 60(b)(4). *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct. App. 1988).

When default is obtained after a party's attorney has been permitted to withdraw, before such a default may be entered, this rule requires particularized notice to the party whose attorney is withdrawing from representation and when the predicate notice does not exist, the subsequent judgment by default is voidable under I.R.C.P. 60(b)(4) as a matter of law. *Reinwald v. Eveland*, 119 Idaho 111, 803 P.2d 1017 (Ct. App. 1991).

If a judgment is voidable for failure to provide the notice required by this rule, it will be set aside as a matter of law. *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Presumption From Noncompliance.

Where the defendant failed to file a written notice of appearance or the appointment of new counsel within the prescribed time limit, his failure to comply with this rule justified a presumption that he abandoned his defense, and where the defendant made no showing of inability to comply with this rule, it was within the district court's power to enter a default judgment against the defendant. *Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

Strict Compliance.

Strict compliance with this rule is reasonable and necessary in light of the rule's extraordinary impact. *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct. App. 1988).

Strict compliance, not substantial compliance, is required when this rule is applicable. *Reinwald v. Eveland*, 119 Idaho 111, 803 P.2d 1017 (Ct. App. 1991).

There must be strict compliance with this rule to obtain a valid judgment. Judgments obtained without such compliance are void. *Wright v. Wright*, 130 Idaho 918, 950 P.2d 1257 (1998).

In a negligence action, plaintiff was entitled to reversal of a default judgment dismissing his case with prejudice based on his failure to retain a new attorney after his counsel was

permitted to withdraw and his failure to appear in person because the district court order did not strictly comply with the rule's requirements as it did not notify plaintiff that his claim could be dismissed with prejudice for failure to comply. *Martinez v. Brown*, 144 Idaho 410, 162 P.3d 789 (2007).

Cited in: *Deutz-Allis Credit Corp. v. Smith*, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990); *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991); *Rosales v. Balbas*, 125 Idaho 848, 875 P.2d 945 (Ct. App. 1994).

Rule 11(b)(4). Withdrawal upon death, extended illness, absence, or disbarment of attorney.

In the event of the death, extended illness, absence, suspension or disbarment from the practice of law of an attorney of record in an action, if such attorney has not indicated on the appearance that the attorney is associated with a partnership, firm, corporation or other attorneys in the action, then no further proceedings can be had in such action that will affect the rights of the party represented by such attorney until the order has been served as provided in this rule. Such order may be obtained and served by any party to the action, or the party's attorney, in the same manner and with the same effect as service of the order by a withdrawing attorney as provided in this Rule 11. (Amended January 8, 1976, effective March 1, 1976.)

Rule 11(b)(5). Limited pro bono appearance.

In accordance with the Idaho Rules of Professional Conduct 1.2(c), an attorney may appear to provide pro bono assistance to an otherwise pro se party in one or more individual proceedings in an action. An attorney making a limited pro bono appearance must file and serve on the opposing party a notice of limited appearance prior to or simultaneous with the proceeding or proceedings, specifying all matters that are to be undertaken on behalf of the party. The attorney shall have no authority to act on behalf of the party on any matter not specified in the notice or any properly filed and served amendment thereto. Service on an attorney who has made a limited appearance for a party shall be valid only in connection with the specific proceedings for which the attorney has appeared, including any hearing or trial at which the attorney appeared and any subsequent motions for presentation of orders. Upon the conclusion of the matters specified for the attorney's limited appearance, the attorney shall file a notice of completion of limited appearance with the court. Upon such filing, the attorney's role terminates without the necessity of leave of the court. (Adopted November 30, 2011, effective January 1, 2012.)

STATUTORY NOTES

Compiler's Notes. Former Rule 11(b)(5), relating to a change of attorneys, was renumbered as I.R.C.P. Rule 11(b)(1) by Order of the

Idaho Supreme Court of March 31, 1978, effective July 1, 1978.

Rule 11(c). Verification.

Verification of pleadings authorized or permitted under these rules or by law shall be a written statement or declaration by a party or the party's

attorney of record sworn to or affirmed before an officer authorized to take depositions by Rule 28, that the affiant believes the facts stated to be true, unless a verification upon personal knowledge is required. When a corporation is a party, the verification may be made by an officer thereof. When a partnership or other unincorporated association is the party under a common name the verification may be made by a member or officer hereof. (Amended December 19, 1975, effective January 1, 1976; amended July 2, 1976, effective October 1, 1976.)

JUDICIAL DECISIONS

Cited in: Johnston v. Pascoe, 100 Idaho 414, 599 P.2d 985 (1979).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Defective Verification.
Effect of Unverified Answer.
Necessity of Verification.
Verification by Attorney.
Waiver of Defect in Verification.
Who May Make Verification.

Defective Verification.

The only mode of reaching a defective verification is by motion to strike. Pence v. Durbin, 1 Idaho 550 (1874).

Effect of Unverified Answer.

Wherever a verified answer is required, an unverified one tenders no issue. Craven v. Bos, 38 Idaho 722, 225 P. 136 (1924).

Necessity of Verification.

An answer to an amended complaint need not be verified where the amended complaint is not verified. People ex rel. Houston v. Hunt, 1 Idaho 433 (1872).

Verification by Attorney.

An attorney may verify a petition for a writ of review where the petition shows he is better acquainted with the proceedings than the client, and he states in the affidavit that he knows the facts stated in the petition and has examined all the proceedings mentioned therein. Madison v. Piper, 6 Idaho 137, 53 P. 395 (1898).

An attorney may verify a cross-complaint for his client during the latter's absence from the county. Silk v. Kelly, 37 Idaho 11, 214 P. 524 (1923).

Waiver of Defect in Verification.

Where the verification of a pleading is not objected to, any defect therein is waived and the pleading cannot be disregarded for want of a proper verification. Pence v. Durbin, 1 Idaho 550 (1874).

Where no error was assigned as to the form or sufficiency of a verification, and record failed to disclose the contrary, the same will be assumed to be complete. Updegraff v. Adams, 66 Idaho 795, 169 P.2d 501 (1946).

Who May Make Verification.

Where facts stated in a pleading are within the knowledge of some person other than the party, such other person may verify the same. Pence v. Durbin, 1 Idaho 550 (1874).

In an original proceeding in the Supreme Court for a writ of mandate to compel a clerk of the district court to file an information presented by the prosecuting attorney, the state is the party interested and the prosecuting attorney, representing the state, may verify the complaint or petition. State v. Quarles, 13 Idaho 252, 89 P. 636 (1907).

Verification means attestation under oath as to the truth of pleadings and is, perforce, a personal ceremony. Updegraff v. Adams, 66 Idaho 795, 169 P.2d 501 (1946).

Rule 12(a). Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on pleadings — When presented.

A defendant shall serve an answer within twenty (20) days after the service of the summons upon the party, or within such longer period as is provided by statute. A party served with a pleading stating a cross-claim

against him shall serve an answer thereto within twenty (20) days after the service of the cross-claim upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within twenty (20) days after service of the answer or, if a reply is ordered by the court, within twenty (20) days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten (10) days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within ten (10) days after the service of the more definite statement. In either case the time for service of the responsive pleading shall not be less than remains of the time which would have been allowed under these rules if the motion had not been made. (Amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Cross References. Adoption of statement in pleading by reference, Rule 10(c).

Class actions, dismissal or compromise, Rule 23(e).

Consolidation of defenses, Rule 12(g).

Demurrers and pleas abolished, Rule 7(c).

Depositions, use, Rule 32(a).

Dismissal of action, voluntary or involuntary, Rules 41(a)(1)-41(d).

Enlargement of time, Rule 6(b).

Evidence on motions, Rule 43(e).

Failure of party to attend or serve answers to interrogatories, Rule 37(d).

Findings by court, Rule 52(a).

Findings of fact and conclusions of law unnecessary, Rule 52(a).

Form of motions, Rule 7(b)(1).

Form of pleadings, Rules 10(a)-10(c).

How presented, Rule 12(b).

Interrogatories, failure to serve answers, Rule 37(d).

Judgment by default defined, Rule 54(c).

Motion day, Rule 78.

Motion for judgment on the pleadings, Rule 12(c).

Motion for more definite statement, Rule 12(e).

Motion to strike, Rule 12(f).

Parties, necessary joinder, Rule 19(a).

Pleadings allowed, Rule 7(a).

Preliminary hearings, Rule 12(d).

Previously dismissed action, costs of, Rule 41(d).

Technical forms of motions not required, Rule 8(e)(1).

Time computation for motions, Rule 7(b)(3).

Trials, hearings and orders in chambers, Rule 77(b).

Waiver of defenses, Rule 12(h).

JUDICIAL DECISIONS

ANALYSIS

Answer Required.

Denial of Day in Court.

Failure to State a Cause of Action.

Answer Required.

Where defendants filed motions to dismiss and to strike in lieu of an answer to plaintiff's complaint, they had an obligation to file an answer to the complaint after their motions were denied, and their failure to do so made the case ripe for entry of a default judgment against them. *Bach v. Miller*, 148 Idaho 549, 224 P.3d 1138 (2010).

Denial of Day in Court.

The trial court failed to properly analyze the eventual consequences to the plaintiff of dismissing the state action. Because the statute of limitation had run, the plaintiff would have been unable to refile his state law claims with the state district court if the federal court chose not to exercise its jurisdiction. Consequently, the plaintiff would never have his day in court and would be denied a forum in which to proceed. *Zaleha v. Rosholt, Robertson & Tucker*, 129 Idaho 532, 927 P.2d 925 (Ct. App. 1996).

Failure to State a Cause of Action.

Idaho Const. art. III, § 14 did not prohibit

the Idaho Senate from denying the passage of a revenue bill, and it did not specifically prohibit the Senate from amending a revenue bill. In the case at bar, the Senate made amendments, the Idaho House approved, and the sales and use tax relating to cigarette taxes was constitutionally enacted; the citizen, who had a generalized grievance, also lacked standing to challenge the tax, and dismissal under Idaho R. Civ. P. 12(b)(6) was proper. *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005).

Cited in: *Martin v. Clements*, 98 Idaho 906, 575 P.2d 885 (1978); *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983);

Bissett v. Unnamed Members of Political Compact, 111 Idaho 863, 727 P.2d 1291 (Ct. App. 1986); *Clark v. Atwood*, 112 Idaho 115, 730 P.2d 1035 (Ct. App. 1986); *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 48 P.3d 1256 (2002); *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002); *Acheson v. Klauser*, 139 Idaho 156, 75 P.3d 210 (Ct. App. 2003); *Lohman v. Flynn*, 139 Idaho 312, 78 P.3d 379 (2003); *Hayes v. Kingstons*, 140 Idaho 551, 96 P.3d 652 (2004); *Goodman v. Lothrop*, 143 Idaho 622, 151 P.3d 818 (2007).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Cross-Complaints.

Effect of Attempted Removal to Federal Court.

Time When Presented.

Tolling the Statute.

Cross-Complaints.

Plaintiff's cross-complaint against intervenor, making no reference to commencement of action or filing of complaint in intervention, and not pleading any facts tolling statute, was held barred by statute of limitations. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

Effect of Attempted Removal to Federal Court.

Former section fixed the time within which to appear and answer, and the defendant was not excused from answering within such time because of his vain effort to get the case into a

federal court. *Morbeck v. Bradford-Kennedy Co.*, 19 Idaho 83, 113 P. 89 (1910); *State ex rel. Mills v. American Sur. Co.*, 26 Idaho 652, 145 P. 1097 (1914).

Time When Presented.

In action to quiet title, refusal to receive defendant's amended answer and qualified complaint tendered on day case was set for trial was not error. *Idaho Trust Co. v. Eastman*, 43 Idaho 142, 249 P. 890 (1926).

Tolling the Statute.

After an action has been removed to a federal court, the state court is without jurisdiction to act further in the cause. Thus the period of time the cause is before the federal court cannot be considered in computing the time within which the appellant had to appear and plead to the cause. *Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co.*, 88 Idaho 11, 395 P.2d 477 (1964).

Rule 12(b). How defenses and objections presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses shall be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party, (8) another action pending between the same parties for the same cause. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court,

the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (Amended April 22, 2004, effective July 1, 2004.)

STATUTORY NOTES

Cross References. Defenses, affirmative, Rule 8(c).

Motion for summary judgment, Rule 56(a).

Opportunity to present material pertinent to motion for summary judgment, Rule 56(e).

Third-party, defendant bringing in, Rule 14(a).

JUDICIAL DECISIONS

ANALYSIS

Another Action Pending.

Appealability of Order.

Facts Which Court May Consider.

Failure to Plead Defenses.

Failure to State a Cause of Action.

Failure to State Claim upon Which Relief Can Be Granted.

Indispensable Parties.

Jurisdiction.

—Personal.

—Subject Matter.

Nature of Rule.

Permissible Litigation of Claims.

Res Judicata.

Review of Dismissal.

Summary Judgment.

Trial Strategy.

Waiver of Objections.

Another Action Pending.

While there may be some circumstances which would justify a state court in staying a state court action pending the termination of a similar controversy in the federal courts, the trial court did not err in dismissing an action for conversion of real property on the ground that another action involving the same claims was pending between the parties, where an action on appeal in the federal court involved the same parties, the same issues, and the same facts. *Roberts v. Hollandsworth*, 101 Idaho 522, 616 P.2d 1058 (1980).

The determination of whether to proceed with a case, when a similar case is pending elsewhere and has not gone to judgment, is discretionary. In exercising such discretion, a trial court should evaluate the identity of the real parties in interest and the degree to which the claims or issues are similar; the court also may consider the occasionally competing objectives of judicial economy, mini-

mizing costs and delay to the litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984), overruled on other grounds, *NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987).

Rule 8(e)(2), permitting the pleading of inconsistent claims, contemplates the claims being filed in the same complaint. Where a claim for monies due under a contract for child support was filed in a separate complaint, along with a claim filed on the same date, filing in separate actions by separate complaints made one or the other amenable to dismissal under this rule which authorizes a motion to dismiss because another action is pending between the same parties for the same cause. *Bondy v. Levy*, 119 Idaho 961, 812 P.2d 268 (1991).

In action to enforce arbitration agreement, district court's decision to decline jurisdiction on the ground that another action was pending in California was reasonable, where none of the parties resided in Idaho, and having a hand in the application of Idaho laws applicable to the arbitration was a negligible consideration. *Diet Ctr., Inc. v. Basford*, 124 Idaho 20, 855 P.2d 481 (Ct. App. 1993).

The trial court's determination of whether to proceed with an action where a similar case is pending in another court is discretionary. *Klaue v. Hern*, 133 Idaho 437, 988 P.2d 211 (1999).

In determining whether a lawsuit should proceed where a similar lawsuit is pending in another court, the court should consider whether the other case has gone to judgment, in which case the doctrines of claim and issue preclusion may bar additional litigation, and whether the court, although not barred from deciding the case, should nevertheless refrain

from doing so. *Klaue v. Hern*, 133 Idaho 437, 988 P.2d 211 (1999).

The district court abused its discretion when it ruled that an out-of-state probate proceeding constituted a pending action justifying dismissal where there was no final judgment resolving the ownership of stock, and where the out-of-state court was not in a position to determine the whole controversy and settle all the rights of the parties. *Klaue v. Hern*, 133 Idaho 437, 988 P.2d 211 (1999).

The plaintiff's argument that a state action filed at the same time as a federal action would have been dismissed if plaintiff had timely served the state complaint on the defendant did not constitute good cause for failing to serve the state complaint within six months of its filing, since there is no requirement that a motion for dismissal be granted, and the trial court might instead have stayed the state action pending determination of the federal action. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Appealability of Order.

Where a trial court granted a motion to quash service of summons with respect to one defendant, it was exercising its discretion under subdivisions (4) and (5), rather than dismissing the action as to that defendant under subdivision (2), and its order was non-appealable. *Silver Sage Ranch, Inc. v. Lawson*, 98 Idaho 707, 571 P.2d 768 (1977).

Facts Which Court May Consider.

The only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, supplemented by those facts of which the court may properly take judicial notice. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

A trial court, in considering a motion to dismiss pursuant to subdivision (6) of this rule, has no right to hear evidence; where judicial notice is merely a substitute for the conventional method of taking evidence to establish facts, the court has no right to take judicial notice of anything, with the possible exception of facts of common knowledge which controvert averments of the complaint. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

Failure to Plead Defenses.

Where the defendants gave no indication before the trial that they would rely on an affirmative defense, and the plaintiffs' right would be significantly prejudiced if the defendants were allowed to assert the defense for the first time at trial, the trial court acted

correctly in denying the defendants' attempt to bring the defense before the jury. *Keller Lorenz Co. v. Insurance Assocs. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977).

The plaintiff's failure to cite the particular statute of limitations upon which it relied as a defense to the defendant's counterclaim would normally result in the waiver of the defense of the statute of limitations; however, where the evidence showed that the statute of limitations issue was not only tried by consent of the parties, but it was actually conceded by the defendant to be valid, it should be deemed to have been raised in the pleadings. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984).

Failure to State a Cause of Action.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to this section is the same as the standard upon the grant of a motion for summary judgment. The non-moving party is entitled to have all inferences from the record and pleadings viewed in his/her favor, and only then may the question be asked whether a claim for relief has been stated. *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993).

Where a governmental entity could not maintain a libel and slander claim against a person whose speech was protected, dismissal of the libel and slander claim pursuant to I.R.C.P. 12(b)(6) was appropriate because an injunction on speech critical of a public official was an impermissible prior restraint. *Nampa Charter Sch., Inc. v. Delapaz*, 140 Idaho 23, 89 P.3d 863 (2004).

District court erred in dismissing the buyers' complaint against the real estate company and realtor under I.R.C.P. 12(b)(6) where real estate agents did not provide professional services for purposes of the professional malpractice statute of limitations, § 5-219(4), and the cause of action brought by the buyers was in tort, not in contract; the four-year statute of limitations of § 5-224 applied and the buyers filed their suit within the applicable statute of limitations period. *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 93 P.3d 680 (2004).

Failure to State Claim upon Which Relief Can Be Granted.

Findings of fact are not required for dismissal of a complaint under subdivision (6) of this rule. *Bissett v. State*, 111 Idaho 865, 727 P.2d 1293 (Ct. App. 1986).

Where the plaintiff brought an action seeking to enjoin the state, county, and city from enforcing laws which he believed infringed upon his right to freely exercise his religious

beliefs, the district court did not abuse its discretion in failing to allow amendment of the plaintiff's complaint, where the record contained no allegations which, if proven, would entitle the plaintiff to the injunctive relief he claimed, and he failed to state on appeal any additional allegations which would establish a cause of action. *Bissett v. State*, 111 Idaho 865, 727 P.2d 1293 (Ct. App. 1986).

The standard for reviewing a dismissal pursuant to subdivision (6) of this rule is the same as a summary judgment standard; the nonmoving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated. *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

The refusal to allow a plaintiff to amend a complaint, where the record contains no allegations which, if proven, would entitle the plaintiff to the relief claimed, is not an abuse of discretion. *Wells v. United States Life Ins. Co.*, 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991).

Where trial court treated a motion under subdivision (6) of this rule as a motion to dismiss, even when the motion was considered as a motion for summary judgment by the reviewing Supreme Court, there nevertheless existed triable issues of fact which precluded the granting of the motion in the case of a State hospital patient seeking release to a less restrictive environment. *Danny L. v. Bonnes*, 120 Idaho 868, 820 P.2d 1225 (1991).

For a complaint to be dismissed under subdivision (6) of this rule on the ground that the complaint fails to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief; therefore where there were genuine issues of material fact presented, the trial court was correct in not granting summary judgment. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

As with a motion under Rule 8(a), every reasonable intentment will be made to sustain a complaint against a Rule 12(b)(6) motion to dismiss. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992).

A court may grant a motion to dismiss for failure to state a claim under clause (6) of this rule only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." It need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain

that some relief may be granted. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992).

Because it could not be said, based upon the general allegations in the complaint, that there was no conceivable set of facts which would have entitled plaintiff to relief in his negligence action against electric utility for injuries he suffered while attempting to re-connect power to his farm after utility allegedly wrongfully terminated it, it was error to hold that the pleading was insufficient to allege a duty and breach of duty causing injuries and dismissal. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 895 P.2d 561 (1995).

A private right of action for insurance company's alleged obstruction of justice and violations of the Idaho Bribery and Corrupt Influences Act was not available and district court's dismissal of these claims was proper. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

District court properly dismissed workers' complaint where the specific facts pled by the workers did not infer bias or prejudgment as a matter of law; as a result, the allegations raised by the workers did not halt the operation of the exhaustion requirement. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 106 P.3d 455 (2005).

In a suit by former boy scouts against Boy Scouts of American (BSA) for damages resulting from their abuse by their former scout leader, the BSA's motion to dismiss should have been granted. Liability imposed under § 6-1701 et seq. differed significantly from that formerly available. The chapter could not be applied to conduct that occurred at least six years before it was enacted, and BSA could not be held accountable for behavior that was not actionable at the time it occurred. *Doe v. BSA*, 148 Idaho 427, 224 P.3d 494 (2009).

Indispensable Parties.

The trial court did not err in denying the state's request to dismiss the claims of individual plaintiffs whose school districts were not named as plaintiffs in a declaratory action challenging school funding, because the school districts bore no responsibility for any state failure to establish and maintain a thorough system of public, free common schools, and the students' school districts were not indispensable parties who were required to be joined to the action. *Idaho Sch. for Equal Educ. Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1999).

Jurisdiction.

In a wrongful death action, the trial court's denial of defendant's motions to dismiss and for summary judgment, both of which were

made upon the ground that the industrial commission had exclusive jurisdiction of the matter, did not remove the question of the applicability of workmen's compensation law from the proceedings, and thus the trial court did not err in carrying that issue forward to trial. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

While a motion to quash service was proper prior to adoption of the rules of civil procedure, under the present rule a motion setting forth the defense of lack of in personam jurisdiction should be brought under subdivision (2), (4) or (5). *Silver Sage Ranch, Inc. v. Lawson*, 98 Idaho 707, 571 P.2d 768 (1977).

Where claimant filed his complaint in district court, alleging that his insurance company intentionally and unreasonably denied his worker's compensation benefits and also alleging breach of duty of good faith and fair dealing, intentional infliction of emotional distress, breach of fiduciary duty, and common law fraud, the action arose under the worker's compensation law and was within the exclusive jurisdiction of the Industrial Commission; thus, a motion to dismiss for lack of subject matter jurisdiction should be granted by the district court. *Walters v. Industrial Indem. Co.*, 127 Idaho 933, 908 P.2d 1240 (1996).

Even though the district court's order for partial summary judgment was not appealable as a matter of right, the appellate court had in limited circumstances treated such appeals as permissive appeals under I.A.R. 12 where the parties had briefed and argued the issue; the district court's order granting partial summary judgment involved a controlling question of law as to which there were substantial grounds for difference of opinion, and where an immediate appeal may materially advance the orderly resolution of the litigation, the appeal was treated as an appeal by permission under I.A.R. 12. *Dep't of Labor v. Sunset Marts, Inc.*, 140 Idaho 207, 91 P.3d 1111 (2004).

In a breach of contract suit, the trial court erred in granting the buyer's motion to dismiss for lack of in personam jurisdiction under this rule because the buyer's filing of a motion to strike the seller's amended complaint was a general appearance; a defendant making a special appearance to challenge in personam jurisdiction could only file a motion to dismiss or file a response to a pleading or motion under Idaho. R. Civ. P. 4(i), and the motion to strike the amended complaint was not a response to a pleading as defined by the Idaho Rules of Civil Procedure. *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008).

When residents petitioned for judicial review of city's decision to annex a subdivision, the city failed to use the appropriate method to challenge subject matter jurisdiction by filing a motion to dismiss pursuant to I.R.C.P. 12(b)(1), (6). I.R.C.P. 84(o) is the only provision for motions to a district court sitting in an appellate capacity. In *re City of Shelley*, — Idaho —, 255 P.3d 1175 (2011).

—Personal.

In that "jurisdiction" refers to the power of a court to decide disputes and to compel parties to come before it, a court ruling on a motion to dismiss for lack of personal jurisdiction must determine whether it has power to hear the complaint rather than utilize a *forum non conveniens* analysis. *Marco Distrib., Inc. v. Biehl*, 97 Idaho 853, 555 P.2d 393 (1976).

This rule requires that the defense of lack of jurisdiction over the person be raised either by a pre-answer motion or in the answer itself no later than the raising of other defenses under the rule. *Nelson v. World Wide Lease, Inc.*, 110 Idaho 369, 716 P.2d 513 (1986).

Under this rule and I.R.C.P. 12(h) a defense of lack of jurisdiction over the person is waived if not raised by a timely motion or by the first responsive pleading. *Gage v. Harris*, 119 Idaho 451, 807 P.2d 1289 (Ct. App. 1991).

By filing a motion for change of venue without joining the motion to dismiss for lack of personal jurisdiction, the defendants waived the defense of lack of personal jurisdiction. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

The Idaho Rules of Civil Procedure do not allow a party to "preserve the right" to object to personal jurisdiction at a later date when filing a motion for change of venue. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

—Subject Matter.

Subject matter jurisdiction can never be waived or consented to, and a court has a *sua sponte* duty to ensure that it has subject matter jurisdiction over a case. Judgments and orders made without subject matter jurisdiction are void and subject to collateral attack and are not entitled to recognition in other states under the full faith and credit clause of the United States Constitution. *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244 (2010), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, — Idaho —, 265 P.3d 502 (2011).

Nature of Rule.

This rule is procedural, not substantive; it specifies the time and manner in which cer-

tain defenses must be presented. It does not, of itself, establish the validity of those defenses in particular cases, nor does it prescribe the action to be taken by the court if a defense mentioned in the rule is properly asserted. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984), overruled on other grounds, *NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987).

Permissible Litigation of Claims.

An attorney may assert a claim of entitlement to a fee and a claim of entitlement to collect the fee from a particular fund in the same case where the client's action against a third party is adjudicated, unless some prejudice would result from doing so. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

The court may direct the parties in an existing case to litigate a claim in that case rather than litigating it in another, separate action; the exercise of this power should be guided by the same criteria that govern a decision to refrain when a separate action already is pending — i.e., the identity of the real parties in interest, the degree to which the claims are similar, and the occasionally competing objectives of judicial economy, minimizing costs and delay to the litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

Res Judicata.

Res judicata (claim preclusion) did not prevent plaintiffs from litigating the validity of city's amended comprehensive land use plan and amended zoning ordinance where plaintiffs were not in privity with parties to related suit. Therefore, the city and state's motion to dismiss under this rule should not have been granted. *Foster v. City of St. Anthony*, 122 Idaho 883, 841 P.2d 413 (1992).

Review of Dismissal.

When reviewing an order of the district court dismissing a case pursuant to this rule the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999).

Summary Judgment.

Even though plaintiff did not move for a summary judgment, the district court was nevertheless empowered to grant it, therefore the district court should have ruled as a matter of law that plaintiff was a third-party

beneficiary of contract between local improvement district and defendant construction company and should have granted the plaintiff a partial summary judgment on the issue of its allegation of a third-party beneficiary contract. *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978).

A motion for summary judgment on the grounds of statute of limitation or laches would be better made in a quiet title action only after the defendant has answered and the issues are framed. *Osterloh v. State*, 100 Idaho 702, 604 P.2d 716 (1979), reversed on other grounds, *Osterloh v. State*, 105 Idaho 50, 665 P.2d 1060 (1983).

Upon motion for summary judgment, it is axiomatic that all facts and inferences arising are construed most favorably towards the party against whom summary judgment is sought, and if any genuine issue of material fact remains unresolved, summary judgment is improper. *Nielsen v. Provident Life & Accident Ins. Co.*, 100 Idaho 223, 596 P.2d 95 (1979).

Where the plaintiff moved for summary judgment and the defendant, which was entitled to summary judgment but did not so move, asserted the defense of failure to state a claim and prayed for dismissal of all claims against it, the district court properly granted summary judgment to the defendant. *Juker v. American Livestock Ins. Co.*, 102 Idaho 644, 637 P.2d 792 (1981).

In view of the affidavits and depositions which were matters outside the pleadings and were submitted in support of the defendant's amended motion to dismiss, the trial court correctly treated the motion to dismiss as a motion for summary judgment. *Masi v. Seale*, 106 Idaho 561, 682 P.2d 102 (1984).

If a trial court considers factual allegations outside the pleadings on a motion pursuant to subdivision (6) of this rule, it errs if it fails to convert the motion to one for summary judgment. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

If a court considers matters outside pleadings on a motion pursuant to subdivision (6) of this rule, such motion must be treated as a motion for summary judgment and the proceedings thereafter must comport with the hearing and notice requirements of IRCP Rule 56. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

Pursuant to the Idaho Rules of Civil Procedure applicable to habeas corpus actions, the magistrate was required to treat the respondents' motion as one for summary judgment upon considering matters outside the pleadings. *Merrifield v. Arave*, 128 Idaho 306, 912 P.2d 674 (Ct. App. 1996).

When a motion was initially presented under Idaho R. Civ. P. 12(b)(6) as a motion for judgment on the pleadings, and the magistrate considered evidence and information extraneous to the pleadings in resolving the motion, the motion was properly treated as one for summary judgment and was reviewed under the summary judgment standards. *Storm v. Spaulding*, 137 Idaho 145, 44 P.3d 1200 (Ct. App. 2002).

Where petitioner's claim that the commission of pardons and parole violated the law by failing to grant petitioner a parole hearing to consider his eligibility for institutional parole at any time during the service of his first two sentences was not moot, his allegations were sufficient to state a claim for relief, and the evidence was sufficient to raise genuine factual issues precluding summary judgment, the magistrate erred in dismissing his petition. *Lake v. Newcomb*, 140 Idaho 190, 90 P.3d 1272 (Ct. App. 2004).

In a case involving alleged sexual molestation of children by their father, his motion to dismiss for failure to state a claim was converted to a motion for summary judgment because the trial court considered the affidavits of his daughters in making its decision. *Glaze v. Deffenbaugh*, 144 Idaho 829, 172 P.3d 1104 (2007).

Trial Strategy.

Where the plaintiff had made a tactical decision by continuing with its appeal in the hope of being the prevailing party and making the statute of limitations a moot issue, there would be no denial of the right to have its day in court if the appellate court affirmed the district court's dismissal of the action. *Eastern Idaho Agric. Credit Ass'n v. Neibaur*, 133 Idaho 402, 987 P.2d 314 (1999).

Waiver of Objections.

Where, in a civil contempt action based on the defendant father's failure to pay child support, the attorney magistrate ruled that a reciprocal action against the defendant father should be consolidated and heard at the same time, the defendant father's failure to object or raise as an affirmative defense the asserted lack of personal jurisdiction over him was deemed to have been a waiver of his objections to the court's jurisdiction over him. *State v. Aguilar*, 103 Idaho 578, 651 P.2d 512 (1982).

Where motion for change of venue was not filed until four and one-half years after the last responsive pleading was filed, movant waived his right to assert a motion for change of venue. *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983).

In a divorce action, the husband did not

waive his jurisdictional challenge by signing a stipulation on the merits of the child support and attorney fee issues after his motion to dismiss had been denied. *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

This rule and I.R.C.P. 12(h) permit a defendant to raise all available defenses and then to proceed on the merits without waiving a jurisdictional challenge. *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

Cited in: *Gardner v. Hollifield*, 97 Idaho 607, 549 P.2d 266 (1976); *Duignan v. A.H. Robins Co.*, 98 Idaho 134, 559 P.2d 750 (1977); *Myers v. City of Pocatello*, 98 Idaho 168, 559 P.2d 1136 (1977); *State v. Crook*, 98 Idaho 383, 565 P.2d 576 (1977); *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977); *Miller v. Stauffer Chem. Co.*, 99 Idaho 299, 581 P.2d 345 (1978); *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *Palmer v. Idaho Bank & Trust*, 100 Idaho 642, 603 P.2d 597 (1979); *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 627 P.2d 326 (1981); *Lincoln County v. Fidelity & Deposit Co.*, 102 Idaho 489, 632 P.2d 678 (1981); *Service Employees Int'l Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 683 P.2d 404 (1984); *Fischer v. Sears, Roebuck & Co.*, 107 Idaho 197, 687 P.2d 587 (Ct. App. 1984); *Estate of Thompson v. Turner*, 107 Idaho 470, 690 P.2d 925 (1984); *Tomchak v. Walker*, 108 Idaho 446, 700 P.2d 68 (1985); *Nenoff v. Graham*, 108 Idaho 550, 700 P.2d 953 (Ct. App. 1985); *Houck v. State*, 109 Idaho 204, 706 P.2d 93 (Ct. App. 1985); *Parsons v. Idaho State Tax Comm'n*, 110 Idaho 572, 716 P.2d 1344 (Ct. App. 1986); *Seitz v. Stecklein*, 111 Idaho 364, 723 P.2d 908 (Ct. App. 1986); *Bissett v. Unnamed Members of Political Compact*, 111 Idaho 863, 727 P.2d 1291 (Ct. App. 1986); *Nilsson v. Mapco*, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988); *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (1989); *Crane Creek Country Club v. Idaho State Tax Comm'n*, 117 Idaho 585, 790 P.2d 366 (1990); *Burton v. Atomic Workers Fed. Credit Union*, 119 Idaho 17, 803 P.2d 518 (1990); *Lundgren v. City of McCall*, 120 Idaho 556, 817 P.2d 1080 (1991); *MacLeod v. Reed*, 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995); *Rincover v. State, Dep't of Fin.*, 128 Idaho 653, 917 P.2d 1293 (1996); *Abrams v. Porter*, 128 Idaho 869, 920 P.2d 386 (1996); *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997); *State v. Nielsen*, 131 Idaho 494, 960 P.2d 177 (1998); *McGlooin v. Gwynn*, 140 Idaho 727, 100 P.3d 621 (2004); *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 106 P.3d 449 (2005); *Herrera v. Estay*, 146 Idaho 674, 201 P.3d 647 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

All Defenses to Be Set Up.
 Another Action Pending.
 Answers.
 Change of Venue.
 Counterclaims.
 Cross-Claims.
 Denial.
 Failure to Plead Defenses.
 Failure to State Claim.
 Forms.
 General Demurrer.
 Improper Venue.
 Intervention.
 Jurisdiction.
 —Personal.
 —Subject Matter.
 Legal Capacity.
 Motion to Dismiss.
 Res Judicata Defenses.
 Statute of Limitations.
 Summary Judgment.
 Waiver of Defense.

All Defenses to Be Set Up.

A defendant is required to set up any and all defenses he may have, whether legal or equitable in character, by answer in the original action. *Utah & N.R.R. v. Crawford*, 1 Idaho 770 (1880).

The statute not only permits, but requires defendant to set up any and all defenses he may have, whether legal or equitable in character, by answer in the original action. *Naccarato v. Village of Priest River*, 68 Idaho 368, 195 P.2d 370 (1948).

Another Action Pending.

Objection that first divorce suit was a bar to the maintenance of the second came too late when no objection of another cause pending was raised either by demurrer or by answer to such second divorce suit but was raised on appeal from order vacating divorce decree granted in second suit. *Bedwell v. Bedwell*, 68 Idaho 405, 195 P.2d 1001 (1948).

Where the court in a divorce action, following the granting of a divorce, appointed a receiver to sell the community property of the parties and the plaintiff filed a motion, claiming the property sold as the property of himself and subsequent wife, to require the defendant, receiver, and purchasers at the receiver's sale to deliver such property to plaintiff, the pendency of said motion was a defense to a separate suit by the plaintiff for claim and delivery of said property and could be presented by a motion asserting defense numbered (8) under former similar rule.

Farmer v. Boyd, 89 Idaho 269, 404 P.2d 353 (1965).

It was error to dismiss a divorce action on ground (8) where the question was first raised after the entry of the decree of divorce on motion to set aside the decree under former Rule 60(b). *Coombes v. Coombes*, 91 Idaho 729, 430 P.2d 95 (1967).

Action by county against former sheriff and his surety, in which complaint alleged that sheriff had exceeded his budget appropriation was premature and improper in that there was, at the time the action was brought, a petition before the court requesting affirmative action on the part of the county commissioners regarding procurement of a court order authorizing that sufficient county funds be made available to the commissioners for payment of such legitimate expenditures as may have been determined, and the companion case should have been determined by the court prior to the instigation of the case in question. *Bonneville County v. Hopkins*, 94 Idaho 536, 493 P.2d 395 (1972).

Answers.

Answers were separated by Code into two classes: those which consist of denials, and therefore serve sole purpose of raising direct issue upon plaintiff's allegations; and those which state new matter—that is, facts different from those averred by plaintiff and not embraced within judicial inquiry into thereto. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

Answer containing general denial and setting forth new matter should not be stricken. *Peterson v. Bell*, 50 Idaho 521, 298 P. 379 (1931).

There were two types of answers under the Code: (1) answers which consist of denials, and (2) answers which plead new matter. *Lang Co. v. Grandview Mut. Canal Co.*, 77 Idaho 220, 291 P.2d 297 (1955).

Change of Venue.

Counter affidavit may be filed in opposition to a motion for change of venue on the ground of popular prejudice. *Hyde v. Harkness*, 1 Idaho 601 (1875).

An appeal from an order denying a change of venue does not stay proceedings in district court. *Hay v. Hay*, 40 Idaho 627, 235 P. 900 (1925).

If foreign insurance company is sued in wrong county, remedy is by motion for change of venue and not by motion to dismiss action. *American Surety Co. v. Ada County Dist. Court*, 43 Idaho 589, 254 P. 515 (1927).

If the District Court of Minidoka County

was not the court to which claimant's appeal from decision of the Industrial Accident Board would have been taken, relief should have been sought by petition to have the cause transferred to the proper county rather than by an assignment of error from appeal. *Thacker v. Jerome Co-op. Creamery*, 61 Idaho 726, 106 P.2d 863 (1940).

A motion for change of venue on the ground of convenience of witnesses is addressed to the sound discretion of the trial court and its action will not be reversed in the absence of an abuse of discretion. *Shirley v. Nodine*, 1 Idaho 696 (1878); *Sweeney v. American Nat'l Bank*, 64 Idaho 695, 136 P.2d 973 (1943).

An application for change of venue on ground of convenience of witnesses need not be made at commencement of action, but may be made within a reasonable time after appearance. *Sweeney v. American Nat'l Bank*, 64 Idaho 695, 136 P.2d 973 (1943).

A defendant who seeks to have a transitory action transferred to county of his residence is required at the time of his first appearance to file an affidavit of merits and demands in writing that the trial be held in the proper county. *Anderson v. Springer*, 78 Idaho 17, 296 P.2d 1024 (1956).

A nonresident defendant who files an affidavit of merits and demands in writing that the trial be held in the county of his residence is not required to file a formal motion for change, since the essential facts of the transfer are set forth in the affidavit of merits. *Anderson v. Springer*, 78 Idaho 17, 296 P.2d 1024 (1956).

Counterclaims.

Office and functions of counterclaim are well-defined and it is not optional with pleader to plead cross-complaint where by terms of statute it is, in truth and in fact, a counterclaim. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

Cross-Claims.

A cross-complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but need not necessarily seek release against all or any of the original plaintiffs or defendants. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

A cross-complaint may be embodied in the same instrument with the answer. *Western Loan & Sav. Co. v. Smith*, 12 Idaho 94, 85 P. 1084 (1906).

Cross-demand must be pleaded as fully as original cause of action, and must be sufficient in itself without recourse to other pleadings, unless expressly referred to therein.

Denton v. Detweiler, 48 Idaho 369, 282 P. 82 (1929).

Denial.

A denial when properly pleaded does not state any facts, but denies facts. *Smith v. Marley*, 39 Idaho 779, 230 P. 769 (1924).

Failure to Plead Defenses.

An objection to an answer on the ground that it states no defense is never waived. *Swanholm v. Reeser*, 3 Idaho 476, 31 P. 804 (1892).

Since former Rule 8(c) required defenses or matters of avoidance to be set forth affirmatively and former Rule 12(h) applied to all defenses and objections, failure to plead defenses and failure to present defenses by pre-answer motion under this rule constituted a waiver only correctable as justice requires under former Rule 15(a). *Garren v. Butigan*, 95 Idaho 355, 509 P.2d 340 (1973).

Failure to State Claim.

In determining whether a complaint does or does not state a cause of action, every reasonable intentment will be made to sustain it. *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Motion to dismiss on the ground of failure to state claim upon which relief can be granted as provided by former similar rule has generally been viewed with disfavor because of the possible waste of time in case of reversal of a dismissal of action, and because the primary object of the law is to obtain a determination of the merits on the claim. *Wackerli v. Martindale*, 82 Idaho 400, 353 P.2d 782 (1960).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Wackerli v. Martindale*, 82 Idaho 400, 353 P.2d 782 (1960); *Williams v. Williams*, 82 Idaho 451, 354 P.2d 747 (1960); *Hadfield v. State*, 86 Idaho 561, 388 P.2d 1018 (1963).

Under former rules of civil procedure, a motion to dismiss the complaint because of failure to state a claim upon which relief can be granted, admitted the facts alleged in the complaint, but challenged the plaintiff's right to relief. *Williams v. Williams*, 82 Idaho 451, 354 P.2d 747 (1960).

Plaintiff's complaint in that it alleged no dissemination of the information obtained by the disclosure of his financial condition by the bank to his employer and also in that it refused to acknowledge such invasion may have been justified under the claimed discretion of the bank manager, failed to state a

claim upon which relief could be granted on the ground of the invasion of his right of privacy; however, if the complaint had alleged some facts which would entitle the pleader to relief on some ground or theory other than that upon which he urged his cause, it would not be subject to motion to dismiss under the rule. *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284, 92 A.L.R.2d 891 (1961).

Under certain conditions parol evidence may be introduced to show the true consideration or want of consideration for the promissory note or other instrument. However, the supreme court has consistently held that the defense of want or failure of consideration are affirmative defenses to be pleaded. *Rosenberry v. Clark*, 85 Idaho 317, 379 P.2d 638 (1963).

Motion to dismiss a complaint on ground of failure to state a claim upon which relief can be granted admits truth of facts alleged, and all intendments and inferences that reasonably may be drawn therefrom, and such will be considered in light most favorable to the plaintiff. *Walenta v. Mark Means Co.*, 87 Idaho 543, 394 P.2d 329 (1964).

A motion to dismiss was properly treated as a motion for summary judgment where the judgment recited that "the pleadings, affidavits, and exhibits of the parties hereto," were considered, and, as a matter of law, plaintiff did not show himself entitled to relief. *James v. State*, 88 Idaho 172, 397 P.2d 766 (1964).

In an action to condemn a roadway across adjacent land it was error to sustain a motion to dismiss plaintiff's complaint, which alleged that his land could be and had been cultivated and was for many years resided upon as a farm and that it was necessary that he have a roadway leading from the public highway to his farm, it not being for the court to decide whether or not plaintiff could prove his property was a farm. *McKenney v. Anselmo*, 88 Idaho 197, 398 P.2d 226 (1965).

A motion to dismiss stating there was a failure "to state a claim upon which relief can be granted," supported by affidavit, was sufficient in stating with particularity the grounds for dismissal. *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965).

If a bona fide complaint is filed that charges every element necessary to recovery, summary dismissal is not justified and the court should be especially reluctant to dismiss on the pleadings where the asserted theory of liability is novel or unusual, since it is important that such legal theories be explored and assayed in the light of actual facts, not a pleader's supposition. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

In action by county against former sheriff and his surety the complaint, seeking to recover alleged liabilities incurred by sheriff in excess of yearly appropriation, was properly dismissed under former similar rule for its failure to allege that expenditures were unreasonable in amount and were not indispensably required for the discharge of the county's governmental functions. *Bonneville County v. Hopkins*, 94 Idaho 536, 493 P.2d 395 (1972).

Every reasonable intendment will be made to sustain a complaint against a motion for failure to state a claim upon which relief can be granted. *Idaho Comm'n on Human Rights v. Campbell*, 95 Idaho 215, 506 P.2d 112 (1973).

Statement attributing incompetence to plaintiff school teacher, made by defendant school superintendent to the school board, was only conditionally and not absolutely privileged and thus teacher's complaint for slander was not subject to dismissal for failure to state a claim upon which relief could be granted. *Gardner v. Hollifield*, 96 Idaho 609, 533 P.2d 730 (1975).

Where teacher's complaint against school board for failure to renew his teaching contract did not indicate whether his resignation was accepted before he withdrew it or whether the school board relied upon his resignation in failing to send him a notice of nonrenewal, the defenses of waiver and estoppel did not appear upon the face of the complaint so dismissal for failure to state a claim upon which relief could be granted was error. *Gardner v. Hollifield*, 96 Idaho 609, 533 P.2d 730 (1975).

In plaintiff's action against a city for its alleged failure to properly operate the municipal water system, the city's motion for dismissal was based on the failure of plaintiff's complaint to state a claim and not under the summary judgment provisions of Rule 56(b), so that the only issues raised and subject to the court's ruling were issues of law. *Calkins v. Fruitland*, 97 Idaho 263, 543 P.2d 166 (1975).

Forms.

The appendix to the former Rules of Civil Procedure volume contains several forms, one of which is number 15. This form contains various grounds for dismissal of an action, including that for dismissal on the ground of improper venue. This form is a guide and does not establish a substantive right. *Bistline v. Eberle*, 85 Idaho 167, 376 P.2d 501 (1962).

General Demurrer.

Defendant's general demurrer was treated by trial court as a motion to dismiss for

"failure to state a claim upon which relief can be granted." *Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959).

Improper Venue.

When question of jurisdiction dependent on question of venue is presented as a mixed question of law and fact by conflicting affidavits, filed on a preliminary motion to dismiss, the court should overrule preliminary motion and determine question on evidence in case as presented on trial. *Purdum v. Neil*, 10 Idaho 263, 77 P. 631 (1904).

There is no authorization by rule or statute in Idaho for a trial court to dismiss an action on the ground of improper venue and the trial court should have denied the motion to dismiss action for libel. *Bistline v. Eberle*, 85 Idaho 167, 376 P.2d 501 (1962).

Trial court, in treating a motion to dismiss as a demand a motion for change of venue on its own motion, erred, for, if a motion to dismiss upon the grounds of improper venue is made, the same should be denied, the trial court being without power to change the venue on its own motion. *Butterfield v. Hatch*, 85 Idaho 527, 381 P.2d 285 (1963).

Intervention.

An assignee has such an interest as entitles him on proper application to intervene. *Pence v. Sweeney*, 3 Idaho 181, 28 P. 413 (1891).

Petition in intervention is filed in time when it is filed before the trial. *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325 (1936).

Jurisdiction.

An objection to the jurisdiction of the court is never waived and may be raised for the first time in a Supreme Court proceeding. *Aram v. Edwards*, 9 Idaho 333, 74 P. 961 (1903).

The question of jurisdiction may be raised at any time. *Richardson v. Ruddy*, 15 Idaho 488, 98 P. 842 (1908).

—Personal.

Where defendant, by affidavit, raises objection to jurisdiction of his person, and plaintiff by counter affidavit shows facts supporting jurisdiction, defendant's objections are properly overruled and the evidence should be heard. *Purdum v. Neil*, 10 Idaho 263, 77 P. 631 (1904).

Since defendant waived any objections to personal jurisdiction by participating in a trial on the merits, any awards of personal property owned by either of the parties was proper from jurisdictional point. *Smestad v. Smestad*, 94 Idaho 181, 484 P.2d 730 (1971).

—Subject Matter.

Motion under former I.R.C.P. 56(c) for summary judgment dismissing cause for lack of

jurisdiction over the subject matter could be more correctly viewed as a motion to dismiss for lack of jurisdiction over the subject matter pursuant to former similar rule. *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969).

Legal Capacity.

Objection that plaintiff is without legal capacity to sue is waived if not taken by answer. *Thelen v. Thelen*, 32 Idaho 755, 188 P. 40 (1920).

Having failed to timely object to respondent's capacity to sue, appellant thereby waived any objection on that ground and the motion to dismiss the appeal was denied. *Farmers' & Mechanics' Bank v. Gallaher Inv. Co.*, 43 Idaho 496, 253 P. 383 (1927).

To assert the failure of a corporation to comply with statute governing filing of articles of incorporation as a defense to a corporate action, counterclaim, or cross-claim, such failure must be presented by proper pleading or motion. *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 414 P.2d 879 (1966).

Motion to Dismiss.

At the conclusion of the pretrial conference where evidence had been introduced of the dissolution of the partnership in an effort to show deceased partner or his representative was not a proper party to the action, where evidence had also been introduced that dump truck had been set over to the deceased partner in dissolution agreement, it being one of the two pieces of machinery involved in the action to recover balance due from the sale of such machinery, motion to dismiss the action was treated as a motion for summary judgment and the trial court entered judgment dismissing the action. *Rush v. G-K Mach. Co.*, 84 Idaho 10, 367 P.2d 280 (1961).

A motion to dismiss presented under former similar rule had generally been viewed with disfavor because of the probable waste of time in case of a reversal or a dismissal of the action and because the primary object of the law is to obtain a determination of the claim. *Hadfield v. State ex rel. Burns*, 86 Idaho 561, 388 P.2d 1018 (1964).

Res Judicata Defenses.

Res judicata defenses should be raised by answer as pleading new matter constituting a defense, and cannot be raised by motion to dismiss. *Kralick v. Shuttleworth*, 49 Idaho 424, 289 P. 74 (1930).

Statute of Limitations.

The affirmative defense of the statute of limitations must be asserted in a responsive pleading if one is required. *Resource Eng'r, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

No original complaint can be dismissed because it does not negate possible statute of limitation defenses since such defenses must be asserted in a responsive pleading. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974).

Summary Judgment.

Inasmuch as matters outside the pleadings in the form of affidavits and exhibits were presented to the trial court and considered, the motion for dismissal was properly treated as one for summary judgment and disposed of as provided in Rule 56. *Rush v. G-K Mach. Co.*, 84 Idaho 10, 367 P.2d 280 (1961); *Coddington v. Lewiston*, 96 Idaho 135, 525 P.2d 330 (1974); *Cook v. Soltman*, 96 Idaho 187, 525 P.2d 969 (1974).

Appellant's assignment of error to the entry of the summary judgment, claiming the matter was not properly before the court, was without merit where the trial court certified that records, papers and files in addition to the pleadings were used by him on the hearing of said motion, such procedure being authorized under this former similar rule and former Rule 56, and the deposition of an attorney also used was regularly taken under direct and cross-examination pursuant to former Rule 30, counsel for respective parties having agreed in open court to treating motion to dismiss as a motion for summary judgment. *Allen v. Moyle*, 84 Idaho 18, 367 P.2d 579 (1961).

Where a motion to dismiss upon the ground that the complaint failed to state a claim upon which relief could be granted, and matters outside the pleading, in the form of affidavits, were presented to and considered by the court it is the duty of the court to treat such motion to dismiss as a motion for summary judgment. *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965).

While motion to dissolve permanent injunction and to keep the record open for additional evidence might have been treated as a motion for summary judgment under this rule, the existence of genuine issues of fact precluded granting the motion. *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

After reversal of summary judgment which had been rendered in their favor, defendants, who had not filed an answer to the complaint, must be accorded an opportunity to develop any further defenses they might have. *Boise City ex rel. Amyx v. Fails*, 94 Idaho 840, 499 P.2d 326 (1972).

When an affirmative defense appears on the face of the complaint, dismissal for failure to state a claim is proper, but if an affirmative defense is not disclosed by the complaint itself the defense may not be raised by motion to

dismiss, except where matters outside the pleading are introduced, and then the motion is one for summary judgment. *Gardner v. Hollifield*, 96 Idaho 609, 533 P.2d 730 (1975).

In an action to recover sums allegedly due for failure of vendors to comply with terms of an agreement for the sale of real estate, where, on vendors' motion to dismiss the complaint for failure to state a claim, the court took judicial notice of the proceedings in purchasers' prior action for rescission and thus treated vendors' motion as one for summary judgment, joinder of vendors' affirmative defense of *res judicata* with the motion to dismiss was proper. *Green v. Gough*, 96 Idaho 927, 539 P.2d 280 (1975).

In an action by the state against a surety to enforce payment under a grain warehouse bond, where affidavits were submitted for and against motions to dismiss surety's third party complaint, the trial court's order dismissing the third party complaint was treated on appeal as one granting summary judgment. *State, Dep't of Agric. v. Millers Nat'l Ins. Co.*, 97 Idaho 323, 543 P.2d 1163 (1975).

Waiver of Defense.

Unless the fact of the compliance of a foreign corporation with our state law is put in issue by answer, it is waived. *Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 P. 765 (1907).

A defect in a pleading short of failure to state a cause of action, or lack of jurisdiction of the subject-matter on the part of the court, must be raised by answer or it is waived and no objection to the introduction of evidence will be considered save alone on the two grounds mentioned above, and where a pleading is subject to criticism but does not fall in the category of not stating sufficient facts, or not showing lack of jurisdiction of the subject-matter, competent evidence is admissible under it and will be received to sustain it. *Aram v. Edwards*, 9 Idaho 333, 74 P. 961 (1903); *Richardson v. Ruddy*, 15 Idaho 488, 98 P. 842 (1908).

Failure to object to defect or misjoinder of parties defendant waives it. *Bonham Nat'l Bank v. Grimes Pass Placer Mining Co.*, 18 Idaho 629, 111 P. 1078 (1910); *Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 P. 1073 (1914).

Objection to another action pending is waived unless taken by answer. *Colorado Nat'l Bank v. Meadow Creek Livestock Co.*, 36 Idaho 509, 211 P. 1076 (1922).

Obtaining several extensions of time to plead and motion for change of venue will constitute waiver of right to object to jurisdiction of court. *American Surety Co. v. Ada*

County Dist. Court, 43 Idaho 589, 254 P. 515 (1927).

RESEARCH REFERENCES

A.L.R. What, other than affidavits, constitutes “matters outside the pleadings,” which may convert motion under Federal Rule of Civil Procedure 12 (b)(c), into motion for summary judgment. 2 A.L.R. Fed. 1027.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b), as waiver of such defense. 17 A.L.R. Fed. 388.

Rule 12(c). Motion for judgment on the pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATUTORY NOTES

Cross References. Evidence on motions, Rule 43(e).

Motion for summary judgment, Rule 56(a).

Opportunity to present material pertinent to motion for summary judgment, Rule 56(e).

JUDICIAL DECISIONS

ANALYSIS

Discretion.
How Presented.

Discretion.

The decision to grant or deny a party's motion to amend a pleading is left to the trial court's discretion and the Supreme Court will not reverse such a ruling absent an abuse of this discretion. *Trimble v. Engelking*, 130 Idaho 300, 939 P.2d 1379 (1997).

How Presented.

Trial court properly treated respondents' motion to dismiss as a summary judgment

motion because the court looked to evidence outside the record. *Ackerman v. Bonneville County*, 140 Idaho 307, 92 P.3d 557 (Ct. App. 2004).

Cited in: *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977); *Idaho Migrant Council, Inc. v. Northwestern Mut. Life Ins. Co.*, 110 Idaho 804, 718 P.2d 1242 (Ct. App. 1986); *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986); *State, Dept. of Health & Welfare v. Estate of Elliott (In re Estate of Elliott)*, 141 Idaho 177, 108 P.3d 324 (2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Admission of Allegations.
Existence of Material Issue.
—Residence.
—Statute of Limitations.
—Statutory Denial.
Liberal Construction.
Referee.
Summary Judgment.

Admission of Allegations.

When a party moves for a judgment on the pleadings, he not only for the purpose thereof admits the truth of the allegations of his adversary, but he also is deemed to have admitted the untruth of all of his own allegations which have been denied by his adversary. *Walling v. Bown*, 9 Idaho 184, 72 P. 960 (1903), *aff'd* on other grounds, 204 U.S. 320, 27 S.Ct. 292, 51 L. Ed. 503 (1970); *Idaho*

Placer Mining Co. v. Green, 14 Idaho 294, 94 P. 161 (1908); Davenport v. Burke, 27 Idaho 464, 149 P. 511 (1915); First Nat'l Bank v. Callahan Mining Co., 28 Idaho 627, 155 P. 673 (1916).

Existence of Material Issue.

When any material allegation of complaint is denied by the answer, it is error for court to render judgment on pleadings. Johnson v. Manning, 3 Idaho 352, 29 P. 101 (1892); Swinehart v. Pocatello Meat & Produce Co., 8 Idaho 710, 70 P. 1054 (1902).

Judgment on pleadings is allowable not because of lack of proof but because of lack of an issue. Davenport v. Burke, 27 Idaho 464, 149 P. 511 (1915).

If a number of defenses are interposed, and but one of them raises an issue, that one is sufficient to prevent a judgment on the pleading and forestalls a ruling that the entire pleading is frivolous or will subject the party interposing the same to judgment on the pleadings. Davenport v. Burke, 27 Idaho 464, 149 P. 511 (1915).

One who moves for judgment on the pleadings is only entitled thereto where the pleadings do not put in issue any material issue of fact and show upon their face that the party moving therefor is entitled to such judgment without offering any proof. Davenport v. Burke, 27 Idaho 464, 149 P. 511 (1915); Coe v. Bennett, 39 Idaho 176, 226 P. 736 (1924).

A judgment on pleadings cannot be granted where there is sufficient defensive new matter set up in the answer. Smith v. Marley, 39 Idaho 779, 230 P. 769 (1924).

—Residence.

By the filing of an answer, denying the residence of the plaintiff and controverting the grounds for a divorce, issues of fact were raised upon which the trial judge was obliged to hear evidence before entering a judgment. Lovell v. Lovell, 80 Idaho 251, 328 P.2d 71 (1958).

—Statute of Limitations.

When the statute of limitations of a foreign jurisdiction is set up as defense, it is error for the court on motion without trial to render a judgment of dismissal, for the reason that the plaintiff is deemed to have controverted the new matter, and there cannot be a judgment

on the pleadings as long as there is an issue of fact. Alspaugh v. Reid, 6 Idaho 223, 55 P. 300 (1898); Mills Novelty Co. v. Dunbar, 11 Idaho 671, 83 P. 932 (1906).

Whether a cause of action is barred by the statute of limitations is not determinable on a motion for a judgment on the pleadings, even though the defense of the statute of limitations is pleaded in the answer and it appears that it is so barred on the face of the complaint. Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1904).

—Statutory Denial.

A denial by force of statute is sufficient to present an issue of fact and thereby prevent the granting of a judgment on the pleadings. Chemung Mining Co. v. Hanley, 9 Idaho 786, 77 P. 226 (1904).

Liberal Construction.

On the motion for judgment on the pleadings, the assailed pleading will be given a most liberal construction to sustain it, all reasonable intendments will be indulged in favor of the pleading attacked, and the motion will be granted only when the attacked pleading totally fails to state cause of action or defense. Bowman v. Bohnet, 36 Idaho 162, 210 P. 135 (1922).

Referee.

A referee under the limited powers conferred upon him has no authority to grant a judgment on the pleadings. Idaho Placer Mining Co. v. Green, 14 Idaho 294, 94 P. 161 (1908); Coe v. Bennett, 39 Idaho 176, 226 P. 736 (1924).

Summary Judgment.

While motion to dissolve permanent injunction and to keep the record open for additional evidence might have been treated as a motion for summary judgment under this rule, the existence of genuine issues of fact precluded granting the motion. Glenn Dale Ranches, Inc. v. Shauh, 94 Idaho 585, 494 P.2d 1029 (1972).

Pursuant to the Idaho Rules of Civil Procedure applicable to habeas corpus actions, the magistrate was required to treat the respondents' motion as one for summary judgment upon considering matters outside the pleadings. Merrifield v. Arave, 128 Idaho 306, 912 P.2d 674 (Ct. App. 1996).

RESEARCH REFERENCES

A.L.R. What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of

Civil Procedure 12 (b)(c), into motion for summary judgment. 2 A.L.R. Fed. 1027.

Rule 12(d). Preliminary hearings.

The defenses specifically enumerated (1)-(8) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

STATUTORY NOTES

Cross References. Defenses enumerated, Rule 12(b).

Motion for judgment on pleadings, Rule 12(c).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Dismissal or Directed Verdict.
Orders at Chambers.

entitle his client to recover. *Wheeler v. Oregon R.R. & Nav. Co.*, 16 Idaho 375, 102 P. 347 (1909).

Dismissal or Directed Verdict.

There is no authority in the court to dismiss an action on the opening statement of counsel, or grant a directed verdict thereon where such counsel's statement did not state a cause of action with such a degree of certainty as to

Orders at Chambers.

Orders made out of court and at chambers may be made by the judge of the court in any county of his district. *Exchange Nat'l Bank v. Northern Idaho Pine Lumber Co.*, 24 Idaho 671, 135 P. 747 (1913).

Rule 12(e). Motion for more definite statement.

If a pleading to which a responsive pleading is permitted violates the provisions of Rules 10(a) or 10(b) or is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a compliance with Rules 10(a)(4) [10(a)] or 10(b) or for a more definite statement before interposing the responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten (10) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. In actions on an account it shall be sufficient to summarize all transactions on the account, and the obligor of the account shall have no right to demand a written copy of the accounting except as may be ordered by Rule 34 of these rules.

STATUTORY NOTES

Compiler's Notes. The bracketed number "10(a)" was inserted by the compiler as it seems to be the reference intended.

Cross References. Designation of unknown owners or heirs, Rule 10(a)(5).

Form of pleadings, Rule 10(a)(1).

Paragraphing claims or defenses, Rule 10(b).

JUDICIAL DECISIONS**ANALYSIS**

Amendment of Complaint.
Failure to Claim.
Uniting Separate Claims.

Amendment of Complaint.

To insure fair adjudication, a plaintiff may be required to refine the issues once litigation has commenced; however, the trial court is under no obligation to compel the pleading party to amend his or her complaint. *Christensen v. Rice*, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988).

Failure to Claim.

Where plaintiff's complaint stated that it delivered rough lumber to defendant with instructions to process it into siding, which defendant did, and plaintiff paid the agreed price and instructed defendant to load the siding on a certain company truck and notwithstanding these instructions defendant loaded the siding onto another company's truck whereby the siding was lost to plaintiff

and defendant did not move under subsection (e) of this rule for a more definite statement of claim prior to trial, the complaint was sufficient to fairly apprise defendant of a cause of action for breach of contract. *Quinto v. Millwood Forest Prods., Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997).

Uniting Separate Claims.

Although the plaintiff's complaint mingled a claim for recovery on a partnership contract with a claim for unjust enrichment, the complaint was sufficient to apprise the defendant of the nature of the claims against him since at no time did the defendant move for a more definite statement of the issues, even though the claims could have been presented in a clearer manner by stating each claim in a separately numbered count. *Nelson v. Gish*, 103 Idaho 57, 644 P.2d 980 (Ct. App. 1982).

Cited in: *Dursteler v. Dursteler*, 108 Idaho 230, 697 P.2d 1244 (Ct. App. 1985); *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 759 P.2d 905 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Capacity to Sue.
Uncertainty.

Capacity to Sue.

Where noncompliance with statute requiring filing of certificate showing true names and trade names of persons doing business appears on face of complaint, objection may be raised for want of capacity, but not for uncer-

tainty. *Shillingford v. Benewah County*, 48 Idaho 447, 282 P. 864 (1929).

Uncertainty.

Where no objection on the ground of uncertainty is taken to a complaint, the complaint, although uncertain, is sufficient to admit proof of the facts uncertainly pleaded. *Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 P. 226 (1904).

Rule 12(f). Motion to strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Application of Rule.
Denials on Information.
Frivolous Pleading.
Genuine Questions Raised.
Incomplete Motion.

Objection to Evidence.
Sham Pleading.
Undertaking for Costs.

Application of Rule.

A motion under former similar rule was proper only for attacking an insufficient de-

fense and could not be used to strike an insufficient complaint. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

Denials on Information.

An answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous. *First Nat'l Bank v. Martin*, 6 Idaho 204, 55 P. 302 (1898).

Frivolous Pleading.

An answer taking issue only on an immaterial issue of the complaint falls within the ban of frivolous pleading and may be stricken out upon that ground. *Goldstein v. Krause*, 2 Idaho 294, 13 P. 232 (1887).

Genuine Questions Raised.

A motion to strike will not be granted where the defense pleaded raises on its face genuine questions of law or fact. *Rosenberg v. Toetly*, 94 Idaho 413, 489 P.2d 446 (1971).

Incomplete Motion.

Motion to strike from a pleading certain paragraphs on the ground they were insufficient to create an issue which did not point out any particular in which such pleading was insufficient will not be considered. *In re Matthews*, 57 Idaho 75, 62 P.2d 578, 111 A.L.R. 13 (1936).

Objection to Evidence.

Failure to move to strike paragraphs of a complaint alleging improper items of damage does not preclude the defendant from objecting to the introduction of evidence thereun-

der. *Risse v. Collins*, 12 Idaho 689, 87 P. 1006 (1906).

Sham Pleading.

A sham pleading is one sufficient on its face but so clearly false that it fails in the presentation of real issues of fact. However, this definition is not sufficiently comprehensive as to embrace a legally insufficient pleading, or a pleading which imperfectly or insufficiently sets forth a valid claim or defense. Sham does not embrace inconsistency in averments, it has been sometimes said that "sham" and "false" mean the same thing. *Goldstein v. Krause*, 2 Idaho 294, 13 P. 232 (1887).

Falsity is the test of a sham pleading, and where it is shown to be sham and when measured by this test and found wanting, it may be stricken. *Goldstein v. Krause*, 2 Idaho 294, 13 P. 232 (1887).

A whole answer may be stricken out as irrelevant or sham. *Goldstein v. Krause*, 2 Idaho 294, 13 P. 232 (1887).

Irrelevant, sham and frivolous matter in answer is properly reached by motion to strike. *Brown v. Jones*, 49 Idaho 797, 292 P. 235 (1930).

Motion to strike, assailing pleading without attempting to separate the sham from the irrelevant, is good only if all is vulnerable to motion. *Parks v. Mathews*, 58 Idaho 8, 69 P.2d 781 (1937).

Undertaking for Costs.

In view of the mandatory nature of the act directing public liability insurance on state vehicles, the issue of want of undertaking for costs was properly raised by a motion to strike. *Pigg v. Brockman*, 79 Idaho 233, 314 P.2d 609 (1957).

Rule 12(g). Waiver or preservation of certain defenses.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived unless it is made by motion prior to filing a responsive pleading and prior to filing any other motion, other than a motion for an extension of time to answer or otherwise appear or a motion under Rule 40(d)(1) or (2). It is not waived, however, by being joined with one or more other motions or by filing a special appearance as provided in Rule 4(i)(2).

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, a defense of another action pending between the same parties for the same cause, and an objection of failure to state a legal defense to a claim may be raised by motion made at or before the trial on the merits.

(3) An objection to improper venue is waived unless a timely motion for proper venue is made as provided in Rule 40(e).

(4) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (Amended April 22, 2004, effective July 1, 2004; amended March 25, 2005, effective July 1, 2005.)

STATUTORY NOTES

Cross References. Amendments to conform to the evidence, Rule 15(b).

JUDICIAL DECISIONS

ANALYSIS

Improper Venue.

Jurisdiction.

—Lack.

—Subject Matter.

Motion In Limine.

Service of Process.

Improper Venue.

Where motion for change of venue was not filed until four and one-half years after the last responsive pleading was filed, movant waived his right to assert a motion for change of venue. *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983).

Jurisdiction.

—Lack.

Where in a civil contempt action based on the defendant father's failure to pay child support, the attorney magistrate ruled that a reciprocal action against the defendant father should be consolidated and heard at the same time, the defendant father's failure to object or raise as an affirmative defense the asserted lack of personal jurisdiction over him was deemed to have been a waiver of his objections to the court's jurisdiction over him. *State v. Aguilar*, 103 Idaho 578, 651 P.2d 512 (1982).

In a divorce action, the husband did not waive his jurisdictional challenge by signing a stipulation on the merits of the child support and attorney fee issues after his motion to dismiss had been denied. *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

I.R.C.P. 12(b) and this rule permit a defendant to raise all available defenses and then to proceed on the merits without waiving a jurisdictional challenge. *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

Where defendant could have raised the defense of lack of jurisdiction over his person by a pre-answer motion or in the answer

itself, under I.R.C.P. 12, his failure to so raise the defense of lack of jurisdiction over his person constituted a waiver of that defense under this rule. *Quintana v. Quintana*, 119 Idaho 1, 802 P.2d 488 (Ct. App. 1990).

Under I.R.C.P. 12(b) and this rule a defense of lack of jurisdiction over the person is waived if not raised by a timely motion or by the first responsive pleading. *Gage v. Harris*, 119 Idaho 451, 807 P.2d 1289 (Ct. App. 1991).

By filing a motion for change of venue without joining the motion to dismiss for lack of personal jurisdiction, the defendants waived the defense of lack of personal jurisdiction. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

The Idaho Rules of Civil Procedure do not allow a party to "preserve the right" to object to personal jurisdiction at a later date when filing a motion for change of venue. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Dismissal was mandatory under subsection (4) upon the appellate court's finding that the district court, and the reviewing appellate court, lacked jurisdiction to review oversize load permits issued by the Idaho transportation department; a remand to the agency was not an available option. *Laughy v. Idaho DOT*, 149 Idaho 867, 243 P.3d 1055 (2010).

—Subject Matter.

Questions of subject matter jurisdiction cannot be waived and may be raised at any time, but the issue of propriety and sufficiency of an assignment to an attorney magistrate is not a question of subject matter jurisdiction. *Wilbanks v. State*, 126 Idaho 341, 882 P.2d 996 (Ct. App. 1994).

Motion In Limine.

Softball player, who brought suit against an opposing player for injuries sustained in a softball game, argued that the opposing player's attempt to preclude ordinary negligence evidence in a motion in limine should have been brought in a summary judgment motion.

Nevertheless, former Idaho R. Civ. P. 12(h)(2) (now Idaho R. Civ. P. 12(g)(2)) allowed such a defense to be brought as late as the time of trial. *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (Ct. App. 2004).

Service of Process.

Where defendants' first appearance in a lawsuit was the filing of their notice of appearance and the notice of appearance was neither a motion nor a responsive pleading,

the affirmative defense of insufficiency of service of process as an affirmative defense under Idaho R. Civ. P. 12(h)(1) did not apply to it. *Engleman v. Milanez*, 137 Idaho 83, 44 P.3d 1138 (2002).

Cited in: *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 586 P.2d 1068 (1978); *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982); *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Another Action Pending.
Change of Venue.
Failure to Join.
Failure to State Claim.
Improper Venue.
Inccapacity of Plaintiff to Sue.
Jurisdiction.
Lack of Bond.
Misjoinder of Parties.
Statute of Limitations.

Another Action Pending.

Objection to another action pending is waived unless taken by answer. *Colorado Nat'l Bank v. Meadow Creek Livestock Co.*, 36 Idaho 509, 211 P. 1076 (1922); *Bedwell v. Bedwell*, 68 Idaho 405, 195 P.2d 1001 (1948).

Change of Venue.

The question of change of venue of a divorce action is not jurisdictional, since, if the action is brought in the wrong county, the defect can be waived. *Finnell v. Finnell*, 59 Idaho 148, 81 P.2d 401 (1938).

A defendant corporation did not waive its right to have the venue of a cause changed to the county where it had its principal office by appearing and obtaining time within which to plead. *Banning v. Minidoka Irrigation Dist.*, 89 Idaho 506, 406 P.2d 802 (1965).

Failure to Join.

Although failure to join an indispensable party is a defense which cannot be waived, a party with the necessary information to make a motion for joinder cannot sit back and raise it at any point in the proceedings when the only effect of the motion would be to protect himself and not the person alleged to be indispensable. *Jolley v. Puregro Co.*, 94 Idaho 702, 496 P.2d 939 (1972).

Failure to State Claim.

An objection that the complaint does not state facts sufficient to constitute a cause of action can be reviewed on appeal from the judgment but not on appeal from an order

denying a new trial. *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908); *Walton v. Clark*, 40 Idaho 86, 231 P. 713 (1924).

That complaint does not state cause of action may be raised for first time in Supreme Court on appeal. *Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 185 P. 554 (1919); *Hess v. Hess*, 41 Idaho 359, 239 P. 956 (1925).

When failure of complaint to state cause of action is raised in appellate court, it will be held sufficient unless it fails in any view of pleadings to state cause of action. *Jenness v. Co-Operative Publishing Co.*, 36 Idaho 697, 213 P. 351 (1923); *Hess v. Hess*, 41 Idaho 359, 239 P. 956 (1925).

Improper Venue.

Where transcript does not show that defendants had answered, appeal will not be dismissed on ground that defendants had pleaded to the merits without objection to the venue. *Morrison v. Finch*, 40 Idaho 791, 237 P. 422 (1925).

Inccapacity of Plaintiff to Sue.

Failure to present the failure of a corporation to comply with statute governing filing of articles of incorporation by proper pleading or motion waives such failure as a defense to a corporate action, counterclaim, or cross-claim. *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 414 P.2d 879 (1966).

Failure of defendant to plead plaintiff's lack of capacity to sue because its failure as a foreign corporation to comply with the requirements of statute governing filing of articles of incorporation waived such failure on the part of plaintiff as a defense. *Dairy Equip. Co. v. Boehme*, 92 Idaho 301, 442 P.2d 437 (1968).

Jurisdiction.

An objection to the jurisdiction of the court is never waived and may be raised for the first time in a Supreme Court proceeding. *Aram v. Edwards*, 9 Idaho 333, 74 P. 961 (1903).

The question of jurisdiction may be raised at any time. *Richardson v. Ruddy*, 15 Idaho 488, 98 P. 842 (1908).

When defendant fails to specifically state his objections to the complaint, he will be deemed to have waived them, excepting jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action. *Hancock v. Elkington*, 67 Idaho 542, 186 P.2d 494 (1947).

Lack of Bond.

Objection to lack of bond required by § 6-610 is a matter of avoidance or affirmative defense and defendant waived right to assert bonding requirement where he raised the issue of lack of bond only after his answer. *Garren v. Butigan*, 95 Idaho 355, 509 P.2d 340 (1973).

Misjoinder of Parties.

Failure to object to defect or misjoinder of

parties defendant waives it. *Bonham Nat'l Bank v. Grimes Pass Placer Mining Co.*, 18 Idaho 629, 111 P. 1078 (1910); *Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 P. 1073 (1914).

In suit by remainderman against co-remaindermen to recover proportionate share of purchase price of sale of right-of-way by co-remaindermen to state based on agreements signed only by defendants and life tenant, there could be no objection to misjoinder of parties defendant for failure to make life tenant a party where objection was not raised by answer. *Woodland v. Spillman*, 75 Idaho 286, 271 P.2d 819 (1954).

Statute of Limitations.

Defense of statute of limitations which is not presented in a reply to a counterclaim is waived. *Resource Eng'r, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

RESEARCH REFERENCES

A.L.R. Waiver of, by failing to promptly raise, objection to splitting cause of action. 40 A.L.R.3d 108.

Rule 13(a). Compulsory counterclaims.

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

STATUTORY NOTES

Cross References. Joinder of additional parties, Rule 13(h).

Answer or reply to, time of service, Rule 12(a).

Court of limited jurisdiction, general rules of pleading, Rule 8(a)(1).

Cross-claim against coparty, Rule 13(g).

Default judgment where cross-claim or counterclaim, Rule 55(d).

Defense mistakenly designated as, Rule 8(c).

Dismissal of action where counterclaim, Rule 41(a)(2).

Dismissal of counterclaim or cross-claim, Rule 41(c).

Exceeding opposing claim, Rule 13(c).

Joinder of claims, Rule 18(a).

Maturing or acquired after pleading, Rule 13(e).

Omitted counterclaims, Rule 13(f).

Permissive counterclaims, Rule 13(b).

Permissible pleadings, Rule 7(a).

Rules of pleading claim for relief, Rule 8(a)(1).

Separate judgments, Rule 13(i).

Separate trials, Rule 13(i).

Service of pleadings between defendants,
Rule 5(c).
State, counterclaim against, Rule 13(d).

Summary judgment, Rules 56(a) and 56(b).
Third-party practice, asserting counter-
claims or cross-claims, Rule 14(a).

JUDICIAL DECISIONS

ANALYSIS

Exceptions.
Failure to Plead Compulsory Counterclaim.
In General.
Manner of Pleading.
Purpose.
Same Transaction.

Exceptions.

A counterclaim falling under one of the exceptions contained within this rule will not be barred in future litigation. *Blaser v. Cameron*, 116 Idaho 453, 776 P.2d 462 (Ct. App. 1989).

Failure to Plead Compulsory Counterclaim.

The failure to plead a claim properly classified as a compulsory counterclaim bars any subsequent action on the claim, and while this consequence is consistent with general principles of *res judicata*, subsequent actions on claims properly classified as compulsory under this rule are barred simply by operation of the rule itself. *Blaser v. Cameron*, 116 Idaho 453, 776 P.2d 462 (Ct. App. 1989).

Where buyer's breach of contract claim arose from the same transaction as the seller's claim, buyer's breach of contract claim is a compulsory counterclaim under this rule and should have been raised. Since he failed to raise his breach of contract claim in the original proceeding between him and the seller, he is now barred from doing so in this action. *Hall v. Forsloff*, 124 Idaho 771, 864 P.2d 609 (1993).

In General.

A compulsory counterclaim does not waive jurisdictional defenses. *Nelson v. World Wide Lease, Inc.*, 110 Idaho 369, 716 P.2d 513 (1986).

Manner of Pleading.

A counterclaim is not a listed pleading under I.R.C.P., Rule 7(a) and, thus, a counterclaim cannot be asserted as an independent pleading but may only be raised as a part of one of the listed pleadings. Accordingly, where a contractor originally filed a counterclaim independent of any listed pleading, it was not properly pleaded and was functionally equivalent to an omitted counterclaim. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Where counterclaim in breach of contract action between landowner and contractor had been filed about two years before trial and pertained to the transaction in litigation between the parties; where striking the counterclaim could put a burden on the contractor in regard to filing another lawsuit; where the contractor's claim might otherwise have been barred by the statute of limitations, and where the owners were unable to show that any prejudice, in the form of surprise or lack of time to prepare, would result from granting leave, after the fact, to file the counterclaim, the judge did not abuse his discretion by denying the owner's motion to strike, thereby effectively granting leave to the filing of the counterclaim, notwithstanding that counterclaim was improperly filed independently of other proceedings and without leave of court prior to filing. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Purpose.

The policy behind this rule is to avoid multiple lawsuits between the parties to a transaction or occurrence. *Blaser v. Cameron*, 116 Idaho 453, 776 P.2d 462 (Ct. App. 1989).

Same Transaction.

The claim of a tenant to a refund of a security deposit may be subject to an offset for damages allowed to the landlord. Indeed, such a counterclaim — if it arose from the same transaction, i.e., the tenancy agreement, which forms the basis for a dispute over the security deposit — would be a compulsory one which could not be raised in a separate, independent action. *Fleming v. Hathaway*, 107 Idaho 157, 686 P.2d 837 (Ct. App. 1984), review denied, 116 Idaho 466, 776 P.2d 828 (1984).

The counterclaim filed with the answer, seeking a judgment against the plaintiff for the deficiency due under the lease contract was compulsory because it arose out of the lease transaction which was the subject matter of a portion of the plaintiff's complaint. *Nelson v. World Wide Lease, Inc.*, 110 Idaho 369, 716 P.2d 513 (1986).

Cited in: *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982); *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985); *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090 (Ct. App. 1986).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Contract.
 Cross-Complaints.
 Damages.
 Debt.
 In General.
 Manner of Pleading.
 Matters Arising from Same Transaction.
 Mortgage.
 Multiple Parties.
 Set-Off.
 Statute of Limitations.
 Time for Filing.
 Unlawful Detainer Actions.
 Unliquidated Claims.

Contract.

A counterclaim may go further than a cross-complaint, and may include any cause of action arising on contract where the complaint states a cause of action arising on contract. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

Where both complaint and defendant's counterclaim were based on a logging contract, defendant's cross demands could be pleaded defensively; therefore, the striking of defendant's counterclaim was erroneous. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Cross-Complaints.

Damages sustained by reason of the wrongful issuance of an attachment are proper matter for a cross-complaint in the attachment suit. *Willman v. Friedman*, 4 Idaho 209, 38 P. 937 (1894), appeal dismissed, 163 U.S. 712, 16 S. Ct. 1208, 41 L. Ed. 313 (1895).

In an action to contest the foreclosure of a chattel mortgage, the defendant is entitled to file a cross-complaint seeking the foreclosure of a real estate mortgage covering property in another county, but given as a part of the same transaction and to secure the same debt for which the chattel mortgage was given. *Murphy v. Russell*, 8 Idaho 151, 67 P. 427 (1901).

A cross-complaint may be embodied in the same instrument with the answer. *Western Loan & Sav. Co. v. Smith*, 12 Idaho 94, 85 P. 1084 (1906).

An equitable right of action which might be brought as an independent right of action may be interposed as a defense in a cross-complaint in an action involving the same subject-matter. *Penninger Lateral Co. v. Clark*, 22 Idaho 397, 126 P. 524 (1912), overruled on other grounds, *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

Cross-complaint stands as an independent action, and dismissal by plaintiff of his complaint does not carry with it dismissal of action on cross-complaint. *Brown v. T.B. Reed & Co.*, 31 Idaho 529, 174 P. 136 (1918).

In action to quiet title, where defendant relies upon title in himself, a cross-complaint is not necessary; but where he seeks to enforce an equitable title against plaintiff as the holder of the legal title, a cross-complaint is proper. *Bacon v. Rice*, 14 Idaho 107, 93 P. 511 (1908); *Coghlan v. City of Boise*, 36 Idaho 613, 212 P. 867 (1923).

Defendant was not deprived of substantial right where it was not essential that matter sought to be set up in cross-complaint be litigated in that particular action to avoid its being barred under former § 5-614. *Idaho Trust Co. v. Eastman*, 43 Idaho 142, 249 P. 890 (1926).

Cross-complaint may be dismissed at any time before any pleading is filed by his adversary praying affirmative relief. *Molen v. Denning & Clark Livestock Co.*, 56 Idaho 57, 50 P.2d 9 (1935); *Jeffery v. Ouldhouse*, 59 Idaho 50, 80 P.2d 685 (1938).

Defendants in prior action to secure possession of the premises and also alleged rents owed, having in writing released all claim to the premises, and in fact having for all practical purposes been ejected in the summary foreclosure proceedings, such premises having been surrendered to the lessors, the right to possession was eliminated and the action was thereafter prosecuted to recover the alleged rent due pursuant to the terms of the lease; therefore, the alleged unlawful detainer no longer being an issue, the complaint was then subject to a cross-complaint or counterclaim. *Williamson v. Ysursa*, 78 Idaho 423, 305 P.2d 732 (1956).

The cross-claim filed by the heirs of the people killed in an automobile collision with insured in suit brought by the insurance company for the purpose of securing a declaration relative to its liability under the insurance policy was not a coercive pleading under this rule because it did not arise out of the transaction or occurrence which is the subject matter of the insurer's action for declaratory relief. *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 365 P.2d 824 (1961).

In case of assignment by, or death of, a claimant, his assignee or representative is also limited to a recovery of the amount by which the claims of his assignor or decedent exceed those of the other party; and to the extent that the cross demands equal each other they have been compensated and paid

by operation of the statute. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Damages.

Where respondent's action was commenced and prosecuted for an injunction against foreclosure on account of alleged fraud and failure of consideration, but he also consistently contended that he should have been supplied with a back beater at the time the bean huller was purchased and delivered, and that he suffered a direct loss on account of the failure of the company to deliver the back beater with the machine, the company was entitled to proceed with its foreclosure, and plaintiff should be allowed to offset his indebtedness by the amount of whatever damages he had sustained which had arisen out of the transaction involved in the litigation. *West v. Prater*, 57 Idaho 583, 67 P.2d 273 (1937).

Debt.

A counterclaim which fails to allege that the debt existed at the commencement of the action, but alleged that it is now due was held to be bad. *McGuire v. Lamb*, 2 Idaho 378, 17 P. 749 (1888), appeal dismissed, *Lamb v. McGuire*, 145 U.S. 644, 12 S. Ct. 983, 36 L. Ed. 856 (1892).

In General.

A counterclaim is one existing in favor of a defendant and against a plaintiff upon which a several judgment might be had in the action. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Manner of Pleading.

Office and functions of counterclaims are well-defined as it is not optional with pleader to plead cross-complaint where, by terms of statute it is, in truth and in fact, counterclaim. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

Unless the subject-matter of a counterclaim is of such character that the plaintiff would be obligated as a matter of law to credit the same upon the obligation sued upon, it would of necessity constitute a counterclaim or cross-demand which does not ipso facto extinguish the debt, but must be specially pleaded. *Bannock Nat'l Bank v. Rowe*, 36 Idaho 197, 210 P. 140 (1922).

Matters Arising from Same Transaction.

In an action on a note, an answer alleging that, as a part of the transaction in which the note was given, plaintiff was to take possession of a certain building, mortgaged to secure payment of the note, and rent the same, applying the rental money to the satisfaction of the note; that plaintiff, when in possession of the building, collected the rent and applied

the same to his own use; that the building was destroyed by fire, and that plaintiff recovered in insurance money, rents, etc., a sum largely in excess of the sum due on the note, is a proper counterclaim. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892).

If counterclaim arises out of the transaction set forth in the complaint as foundation of plaintiff's claim, or connected with the subject of the action, it must be pleaded by the defendant in the action, otherwise it is barred. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Mortgage.

Where suit is brought to recover the penalty prescribed by statute for failure of the mortgagee to satisfy the mortgage on the record and to procure an adjudication of satisfaction of the mortgage, the mortgagee must assert by counterclaim in said suit any right which he may have for the foreclosure of the mortgage, and cannot thereafter maintain an independent action to foreclose the mortgage. *Stevens v. Home Sav. & Loan Ass'n*, 5 Idaho 741, 51 P. 779 (1898).

Where claim on assigned account did not arise out of transaction which was the subject matter of action against assignee in earlier suit, but was a claim on a debt entirely unrelated to such mortgage and note, such case would have been permissive rather than compulsory counterclaim and therefore later action on account was not barred. *Joseph v. Darrar*, 93 Idaho 762, 472 P.2d 328 (1970).

Multiple Parties.

Cause of action in favor of defendants against only one of plaintiffs or in favor of one only of several defendants cannot be set up by way of counterclaim. *Colorado Nat'l Bank v. Meadow Creek Livestock Co.*, 36 Idaho 509, 211 P. 1076 (1922).

Set-Off.

In suit against state for recommendatory judgment, state has right to set-off moneys admittedly due it. *Ada Inv. Co. v. State*, 40 Idaho 409, 234 P. 304 (1925).

The right of set-off exists in this state except where denied or limited. *Brown v. Porter*, 42 Idaho 295, 245 P. 398 (1926).

Statute of Limitations.

Counterclaim is subject to operation of statute of limitations. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

Time for Filing.

In action to quiet title, refusal to receive defendant's amended answer and cross-complaint tendered on day case was set for trial

was not error. *Idaho Trust Co. v. Eastman*, 43 Idaho 142, 249 P. 890 (1926).

Unlawful Detainer Actions.

Where the action is in the nature of unlawful detainer, no counter or cross-claim is allowed. *Willmore v. Christensen*, 94 Idaho 262, 486 P.2d 273 (1971).

Since a counter or cross-claim was improper in an unlawful detainer action filed by a gas company against a bulk distributor operator to recover possession of a bulk plant, dismissal of the operator's counterclaim alleging that gas company's action in terminating distributor and consignment agreements interfered with operator's right to freely sell his

business, rather than severance for separate trial as operator requested, was proper. *Texaco, Inc. v. Johnson*, 96 Idaho 935, 539 P.2d 288 (1975).

Unliquidated Claims.

A claim for unliquidated damages for a tort cannot be set off against a claim upon a judgment. *Pindel v. Holgate*, 221 F. 342 (9th Cir. 1915).

Where a cause of action arose out of the same contract or transaction, there is no difference between liquidated and unliquidated damages, in considering the essentials of a counterclaim. *Wollan v. McKay*, 24 Idaho 691, 135 P. 832 (1913).

RESEARCH REFERENCES

A.L.R. Bank's right to apply or set off deposit against debt of depositor not due at time of his death. 7 A.L.R.3d 908.

Proceeding for summary judgment as affected by presentation of counterclaim. 8 A.L.R.3d 1361.

Right in equity suit to jury trial of counterclaim involving legal issue. 17 A.L.R.3d 1321.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff. 36 A.L.R.3d 693.

Tort claim against which period of statute of limitations has run as subject to setoff, counterclaim, cross bill, or cross action in tort

action arising out of same accident or incident. 72 A.L.R.3d 1065.

Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13(a) or (b). 1 A.L.R. Fed. 815.

Claim as to which right to demand arbitration, exists as subject of compulsory counterclaim under Federal Rules of Civil Procedure 13(a). 2 A.L.R. Fed. 1051.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b), as waiver of such defense. 17 A.L.R. Fed. 388.

Rule 13(b). Permissive counterclaims.

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.

JUDICIAL DECISIONS

ANALYSIS

Child Custody and Support.
Manner of Pleading.

Child Custody and Support.

The authority of trial courts under this rule to act on child custody and support matters during pendency of an appeal is extended to magistrates by I.R.C.P. 83(i); therefore, the pursuit of an appeal need not delay action by magistrate to resolve issues of child custody, visitation or support. *Dooley v. Dooley*, 128 Idaho 703, 918 P.2d 287 (Ct. App. 1996).

Manner of Pleading.

A counterclaim is not a listed pleading under I.R.C.P., Rule 7(a) and, thus, a counterclaim cannot be asserted as an independent

pleading but may only be raised as a part of one of the listed pleadings. Accordingly, where a contractor originally filed a counterclaim independent of any listed pleading, it was not properly pleaded and was functionally equivalent to an omitted counterclaim. *Chadlerdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Where counterclaim in breach of contract action between landowner and contractor had been filed about two years before trial and pertained to the transaction in litigation between the parties; where striking the counterclaim could put a burden on the contractor in regard to filing another lawsuit; where the contractor's claim might otherwise have been barred by the statute of limitations, and where the owners were unable to show that

any prejudice, in the form of surprise or lack of time to prepare, would result from granting leave, after the fact, to file the counterclaim, the judge did not abuse his discretion by denying the owner's motion to strike, thereby effectively granting leave to the filing of the counterclaim, notwithstanding that counterclaim was improperly filed independently of

other proceedings and without leave of court prior to filing. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Cited in: *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982); *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Action on Mortgage.
Contracts.
Recovery on Notes.
Res Judicata.
Rights-of-Way.
Unlawful Detainer Actions.

Action on Mortgage.

Conversion of mortgaged chattels by mortgagee is proper matter of counterclaim in suit by mortgagee on note for which mortgage was given. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

In action to foreclose mortgages, cross-complaint seeking damages issuing out of trespass or injury to property covered by mortgage was properly filed. *Hudson v. Kootenai Fox Farms Co.*, 47 Idaho 58, 272 P. 704 (1928).

Damages for failure to advance funds as required by mortgage agreement for completion of building was proper subject for cross-complaint. *Harshbarger v. Rankin*, 50 Idaho 24, 293 P. 327 (1930).

Allegations regarding alleged conspiracy of mortgage-holders to ruin mortgagor's credit by false and malicious statements and in rejecting mortgagor's check was not proper subject of cross-complaint in action to foreclose mortgage. *Harshbarger v. Rankin*, 50 Idaho 24, 293 P. 327 (1930).

Contracts.

In an action arising on contract, another action arising on contract existing at the commencement of the action may be pleaded as a counterclaim, although it has no relation to the subject-matter set out in the plaintiff's complaint. *Miller v. Hunt*, 6 Idaho 523, 57 P. 315 (1899).

Recovery on Notes.

Notes executed by plaintiff and assigned to defendant after maturity were proper subject of counterclaim in action to recover for labor or services. *Jones v. Bussell*, 44 Idaho 27, 255 P. 303 (1927).

Res Judicata.

The defense of res judicata is inapplicable to permissive counterclaims. *Joseph v. Dar-rar*, 93 Idaho 762, 472 P.2d 328 (1970).

Rights-of-Way.

In action on promissory note given in payment for ditch and right-of-way, defendant may set up counterclaim for damages done to such property by plaintiff in action. *Tage v. Tage*, 36 Idaho 472, 211 P. 548 (1922).

Unlawful Detainer Actions.

In an action for unlawful detainer, a claim for unliquidated damages arising out of a breach of covenant made by the lessor is not a proper matter of counterclaim. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

Defendants in prior action to secure possession of the premises and also alleged rents owed, having in writing released all claim to the premises, and in fact having for all practical purposes been ejected in the summary foreclosure proceedings, such premises having been surrendered to the lessors, the right to possession was eliminated and the action was thereafter prosecuted to recover the alleged rent due pursuant to the terms of the lease; therefore, the alleged unlawful detainer no longer being an issue, the complaint was then subject to a cross-complaint or counterclaim. *Williamson v. Ysursa*, 78 Idaho 423, 305 P.2d 732 (1956).

Since a counter or cross-claim was improper in an unlawful detainer action filed by a gas company against a bulk distributor operator to recover possession of a bulk plant, dismissal of the operator's counterclaim alleging that gas company's action in terminating distributor and consignment agreements interfered with operator's right to freely sell his business, rather than severance for separate trial as operator requested, was proper. *Texaco, Inc. v. Johnson*, 96 Idaho 935, 539 P.2d 288 (1975).

RESEARCH REFERENCES

A.L.R. Who is an “opposing party” against whom a counterclaim can be filed under Federal Civil Procedure Rule 13(a) or (b). 1 A.L.R. Fed. 815.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b), as waiver of such defense. 17 A.L.R. Fed. 388.

Rule 13(c). Counterclaim exceeding opposing claim.

A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

DECISIONS UNDER PRIOR RULE OR STATUTE**Extent of Recovery.**

Reciprocal demand, when properly pleaded, entitles defendant to judgment for any excess over plaintiff's claim. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

When one party brings an action against another having cross demands against him, he can recover if, and only to the extent that, his claims exceed those of his adversary. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

In case of assignment by, or death of, a claimant, his assignee or representative is also limited to a recovery of the amount which the claims of his assignor or decedent exceed those of the other party; and to the extent that the cross demands equal each other they have been compensated and paid by operation of the statute. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Rule 13(d). Counterclaim against the state.

These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the state of Idaho or any of its governmental subdivisions, agencies or officers.

DECISIONS UNDER PRIOR RULE OR STATUTE**Claims against State.**

In a case where state board of examiners unjustly disallows a claim against state, claimant has his remedy under Constitution, art. 5, § 10, by applying to Supreme Court to hear such claim, and securing a recommenda-

tory judgment to be presented to the next legislature for its action. *Bragaw v. Gooding*, 14 Idaho 288, 94 P. 438 (1908), overruled on other grounds, *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962).

Rule 13(e). Counterclaim maturing or acquired after pleading.

A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

JUDICIAL DECISIONS**Service.**

Service of a motion for leave to file a counterclaim, even with the proposed counterclaim attached, is not the equivalent of ser-

vice of the claim itself, since it remained possible that the court might deny the motion. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Rule 13(f). Omitted counterclaims.

When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

JUDICIAL DECISIONS**ANALYSIS**

Amendment.
Discretion of Court.
Grounds for Amendment.
Pleadings.

Amendment.

Nothing in this rule prohibits a grant of leave to amend after the counterclaim has been physically filed. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Discretion of Court.

The decision of whether to permit amendment of a pleading is vested in the sound discretion of the trial court, which is especially true in the situation where a pleader fails to set up a counterclaim through mistake, inadvertence or excusable neglect. *Cougar Bay Co. v. Bristol*, 100 Idaho 380, 597 P.2d 1070 (1979).

Where newly retained defense counsel, who entered the case only after the original counsel resigned, attempted to amend the answer to file a counterclaim involving over \$600,000.00 two days before the trial was scheduled, but 211 days after the original answer was filed, and where additional discovery would take 60 to 90 days extra to complete, it was not an abuse of discretion to deny the amendment. *Cougar Bay Co. v. Bristol*, 100 Idaho 380, 597 P.2d 1070 (1979).

Where counterclaim in breach of contract action between landowner and contractor had been filed about two years before trial and pertained to the transaction in litigation between the parties; where striking the counterclaim could put a burden on the contractor in regard to filing another lawsuit; where the contractor's claim might otherwise have been barred by the statute of limitations, and where the owners were unable to show that any prejudice, in the form of surprise or lack of time to prepare, would result from granting leave, after the fact, to file the counterclaim, the judge did not abuse his discretion by denying the owner's motion to strike, thereby effectively granting leave to the filing of the

counterclaim, notwithstanding that counterclaim was improperly filed independently of other proceedings and without leave of court prior to filing. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

The decision whether to allow an amendment can be reversed on appeal only if an aggrieved party can demonstrate that the court abused its discretion. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Grounds for Amendment.

Besides situations of oversight, inadvertence, or excusable neglect, a pleader may also seek leave of the court to amend an answer and set up a counterclaim "when justice requires" the amendment be allowed. *Cox v. Mountain Vistas, Inc.*, 102 Idaho 714, 639 P.2d 12 (1981).

A motion for leave to set up counterclaim through an amended answer, which was filed by defendant's new counsel more than three years after the filing of the original answer was accompanied by an affidavit of counsel explaining the delay and concluding that justice could not be accomplished without leave to amend, was properly granted, even though the request contained no allegations of oversight, inadvertence or excusable neglect, where a review of the amended answer and counterclaim revealed that they would not enlarge the issues already presented. *Cox v. Mountain Vistas, Inc.*, 102 Idaho 714, 639 P.2d 12 (1981).

Pleadings.

A counterclaim is not a listed pleading under I.R.C.P., Rule 7(a) and, thus, a counterclaim cannot be asserted as an independent pleading but may only be raised as a part of one of the listed pleadings. Accordingly, where a contractor originally filed a counterclaim independent of any listed pleading, it was not properly pleaded and was functionally equivalent to an omitted counterclaim. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.
 Liberality Exercised.
 Maturing After Pleading.

Discretion of Court.

Trial court has large discretion in permitting amendments to pleadings, and they permit such amendments at any stage of the pleading almost as of course to make the pleadings correspond with the proof. *Pennsylvania-Coeur d'Alene Mining Co. v. Gallagher*, 19 Idaho 101, 112 P. 1044 (1910).

The statutory discretion of the trial court to permit or deny amendment to pleadings is a sound and impartial discretion. *Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426 (1942).

Trial court abused its discretion in denying motion to amend cross-complaint by eliminating equitable portions so as to reduce same to fraud issue, since the adverse party would not be prejudiced. *Cooper v. Wesco Bldrs., Inc.*, 76 Idaho 278, 281 P.2d 669 (1955).

Liberality Exercised.

Great liberality must be exercised in allowance of amendments to pleadings. *Kroetch v. Empire Mill Co.*, 9 Idaho 277, 74 P. 868 (1903).

The trial court should be liberal in allowing amendments. *Cooper v. Wesco Bldrs., Inc.*, 76 Idaho 278, 281 P.2d 669 (1955).

Maturing After Pleading.

Defendants in prior action to secure possession of the premises and also alleged rent owed, having in writing released all claim to the premises, and in fact having for all practical purposes been ejected in a summary foreclosure proceedings, such premises having been surrendered to the lessors, the right to possession was eliminated and the action was thereafter prosecuted to recover the alleged rent due pursuant to the terms of the lease; therefore, the alleged unlawful detainer no longer being an issue, the complaint was then subject to a cross-complaint or counterclaim. *Williamson v. Ysursa*, 78 Idaho 423, 305 P.2d 732 (1956).

Rule 13(g). Cross-claim against coparty.

A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

JUDICIAL DECISIONS

ANALYSIS

Insurance Policy.
 Permissible Scope.
 Res Judicata.
 Transactions Between Coparties.

Insurance Policy.

Where the insurer acts with reasonable promptness in filing a cross-claim so that the injured insured and injured third parties are not prejudiced, the insurer is entitled to have the question of the validity of its policy and its liability thereunder determined prior to the trial of an action against the insurer upon a liability alleged to be covered by the policy so that the insurer may know whether it is obligated to defend the insurer as provided by the policy. *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 365 P.2d 824 (1961).

Permissible Scope.

Where the original action involved a determination of who should be responsible for street maintenance in a subdivision annexed by a city, a cross-claim could properly involve the question of responsibility for street maintenance as between the city and highway district; to the extent the district court attempted to determine responsibility for street signs and lights, regulating curb cuts and planting trees, the court erred in exceeding the permissible scope of cross-claim. *City of Sandpoint v. Sandpoint Indep. Hwy. Dist.*, 126 Idaho 145, 879 P.2d 1078 (1994).

Res Judicata.

The bringing of cross-claims is permissive. A party is not required to bring a cross-claim against a co-party. However, when a party asserts a cross-claim against a co-party, they

become adverse as to that claim and the principles of *res judicata* apply. The cross-claimant becomes a plaintiff for *res judicata* purposes and is required to assert all claims against the cross-defendant arising from the subject matter of the original cross-claim. *Kootenai Elec. Coop., Inc. v. Lamar Corp.*, 148 Idaho 116, 219 P.3d 440 (2009).

Transactions Between Coparties.

Farmer's complaint against grain pur-

chaser and one of purchaser's customers for breach of contract for the sale of grain did not give rise to antitrust cross-claim by grain purchaser against its customer; the mere fact that purchaser and customer were both parties to the suit did not automatically bring into question each and every transaction between the parties. *Frieberger v. American Triticale, Inc.*, 120 Idaho 239, 815 P.2d 437 (1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Action on Note.

Manner of Pleading.

Relation to Main Demand.

Statute of Limitations.

Action on Note.

Where, in an action by the assignee of a note given in payment for a furnace, defendant filed a cross-complaint alleging fraudulent representations by the seller of the furnace and that the interest charged was in excess of the legal rate, a proper cross-complaint was set up against the seller. *C.I.T. Corp. v. Elliott*, 66 Idaho 384, 159 P.2d 891 (1945).

Manner of Pleading.

Cross-demand must be pleaded as fully as original cause of action, and must be suffi-

cient in itself without recourse to other pleadings, unless expressly referred to therein. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

Relation to Main Demand.

A cross-complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but need not necessarily seek relief against all or any of the original plaintiffs or defendants. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

Statute of Limitations.

Plaintiff's cross-complaint against intervenor, making no reference to commencement of action or filing of complaint in intervention, and not pleading any facts tolling statute, held barred by statute of limitations. *Denton v. Detweiler*, 48 Idaho 369, 282 P. 82 (1929).

RESEARCH REFERENCES

A.L.R. Tort claim against which period of statute of limitations has run as subject to setoff, counterclaim, cross bill, or cross action

in tort action arising out of same accident or incident. 72 A.L.R.3d 1065.

Rule 13(h). Joinder of additional parties.

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

STATUTORY NOTES

Cross References. Third-party practice, Rule 14(a).

JUDICIAL DECISIONS

Necessity of Joinder.

It is not necessary to determine whether the joinder sought is necessary, since if per-

missive it should be granted. *Warren v. Hall*, 92 Idaho 222, 440 P.2d 342 (1968).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Liberal Construction.
Necessary Party.
Power of Court.

Liberal Construction.

Such provisions have always been liberally construed, and no error can be predicated upon allowing an amendment bringing in competent parties. *McGrath v. West End Orchard & Land Co.*, 43 Idaho 255, 251 P. 623 (1926).

Necessary Party.

In a suit by the daughter of the insured to recover the proceeds of a life insurance policy against the insurance company on the ground that same had been assigned to her, but had been paid by the insurance company to the husband of the insured as the original beneficiary, the husband should have been made a

party to the proceeding on a motion by the insurance company. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

Power of Court.

The court has the power and duty, of its own motion, to call into court all persons interested in the controversy and not legally made parties thereto, to the end that their rights may be adjudicated without the necessity of resorting to another action. So, when it becomes apparent that a determination of an action cannot be completely and fully made without other persons being brought in as parties, who are not parties thereto, then the court may, of its own motion, and it is its duty to order such persons brought in and made parties. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892).

Rule 13(i). Separate trials — Separate judgments.

If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) even if the claims of the opposing party have been dismissed or otherwise disposed of.

STATUTORY NOTES

Cross References. Judgment upon multiple claims, Rule 54(b).

Separate trials, Rule 42(b).

DECISIONS UNDER PRIOR RULE OR STATUTE

Dismissal by Plaintiff where Cross-Complain.

A dismissal by the plaintiff of his action does not carry with it ipso facto a dismissal of the action based upon the cross-complaint,

but the defendant is entitled to have the issue raised therein determined upon the merits. *Brown v. T.B. Reed & Co.*, 31 Idaho 529, 174 P. 136 (1918).

Rule 14(a). Third party practice — When defendant may bring in third party.

At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third party plaintiff must obtain leave on motion upon notice to all parties to the action. The person so served, hereinafter called the third-party defendant, shall make

any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; and the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant. (Amended July 2, 1976, effective October 1, 1976.)

STATUTORY NOTES

Cross References. Counterclaims and cross-claims, bringing in additional parties to determine, Rule 13(h).

Default judgments, Rule 55(d).

Defenses, when and how presented, Rule 12(a).

Dismissal of third-party claim, Rule 41(c).

General rules of pleading, Rule 8(a)(1).

Joinder of claims, Rule 18(a).

Judgment upon third-party claim, Rule 54(b).

Separate trials, Rule 42(b).

Third-party answer to third-party complaint, Rule 7(a).

When plaintiff may bring in third-party, Rule 14(b).

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.

Independent Action Necessary.

Third Party Participation.

Discretion of Court.

Under this rule, it is discretionary with the district court whether to allow the third-party complaint to be filed and, in the absence of a showing that the court abused its discretion, a denial of the motion will not be disturbed. *Harris v. Rasmussen*, 106 Idaho 322, 678 P.2d 114 (Ct. App. 1984).

Where the trial court's ruling demonstrated that it understood it had discretion in making its decision, that it acted within the parameters of its discretion and applied the applicable rule in making its decision, and that it exercised reason in denying the state's motion for permission to file a third-party complaint,

the court did not abuse its discretion in denying the state's request. *Idaho Sch. for Equal Educ. Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1999).

Independent Action Necessary.

In quiet title action by purchasers of property at tax sale, it was unnecessary to litigate claims which grantees of record owner's predecessors in title might make against the predecessors for selling them land the predecessors had already conveyed to the record owner; by denial of their motion the grantees were not precluded from filing an independent action against the predecessors and, accordingly, no abuse of discretion was shown by court's denial of proposed third-party complaint against predecessors. *Harris v. Rasmussen*, 106 Idaho 322, 678 P.2d 114 (Ct. App. 1984).

Third Party Participation.

Although a district court can sever a third-party claim and try it separately, because the city had admitted liability and ceased defending against the injured parties' claims and the district court had ruled there was coverage under the city's policy with the insurer, so that the insurer was liable for any damages awarded to the injured parties up to the policy

limits, pursuant to Idaho R. Civ. P. 14(a), it was an abuse of discretion not to permit the insurer to participate in the trial on damages. *Exterovich v. City of Kellogg*, 139 Idaho 439, 80 P.3d 1040 (2003).

Cited in: Consolidated AG of Curry, Inc. v. Rangen, Inc., 128 Idaho 228, 912 P.2d 115 (1996).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Mortgagors.
Motion to Add Party.
Quiet Title Proceedings.

Mortgagors.

A mortgagor and every other person having an interest in the mortgaged property should be made defendants in an action to foreclose a chattel mortgage. *Bank of Roberts v. Olavson*, 38 Idaho 223, 221 P. 560 (1923).

Motion to Add Party.

In a suit by the daughter of the insured to recover the proceeds of a life insurance policy

against the insurance company on the ground that same had been assigned to her, but had been paid by the insurance company to the husband of the insured as the original beneficiary, the husband should have been made a party to the proceeding on a motion by the insurance company. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

Quiet Title Proceedings.

Grantee in deed is necessary party to action by grantor to quiet title. *Murray Hill Mining Co. v. Paragon Mining Co.*, 43 Idaho 20, 248 P. 446 (1926).

RESEARCH REFERENCES

A.L.R. Right of employer sued for tort of employee to plead the latter. 5 A.L.R.3d 871.

Impleading minor child as party defendant in tort action by parent against third party. 62 A.L.R.3d 1299.

Right of defendant under Rules 14 (a) and 18 (a) of Federal Rules of Civil Procedure to assert against third party properly in case, claim for damages in excess of, or different

from, those sought by original plaintiff. 12 A.L.R. Fed. 877.

Antagonistic defenses as ground for separate trials of codefendants in criminal case—Federal homicide offenses. 7 A.L.R. Fed. 2d 415.

Antagonistic defenses as ground for separate trials of codefendants in criminal case—Federal cocaine offenses. 7 A.L.R. Fed. 2d 491.

Rule 14(b). When plaintiff may bring in third party.

When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

STATUTORY NOTES

Cross References. Correlative of, Rule 14(a).

Counterclaims and cross-claims, bringing in additional parties to determine, Rule 13(h).

DECISIONS UNDER PRIOR RULE OR STATUTE

Quiet Title Action.

Grantee in deed is necessary party to action by grantor to quiet title. *Murray Hill Mining*

Co. v. Paragon Mining Co., 43 Idaho 20, 248 P. 446 (1926).

Rule 15(a). Amended and supplemental pleadings — Amendments.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires, and the court may make such order for the payment of costs as it deems proper. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATUTORY NOTES

Cross References. Amendments to conform to evidence, Rule 15(b).

Public officer, death or separation from office, substitution of successor, Rule 25(d).

Relation back of amendments, Rule 15(c).

Service and filing, Rule 5(a).

Substitution of parties on death, Rule 25(a) (1).

Supplemental pleadings, Rule 15(d).

When presented, Rule 12(a).

JUDICIAL DECISIONS**ANALYSIS**

Burden on Appeal.

Constructive Fraud.

Defenses.

Delay Asserting Affirmative Defense.

Denial of Motion.

Discretion of Magistrate.

Discretion of Trial Court.

Failure to Establish Cause of Action.

Habeas Corpus.

Justifying Reason.

Leave of Court Not Required.

Liberality in Allowance.

Payment of Attorney Fees.

Purpose.

Response to Amended Pleading.

Sufficiency of Amended Complaint.

Timeliness.

Burden on Appeal.

Because party bringing appeal bears the burden of establishing a record and presenting it on appeal to substantiate claims before the appellate court and because the precise nature of the company's proposed amendment to pleadings was not disclosed sufficiently to the appellate court by the record, transcript, company's motion, or oral argument, company failed to demonstrate that the lower court abused its discretion in denying the motion to amend. *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995).

Constructive Fraud.

In action alleging breach in agreement concerning sale of plaintiff's shares of stock of corporation formed by plaintiff and defendant to defendant, where plaintiff alleged fraud on the part of defendant in relating certain information regarding the corporation, court erred in not permitting plaintiff to amend his complaint to plead constructive fraud; there appeared to be some evidence for plaintiff's allegations that defendant had breached a fiduciary duty owed to plaintiff and that there was a mutual mistake regarding the profitability of the company and the value of plaintiff's stock. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Defenses.

Softball player's claim that trial court should have denied opposing player's motion in limine to exclude evidence in her trial for personal injuries was frivolous. The opposing player had stipulated only to allowing the softball player to amend her pleadings; this stipulation did not require the opposing player to waive all of his defenses. *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (Ct. App. 2004).

Delay Asserting Affirmative Defense.

Defendant's delay of three years after filing of complaint in asserting an affirmative defense under this section did not provide a basis to deny the motion for leave to amend.

The court observed that it is common for parties to use the pre-trial process to sort out their claims and defenses and to hone their legal arguments; additionally, it appears that defendant asserted the defense as soon as it discovered the facts necessary to support the claim. *West v. El Paso Prods. Co.*, 122 Idaho 133, 832 P.2d 306 (1992).

Denial of Motion.

If an amended pleading does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim, or if the opposing party has an available defense such as a statute of limitations, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 804 P.2d 900 (1991).

Although, in the best interest of justice, courts should favor liberal grants of leave to amend, it is not an abuse of discretion for a court to deny a request for leave to amend a complaint if the new claims proposed to be asserted fail to state a valid claim. *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co.*, 132 Idaho 318, 971 P.2d 1142 (1998).

Because Rule 15(a) requires the district court to allow amendments only when justice requires, the court's decision to deny the amendment to add a party defendant was both within the bounds of its discretion and within applicable legal standards. *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000).

Because the district judge considered the merits of the emotional distress claims in denying leave to add such claims, the district judge acted outside the bounds of discretion in denying the discharged doctor's motion to amend the complaint pursuant to Idaho R. Civ. P. 15(a). *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 61 P.3d 557 (2002).

District court did not err when it denied the inmate's motion for leave to amend his petition for habeas corpus; the inmate provided no supporting affidavit in the appellate record, where the inmate had to present an appropriate record on appeal to substantiate his claim that justice required that his motion should have been granted. *Acheson v. Klauser*, 139 Idaho 156, 75 P.3d 210 (Ct. App. 2003).

The grower's motion to amend its complaint pursuant to Idaho R. Civ. P. 15(b) was denied where the refinery agent's testimony amounted to nothing more than warnings and precautions that would need to be taken while installing the roofing to the grower's warehouse. *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 86 P.3d 475 (2004).

Although it was proper for the district court to consider whether the proposed amended complaint alleged valid claims, it was not proper for the district court to require an employee in a wage case to produce evidence showing the people he wanted to add to his complaint were shareholders or owners of the corporation before permitting the complaint to be amended. However, the district court's alternative basis for denying the motions to amend because they were untimely, was proper. *Maroun v. Wyreless Sys.*, 141 Idaho 604, 114 P.3d 974 (2005).

District court's denial of the owners' motions to amend would be reversed and remanded because the district court did not provide a reason for denying the motions, and the reviewing court was unable to determine whether the district court acted within its boundaries of discretion or whether it reached its decision by an exercise of reason. *Atwood v. Smith*, 143 Idaho 110, 138 P.3d 310 (2006).

Where appellant landowners filed suit to quiet title against respondent neighbors, the district court acted within its discretion by denying appellants' motion for leave to amend their complaint under Idaho R. Civ. P. 15(a) to add an adverse possession claim; the motion to amend was made well over a year after the filing of the initial complaint, allowing the amendment would require additional evidence and witness gathering, and the facts alleged by appellants failed to establish a valid claim of adverse possession. *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010).

Because property owners' claims relating to damage from highway maintenance lacked merit, leave to amend under Idaho R. Civ. P. 15(a) was properly denied. *Halvorson v. N. Latah County Highway Dist.*, — Idaho — , 254 P.3d 497 (2011).

Discretion of Magistrate.

Where a claim for unlawful detainer was brought before the magistrate and subsequently dismissed upon the magistrate's realization that the parties involved in the unlawful detainer action did not have a landlord-tenant relationship as required for such an action, the magistrate's order dismissing the claim, granting leave to file amended complaint which asserted claims of ejectment, trespass and quiet title, and transferring amended complaint which was beyond the magistrate's authority to the district court was properly within the magistrate's discretion. *Nationsbanc Mtg. Corp. v. Cazier*, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995), cert. denied, 519 U.S. 864, 117 S. Ct. 172, 136 L. Ed. 2d 113 (1996).

Where defendants' motion to file a counterclaim was filed subsequent to the filing of

their answer, the granting of that motion was given to the sound discretion of the trial court. *Payette Farms Co. v. Conter*, 103 Idaho 148, 645 P.2d 888 (1982).

It was an abuse of the trial court's discretion to deny the motion to amend the complaint where the major claim of liability had not yet been adjudicated so that the substance of the original complaint was still pending. *Sinclair Mktg., Inc. v. Siepert*, 107 Idaho 1000, 695 P.2d 385 (1985).

Where no leave of court was obtained to file the amended complaint, early case law has established in Idaho that a court may, in its discretion, permit an amended pleading to remain on file even though it was filed without leave and the adoption of this rule would not appear to change the result. *Southern Idaho Prod. Credit Ass'n v. Gneiting*, 109 Idaho 493, 708 P.2d 898 (1985).

Where the plaintiff's complaint specifically asked the court to declare the duties of the defendants with respect to their improper conduct and to provide the plaintiff with whatever relief he was legally entitled to, and the district court's orders left the controversy unresolved and the plaintiff without any relief whatsoever, the district court abused its discretion in denying the plaintiff's motion to amend his complaint to specify the precise relief he was requesting. *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986).

After a responsive pleading is filed, amendment of the complaint is in the district court's discretion, and will not be disturbed on appeal absent a showing of an abuse of discretion. *Bissett v. State*, 111 Idaho 865, 727 P.2d 1293 (Ct. App. 1986).

A district court's reasoning that claims contained in an eighth amended complaint plaintiff attempted to file on the morning of the first day of trial "would be highly prejudicial to the defense to try and ... defend" showed the court recognized that it had discretion to allow the amended complaint, and it was well within the outer bounds of the court's discretion and within applicable legal standards to deny that complaint. *Cook v. State, DOT*, 133 Idaho 288, 985 P.2d 1150 (1999).

Order striking the amended complaint under the provisions of Idaho R. Civ. P. 15(a) was proper because the trial court did not abuse its discretion in finding that the stipulation permitting the amendment was ambiguous and the plaintiff individual was responsible for the ambiguity. *Win of Mich., Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002).

In a divorce action, the magistrate did not abuse his discretion in denying the wife's motion for leave to amend pleadings, because

the wife sought to amend her answer and counterclaim on the morning of the first day of trial, and given the time and money the husband had expended in preparing for trial, prejudice would result to the husband if the court allowed the amendment, as the husband had not prepared his case to respond to an allegation of a common-law marriage because it was not raised in the pleadings. *Hoskinson v. Hoskinson*, 139 Idaho 448, 80 P.3d 1049 (2003).

Discretion of Trial Court.

The decision to grant or refuse permission to amend is left to the sound discretion of the trial court and it could not be said that the trial court abused such discretion in refusing to allow an amendment to an answer which would raise an entirely new counterclaim on the day of trial. *Jones v. Watson*, 98 Idaho 606, 570 P.2d 284 (1977).

Because the evidence that would have been offered on the proposed new claims of unlawful entry, assault, battery, conversion, false imprisonment and "wrongful possession" for which party sought to amend to their complaint would have been entirely different from that necessary for the original cause of action seeking specific performance of alleged contract for sale of premises and would have added new parties, opened up new avenues of discovery and almost certainly required a delay, the lower court's denial of the motion to amend was not an abuse of discretion. *Hinkle v. Winey*, 126 Idaho 993, 895 P.2d 594 (Ct. App. 1995).

The decision to grant or refuse permission to amend a complaint is left to the sound discretion of the trial court when a party proposes to amend its complaint after a responsible pleading is served or when the record contains no allegation, which, if proven, would entitle the party to the relief claimed; however, in the interest of justice, district courts should favor liberal grants of leave to amend a complaint. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Failure to Establish Cause of Action.

Where the plaintiff brought an action seeking to enjoin the state, county, and city from enforcing laws which he believed infringed upon his right to freely exercise his religious beliefs, the district court did not abuse its discretion in failing to allow amendment of the plaintiff's complaint, where the record contained no allegations which, if proven, would entitle the plaintiff to the injunctive relief he claimed, and he failed to state on appeal any additional allegations which would establish a cause of action. *Bissett v.*

State, 111 Idaho 865, 727 P.2d 1293 (Ct. App. 1986).

The refusal to allow a plaintiff to amend its complaint, where the record contains no allegations which, if proven, would entitle the plaintiff to the relief claimed, is not an abuse of discretion. *Wells v. United States Life Ins. Co.*, 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991).

In determining whether an amended complaint should be allowed, where leave of court is required under this rule, the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 804 P.2d 900 (1991).

In a case of alleged price-fixing by manufacturers, the district court, after dismissing an unfair competition claim, did not err in denying the state's request to amend its complaint to allege a consumer protection claim; price-fixing of products that are not sold directly to consumers is not an unconscionable act within the meaning of this section, which addresses the prevention of outrageous transactions involving vulnerable consumers. *State v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 106 P.3d 428 (2005).

Habeas Corpus.

Despite the district court's error in dismissing the inmate's entire petition for habeas corpus relief because it contained a claim for monetary compensation, the inmate's motion to amend was properly denied because he was not entitled to any other relief claimed. *Hoots v. Craven*, 146 Idaho 271, 192 P.3d 1095 (2008).

Justifying Reason.

District court abused its discretion by denying plaintiff's motion to amend complaint without any justifying reason. *Idaho Sch. for Equal Educ. Opportunity ex rel. Eikum v. Idaho State Bd. of Educ. ex rel. Mossman*, 128 Idaho 276, 912 P.2d 644 (1996).

Leave of Court Not Required.

Where defendant had not filed an answer to complaint but only a motion for dismissal for lack of in personam jurisdiction, plaintiff could file an amended complaint without seeking leave of court; this rule permits a party to file an amended complaint before a responsive pleading is filed and a motion to dismiss is not a pleading under Rule 7(a). *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008).

Liberality in Allowance.

In the interest of justice, courts should favor liberal grants of leave to amend. *Wick-*

strom v. North Idaho College, 111 Idaho 450, 725 P.2d 155 (1986).

District court erred in denying corporation's second motion to amend its complaint against law firm on grounds of undue delay, where corporation adequately alleged each of the elements necessary to assert the new claim, and where law firm contributed substantially to the delay by its persistent objections to discovery of memoranda relevant to the new claim. *Spur Prods. Corp. v. Stool Rives LLP*, 142 Idaho 41, 122 P.3d 300 (2005).

Payment of Attorney Fees.

The district court did not err in conditioning filing of the subdivision plat applicant's amended complaint upon payment of the attorney fees, where in his initial complaint, the applicant had named the individual members of the zoning commission and city council as well as the mayor and city attorney as defendants, and nearly three years later, the applicant dismissed as defendants all 14 individually named city officials on the ground that they were not real parties in interest, and the city incurred substantial legal expense in defending the action against the named individuals. *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986).

Purpose.

The purpose of this rule is two-fold: first, to allow the best chance for each claim to be determined on its merits rather than on some procedural technicality; and, second, to relegate pleadings to the limited role of providing parties with notice of the nature of the pleader's claim and the facts that have been called into question. *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986).

Response to Amended Pleading.

Despite defendants' contention that they were not required to file another answer to an amended complaint because the amended complaint did not state a new cause of action but, rather, went only to formal or immaterial matters, defendants were not relieved of their responsibility to respond to the amended pleading; however, their failure to do so did not vitiate the three-day notice requirement of I.R.C.P. 55(b)(2). *Farber v. Howell*, 105 Idaho 57, 665 P.2d 1067 (1983).

The trial court did not abuse its discretion by permitting the defendants to respond to a new count but disallowing them to plead new defenses to plaintiff's claims in counts which had already been decided on summary judgment. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984).

Sufficiency of Amended Complaint.

The lower court erred in considering the

sufficiency of the proposed amended complaint against the facts disclosed in the record rather than solely against the allegations advanced by the moving party. *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 895 P.2d 1195 (1995).

District court erred by failing to identify any valid reason for not ruling on the inmate's motion to amend his petition to include supporting documentation of his attempts to exhaust grievance procedures prior to ruling on the respondent's motion to dismiss; under the provisions of Idaho R. Civ. P. 15(a), a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, and a motion to dismiss did not constitute a responsive pleading within the meaning of this rule. The district court's order dismissed the petition without prejudice such that the inmate could refile his petition the next day with exactly the same content as that found in his proposed amended petition already before the district court on his motion to amend. *Drennon v. Fisher*, 141 Idaho 942, 120 P.3d 1146 (Ct. App. 2005).

Timeliness.

Because the district court did not consider whether the amendment would cause delay or would prejudice the defendants, the exercise of its discretion was not consistent with the legal standards applicable to timeliness of a proposed amendment. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999).

District court's alternative basis for denying the motions to amend, because they were untimely, was proper where plaintiff filed his motions to amend several months after the deadline and named defendants who he had already voluntarily dismissed from the suit. In denying the motions, the district court

discussed the fact that the motions were filed after the deadline for filing amended pleadings and after two discovery deadlines had passed and noted that the court was two years into the case and that the time to amend pleadings had passed. *Maroun v. Wyreless Sys.*, 141 Idaho 604, 114 P.3d 974 (2005).

Plaintiff's motion for leave to amend his complaint, originally filed in relation to a first mechanic's lien, commenced proceedings within the statutory time period under § 45-1510 on a second mechanic's lien, allowing him to foreclose on the second lien. Foreclosure was timely not because the time for filing was tolled after the filing of the first complaint, but because the motion to amend, in relation to the second lien, was filed within the necessary time period. *Terra West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010).

Cited in: *Fajen v. Powlus*, 98 Idaho 246, 561 P.2d 388 (1977); *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982); *First Sec. Bank v. Hansen*, 107 Idaho 472, 690 P.2d 927 (1984); *Kugler v. Northwest Aviation, Inc.*, 108 Idaho 884, 702 P.2d 922 (Ct. App. 1985); *Wilson v. Hambleton*, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985); *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985); *Raedlein v. Boise Cascade Corp.*, 129 Idaho 627, 931 P.2d 621 (1996); *Lindberg v. Roseth*, 137 Idaho 222, 46 P.3d 518 (2002); *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 48 P.3d 1256 (2002); *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp.* Idaho, 139 Idaho 492, 80 P.3d 1093 (2003); *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 215 P.3d 457 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adverse Parties.
After Partial Settlement.
Alleging Oral Agreement.
Answer to Amendment.
Discretion of Trial Court.
Effect of Amendments.
Failure to Present Defenses.
Fraud.
Lack of Motion.
Liberality in Allowance.
New Issue Prohibited.
Nonsuit Pending.

Prejudicial Error.
Reopening Suit.
Service of Amended Complaint.
Showing to Justify Amendment.
Supplemental Complaint.
Time for Amendment.
To Correct Defect of Parties.

Adverse Parties.

Term "adverse party" means party to original action or proceeding or one who has been brought into case by order of court, or one who has been allowed by court to intervene or become party plaintiff or defendant in action

as originally instituted. *Eldridge v. Payette-Boise Water Users Ass'n*, 48 Idaho 182, 279 P. 713 (1929).

After Partial Settlement.

Where the original complaint alleges several joint tortfeasors, plaintiff, upon showing that settlement had been made with all but one of the alleged tortfeasors, should be permitted to amend his complaint to allege that one as the sole tortfeasor. *Philpot v. Gerard*, 88 Idaho 422, 400 P.2d 383 (1965).

Alleging Oral Agreement.

Where it is apparent that all of the terms of both a written and oral agreement were complied with by the parties, it is not error for the court to permit an amendment so as to allege the oral agreement. *Nohnberg v. Boley*, 42 Idaho 48, 246 P. 12 (1925).

Answer to Amendment.

It is not necessary to deny affirmative allegations in an amended cross-complaint made by defendant when such allegations were contained in substance in the original cross-complaint of said defendant and were denied by the answer of plaintiff thereto. *Brossard v. Morgan*, 7 Idaho 215, 61 P. 1031 (1900).

Where defendant fails to plead to amended complaint within statutory time, judgment by default may be entered the same as in other cases. *Nuestel v. Spokane Int'l Ry.*, 27 Idaho 367, 149 P. 462 (1915).

Discretion of Trial Court.

Unless the exercise of the discretion to permit amendments vested in the trial court deprives the complaining party of some substantial right, it is not error. *Havlick v. Davidson*, 15 Idaho 787, 100 P. 91 (1909); *Panhandle Lumber Co. v. Rancour*, 24 Idaho 603, 135 P. 558 (1913); *Lind v. Holland*, 37 Idaho 178, 215 P. 834 (1923); *Craven v. Bos*, 38 Idaho 722, 225 P. 136 (1924); *Mole v. Payne*, 39 Idaho 247, 227 P. 23 (1924); *Hoy v. Anderson*, 39 Idaho 430, 227 P. 1058 (1924); *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924); *Idaho Trust Co. v. Eastman*, 43 Idaho 142, 249 P. 890 (1926); *Farmers' & Mechanics' Bank v. Gallaher Inv. Co.*, 43 Idaho 496, 253 P. 383 (1927); *Marysville Dev. Co. v. Marotz*, 44 Idaho 469, 258 P. 180 (1927); *Claris v. Oregon S. L. R.R.*, 54 Idaho 568, 33 P.2d 348 (1934), cert. denied, 297 U.S. 714, 56 S. Ct. 590, 80 L. Ed. 1000 (1936); *Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426 (1942).

Trial court has large discretion in permitting amendments to pleadings, and may permit amendments at any stage of the proceedings, almost as of course, to make the proceedings correspond with the proofs.

Pennsylvania-Coeur d'Alene Mining Co. v. Gallagher, 19 Idaho 101, 112 P. 1044 (1910).

Amendment of pleadings during trial of cause is addressed to sound discretion of trial court. *Mantle v. Jack Waite Mining Co.*, 24 Idaho 613, 135 P. 854 (1913); *Powers v. Security Sav. & Trust Co.*, 38 Idaho 289, 222 P. 779 (1923).

Where an action for injuries to a minor child was commenced by the mother on the theory that she was the natural guardian and could recover for its injuries, both on her own account and on behalf of the child, and the defendant answered on the same theory, and at the close of the introduction of evidence and by consent of counsel the complaint was amended by inserting in the title thereof the additional words, to-wit: "For herself and on behalf of her minor son, W. E. Trask," the allowance of such amendment did not constitute the introduction of a new cause of action and was properly granted. *Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 P. 1073 (1914).

The granting of a motion by defendant, objected to by plaintiff, to file an amended answer after a motion has been made by plaintiff for a judgment on the pleadings is within the discretion of the trial court and its order denying the motion will not be reversed unless an abuse of discretion is shown. *Craven v. Bos*, 38 Idaho 722, 225 P. 136 (1924).

Amending answer morning before trial, after offer and refusal of postponement, is proper exercise of court's discretion. *Vollmer Clearwater Co. v. Union Whse. & Supply Co.*, 43 Idaho 37, 248 P. 865 (1926).

Matters occurring after commencement of suit may be set up, in the discretion of the trial court, by way of amendment instead of supplemental complaint where no new cause of action is alleged but merely matters increasing damages. *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.2d 651 (1934).

Amendments and the filing of amended pleadings rest in the sound, legal discretion of the trial court and, in determining the question of discretion, the power of the court should be freely and liberally exercised. *General Hosp. v. City of Grangeville*, 69 Idaho 6, 201 P.2d 750 (1949).

The trial court did not abuse its discretion in permitting plaintiff to amend his complaint, showing a change in the status of the plaintiff, as it did not appear that defendant was prejudiced or surprised thereby. *Citizens Auto. Inter-Insurance Exch. v. Andrus*, 70 Idaho 114, 212 P.2d 406 (1949).

Where court during the trial granted plaintiff leave to amend his complaint, over defendant's objection, to state that wages lost as a result of the personal injuries amounted to

\$3,000 rather than \$1,400, it was not an abuse of discretion. *Shrum v. Wakimoto*, 70 Idaho 252, 215 P.2d 991 (1950).

Where motion of defendant to amend answer was addressed to discretion of court but nature of amendment was not set out in motion, the court did not abuse its discretion in denying motion since there was nothing upon which court could exercise its discretion. *Salitan v. Benson*, 74 Idaho 379, 262 P.2d 996 (1953).

While ordinarily liberality should be shown in permitting amendments, under the facts of the present case where the amendments sought to change the issues from a guest-host relationship to an action involving negligence, under the facts the trial court did not abuse its discretion in denying the plaintiff's motion to amend as coming too late. *Grant v. Clarke*, 78 Idaho 412, 305 P.2d 752 (1956).

An application to amend a pleading is directed to the sound discretion of the court. *Markstaller v. Markstaller*, 80 Idaho 129, 326 P.2d 994 (1958).

No abuse of discretion on the part of the trial court was discernible and his refusal of leave to amend the complaint after plaintiff had initially rested his case being a matter laying within the discretion of the trial court will not be reversed since under former similar rule leave of court to amend is required and this requirement contemplates exercise of discretion by the court. *Mercer v. Shearer*, 84 Idaho 536, 374 P.2d 716 (1962).

Trial court did not abuse its discretion in denying plaintiffs' motion to amend the complaint, in view of the fact that the court had previously authorized an amendment of the original complaint to enable plaintiffs to specifically allege the misrepresentations they were relying upon, and the fact that a pretrial conference was had, which contemplates settling of any amendments of the pleadings. *Andrus v. Irick*, 87 Idaho 471, 394 P.2d 304 (1964).

Effect of Amendments.

Where an amended complaint and answer thereto are filed, the original complaint and the answer cease to perform any function as pleadings and are no part of the record. *People ex rel. Houston v. Hunt*, 1 Idaho 433 (1872).

An amended complaint renders the original functus officio as a pleading and takes the place of the original and dates back by relation to the time of filing such original. *Woody v. Jamieson*, 4 Idaho 448, 40 P. 61 (1895), overruled on other grounds, *Farmers State Bank v. Gray*, 36 Idaho 49, 210 P. 1006 (1922).

Where a complaint is amended, it takes the

place of the original complaint. *Andrews v. Moore*, 14 Idaho 465, 94 P. 579 (1908).

Failure to Present Defenses.

Since former Rule 8(c) required defenses or matters of avoidance to be set forth affirmatively and former Rule 12(h) applied to all defenses and objections, failure to plead defenses and failure to present defenses by pre-answer motion under former Rule 12(b) constituted a waiver only correctable as justice requires under former identical rule. *Garren v. Butigan*, 95 Idaho 355, 509 P.2d 340 (1973).

Fraud.

An insurer defendant, having filed an answer charging fraud on the part of the insured in his application for the policy, may be permitted to present evidence of fraudulent collusion between the insured and the agent and, if necessary, be granted leave to amend its answer to conform to the evidence. *Matthews v. New York Life Ins. Co.*, 92 Idaho 372, 443 P.2d 456 (1968).

Lack of Motion.

Although pleading amendments should be freely allowed where justice would be served, where there was no indication plaintiffs ever filed a motion to amend their complaint, the district court did not err when it dismissed the case without leave to amend. *Walker v. Board of Hwy. Dirs.*, 96 Idaho 41, 524 P.2d 169 (1974).

Liberality in Allowance.

Great liberality should be shown in allowing amendments to pleadings in furtherance of justice between the parties. *Kroetch v. Empire Mill Co.*, 9 Idaho 277, 74 P. 868 (1903); *Dunbar v. Griffiths*, 14 Idaho 120, 93 P. 654 (1908); *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908); *Mole v. Payne*, 39 Idaho 247, 227 P. 23 (1924); *Hoy v. Anderson*, 39 Idaho 430, 227 P. 1058 (1924); *Jeffery v. Ouldhouse*, 59 Idaho 50, 80 P.2d 685 (1938); *Hall v. Boise Payette Lumber Co.*, 63 Idaho 686, 125 P.2d 311 (1942); *Hill v. Bice*, 65 Idaho 167, 139 P.2d 1010 (1943); *Petty v. Petty*, 66 Idaho 717, 168 P.2d 818 (1946).

Great liberality should be exercised in permitting amendments to pleadings in furtherance of justice between the parties. *Markstaller v. Markstaller*, 80 Idaho 129, 326 P.2d 994 (1958); *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348 (1960).

On remand to the district court, challenge to the sufficiency of an affidavit in civil contempt proceedings should be considered by granting the state leave to amend affidavit consistent with the liberal amendment policies of the rules of civil procedure. *State v.*

Palmlund, 95 Idaho 150, 504 P.2d 1199 (1972).

New Issue Prohibited.

A new complaint and a new cause of action cannot be substituted under the guise of an amendment to the original complaint. *Hallett v. Larcom*, 5 Idaho 492, 51 P. 108 (1897).

Where amendment would change entirely or materially the issues, discretion of the court in refusing amendment will not be questioned. *Fralick v. Mercer*, 27 Idaho 360, 148 P. 906 (1915).

Nonsuit Pending.

Application to amend complaint while motion for nonsuit is pending is addressed to sound discretion of trial court. *The Mode, Ltd. v. Myers*, 30 Idaho 159, 164 P. 91 (1917); *Johnson v. Brown*, 65 Idaho 359, 144 P.2d 198 (1943).

Prejudicial Error.

It is not prejudicial error to refuse to permit an amendment to a pleading where the facts set forth in the amendment were admissible under the pleading prior to the amendment. *Kroetch v. Empire Mill Co.*, 9 Idaho 277, 74 P. 868 (1903).

It was not error for trial court to allow amendment to complaint where defendant was allowed a continuance, if he desired. *Lorang v. Randall*, 27 Idaho 259, 148 P. 468 (1915).

Ruling of trial court granting right to amend complaint will not be disturbed where appellant has not pointed out, and it does not appear to court, that he was prejudiced in his defense. *Hoy v. Anderson*, 39 Idaho 430, 227 P. 1058 (1924).

It is not denial of substantial right to refuse amendment that might have effect of producing accounting in action without bringing another action. *Idaho Trust Co. v. Eastman*, 43 Idaho 142, 249 P. 890 (1926).

Trial court did not err in dismissing complaint after sustaining general demurrer where appellants did not raise question as to right to amend, or offer to amend, either before or after ruling on demurrer. *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 249 P.2d 192 (1952).

Reopening Suit.

It was error for trial court to refuse to allow defendant's motion to reopen suit and amend pleading to allege that deed and bill of sale were fraudulent. *Petty v. Petty*, 66 Idaho 717, 168 P.2d 818 (1946).

Service of Amended Complaint.

Where an amendment affects but one of several defendants, it is not necessary to

serve the amended complaint on the defendants not affected. *Vermont Loan & Trust Co. v. McGregor*, 5 Idaho 320, 51 P. 102 (1897).

Showing to Justify Amendment.

A proposed amendment must be supported by a showing sufficient to set in motion the discretion of the court to allow the party to amend. *Snowy Peak Mining Co. v. Tamarack & Chesapeake Mining Co.*, 17 Idaho 630, 107 P. 60 (1910).

Any power to permit the amendment of an answer must rest upon a sufficient showing, in the furtherance of justice. *Farmers' & Mechanics' Bank v. Gallaher Inv. Co.*, 43 Idaho 496, 253 P. 383 (1927).

Court could refuse amendment of answer to show that defendant was a foreign corporation, no reason being given for failure to plead that fact in the first instance. *Farmers' & Mechanics' Bank v. Gallaher Inv. Co.*, 43 Idaho 496, 253 P. 383 (1927).

Supplemental Complaint.

Matters changing the parties or their relation to a suit which affect the matter in litigation, and which have transpired since the filing of the original complaint are proper matters for supplemental complaint. *Dennison v. Willcutt*, 3 Idaho 793, 35 P. 698 (1894).

Time for Amendment.

After a case has been reversed on appeal and remanded for a new trial, the allowance of amendments to the pleadings is in the discretion of the court. *Parke v. Boulware*, 9 Idaho 225, 73 P. 19 (1903); *Elder v. Idaho-Washington N.R.R.*, 26 Idaho 209, 141 P. 982 (1914).

Where a party's attention is directed by answer to the uncertainty of his pleading and he reposes and slumbers on his rights for a considerable length of time (in the cited case for two years) without applying for leave to amend in the respects pointed out, an application to amend may be properly denied. *Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 P. 226 (1904).

Where a cause has been pending for some three or four years and had been finally tried and determined, it was proper for the court to refuse to permit the defendant to amend his answer and to file a cross-complaint which would have necessitated a retrial of the case. *Kindall v. Lincoln Hdwe. & Implement Co.*, 10 Idaho 13, 76 P. 992 (1904).

Right of amendment without leave of court does not extend beyond the time allowed by law for filing an answer where no such pleading has in fact been filed, and the right to thereafter file such a pleading rests in the sound discretion of the court. *Dunbar v. Griffiths*, 14 Idaho 120, 93 P. 654 (1908).

Amendments should be submitted before the close of the trial and submission of the case. *Snowy Peak Mining Co. v. Tamarack & Chesapeake Mining Co.*, 17 Idaho 630, 107 P. 60 (1910).

Amendment of pleadings during trial of cause is addressed to sound discretion of trial court. *Mantle v. Jack Waite Mining Co.*, 24 Idaho 613, 135 P. 854 (1913); *Powers v. Security Sav. & Trust Co.*, 38 Idaho 289, 222 P. 779 (1923).

A pleading filed after the expiration of the time allowed to amend may be stricken on motion. *Tobias v. Wolverine Mining Co.*, 52 Idaho 576, 17 P.2d 338 (1932).

Trial amendment which is material and made to present the issues more clearly should be allowed; great liberality is required in allowing amendment in furtherance of justice. *Claris v. Oregon S. L. R.R.*, 54 Idaho 568, 33 P.2d 348 (1934), cert. denied, 297 U.S. 714, 56 S. Ct. 590, 80 L. Ed. 1000 (1936).

In an action for personal injuries, permitting the plaintiffs to amend their complaint at the close of the second day of the trial by placing in issue a claim of fracture of the plaintiff's skull resulting from the accident was not an abuse of the trial judge's discretion. *Hall v. Boise Payette Lumber Co.*, 63 Idaho 686, 125 P.2d 311 (1942).

Plaintiff's motion to amend his complaint to plead an inverse condemnation action against the highway board, made after the jury had been impaneled, where the trial court nearly

five months previously, in denying a motion of the highway board for summary judgment, had commented that, while the state of Idaho was not liable in tort as pleaded in plaintiff's complaint unless covered by insurance, the highway board would be obliged to compensate any landowner if there had been a taking of property without just compensation as by depriving the plaintiff of his proper flow of water through reconstructing an irrigation channel as an incident to highway construction was properly denied. *Gates v. Pickett & Nelson Constr. Co.*, 91 Idaho 836, 432 P.2d 780 (1967), overruled on other grounds, *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970).

The trial court did not abuse its discretion in denying defendant's motion for leave to amend his answer made five days before trial where defendant had ample opportunity to make such amendment before the case was set for trial. *Dairy Equip. Co. v. Boehme*, 92 Idaho 301, 442 P.2d 437 (1968).

To Correct Defect of Parties.

Where defendants moved to dismiss plaintiff's action for defect of parties plaintiff in that plaintiff brought the action in his name alone, doing business under the partnership name, when in fact there was a partner, it was proper to permit plaintiff to amend his complaint by joining his partner as an additional party plaintiff and then deny defendants' motion. *Hessing v. Drake*, 90 Idaho 67, 408 P.2d 180 (1965).

RESEARCH REFERENCES

A.L.R. Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action. 71 A.L.R.3d 933.

Timeliness of amendments to pleadings made by leave of court under Federal Rule of Civil Procedure 15(a). 4 A.L.R. Fed. 123.

Necessity of leave of court to add or drop parties by amended pleading filed before responsive pleading is served, under Rules 15(a) and 21 of Federal Rules of Civil Procedure. 31 A.L.R. Fed. 752.

Rule 15(b). Amendments to conform to the evidence.

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the

court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

JUDICIAL DECISIONS

ANALYSIS

Amendment After Judgment.
Amount of Claim.
Decision on Unpleaded Issue.
Denial of Motion.
Discretion of Court.
Discretion of Magistrate.
Issue Raised.
Issues Not Raised by the Pleadings.
—Motion to Amend.
Issues Tried by Express or Implied Consent.
Unpleaded Remedies.

Amendment After Judgment.

Although leave to amend is to be freely given, the trial court has broad discretion to permit or disallow an amended pleading, and a pleading may be amended even after judgment has been entered. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984).

Amount of Claim.

Unless surprise or unfair prejudice is shown, the amount of a claim may be amended to conform to the proof, even during a trial. *Resource Eng'g, Inc. v. Nancy Lee Mines, Inc.*, 110 Idaho 136, 714 P.2d 526 (Ct. App. 1985).

Where no facts had been presented to show any specific, unfair disadvantage and the defendant was informed by the plaintiff's first pleading, and had been on notice throughout the litigation, that the plaintiff sought foreclosure of a lien for whatever amount the court might determine to be due for labor and services during the specified time period, the district court abused its discretion by refusing to allow a revision of the amount claimed for the pleaded time period. *Resource Eng'g, Inc. v. Nancy Lee Mines, Inc.*, 110 Idaho 136, 714 P.2d 526 (Ct. App. 1985).

Decision on Unpleaded Issue.

Where nothing in the record indicates that an unpleaded issue was litigated at trial, it is error for the trial court to base its decision on the unpleaded issue. *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980).

Although this rule specifies that where a theory of recovery is tried fully by the parties, the court may base its decision on that theory and deem the pleadings amended accordingly, an issue not tried by either express or implied

consent cannot be the basis for a decision. *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980).

Where the proof taken at trial is relevant to the pleaded issues in the case it would be manifestly unjust for the court to decide the case on theories not considered by the parties which may be inferentially proven by the evidence. *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980).

Because the issue of misrepresentation was fully litigated with the consent of the parties, the district court did not abuse its discretion in treating that issue as though it had been properly pled. *Anderson-Blake, Inc. v. Los Caballeros, Ltd.*, 120 Idaho 660, 818 P.2d 775 (Ct. App. 1991).

This rule applies only to unpled theories that are litigated through the submission of evidence at a trial of the cause on the merits, and not to factual issues raised in a motion for summary judgment, and where a plaintiff did not plead fraud with particularity in her complaint, and the trial court granted a motion for summary judgment against the plaintiff on the fraud issue, the issue was not "tried by express or implied consent of the parties" so as to preserve the issue under subsection (b) of this rule. *Estes v. Barry*, 132 Idaho 82, 967 P.2d 284 (1998).

Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least, it must appear that the parties understood the evidence to be aimed at the unpleaded issue. Thus, where both parties presented evidence regarding road elevation and slope of an easement, it was within the power of the court to enjoin the relocation of the easement. *Belstler v. Sheler*, — Idaho —, 264 P.3d 926 (2011).

Denial of Motion.

Where the trial court denied plaintiff's motion to amend his complaint to conform to the evidence by adding a tort claim for intentional interference with contract, where this motion was made at the close of the trial during the jury instruction conference, and where, in ruling on the motion the trial judge stated that in his opinion, defendant had not been given sufficient notice to properly respond to the claim and that the trial court was given inadequate time to determine the merits of

the claim, this reasoning was a sufficient basis to uphold the decision of the trial judge. *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082 (1991).

Discretion of Court.

The determination whether an issue has been tried with the consent of the parties is a matter for the trial court's discretion. *Lynch v. Cheney*, 98 Idaho 238, 561 P.2d 380 (1977).

The trial court has wide discretion in permitting amendments of pleadings to conform to the proof, and while amendments should be liberally allowed, the ruling of a district court will not be overturned absent a showing of abuse of such discretion. *Obray v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977).

The determination of whether an issue, not raised by the pleadings, has been tried by consent of the parties is within the discretion of the trial court and such determination will only be reversed when that discretion has been abused. *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979).

To insure fair adjudication, a plaintiff may be required to refine the issues once litigation has commenced; however, the trial court is under no obligation to compel the pleading party to amend his or her complaint. *Christensen v. Rice*, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988).

Without a specific motion indicating what cause of action was to be added and evidence in the trial record supporting the amendment, the trial court could not make a reasoned analysis to guide its discretionary act; therefore, the district court was not required to make any findings as to whether the family breached their fiduciary duty to the business owner. *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009).

Discretion of Magistrate.

Where a claim for unlawful detainer was brought before the magistrate and subsequently dismissed upon the magistrate's realization that the parties involved in the unlawful detainer action did not have a landlord-tenant relationship as required for such an action, the magistrate's order dismissing the claim, granting leave to file amended complaint which asserted claims of ejectment, trespass and quiet title, and transferring amended complaint which was beyond the magistrate's authority to the district court was properly within the magistrate's discretion. *Nationsbanc Mtg. Corp. v. Cazier*, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995), cert. denied, 519 U.S. 864, 117 S. Ct. 172, 136 L. Ed. 2d 113 (1996).

While amendments to pleadings should be liberally allowed, the ruling of a district court

will not be overturned absent a showing of abuse of discretion. *Sweitzer v. Dean*, 118 Idaho 568, 798 P.2d 27 (1990).

Issue Raised.

The introduction of evidence of agreement to release husband from obligations under divorce decree was sufficient to raise an issue as to whether or not the oral agreement constituted a novation which discharged the husband's obligations under the decree of divorce. *Thomas v. Goff*, 100 Idaho 282, 596 P.2d 794 (1979).

Under this rule, the issue of mitigation should have been treated as though it had been raised in the pleadings. Therefore, the trial court improperly exercised its discretion by not permitting the defendant to amend his pleadings to include the affirmative defense of failure to mitigate. *Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996).

Issues Not Raised by the Pleadings.

Where defendant clearly raised the defense of an agreement to forgive child support arrearages and the plaintiff presented rebuttal testimony denying the existence of an agreement, the child support was bound to make a finding on that question despite the fact that the defendant neither raised this defense in his answer nor moved to amend the pleadings during trial. *Lynch v. Cheney*, 98 Idaho 238, 561 P.2d 380 (1977).

Where the question of reimbursement for payment of property taxes and other payments were neither raised in the pleadings nor considered at trial with the express or implied consent of the parties, the trial court did not err in failing to consider such questions. *Furness v. Park*, 98 Idaho 617, 570 P.2d 854 (1977).

Where evidence concerning a prescriptive easement came into the record without objection, it would invoke the provisions of the rule concerning issues tried by express or implied consent of the parties, and the issue was therefore before the court. *Stecklein v. Montgomery*, 98 Idaho 671, 570 P.2d 1359 (1977).

Where the record, in an action against insurance agents for failure to provide insurance, showed that the defense of the agency was not tried by express or implied consent of the parties and that asserting it on appeal would prejudice the plaintiff, who would be unable to bring in the insurance company as a codefendant at that stage, the consideration of the issue did not fall under this rule's exception for issues tried with the consent of the parties and could not be relied on by defendants. *Keller Lorenz Co. v. Insurance Assocs. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977).

Where plaintiffs, after the close of trial but before judgment, requested relief from the forfeiture provision of their land sale contract with defendant, which issue had not been raised in the pleadings, the trial court correctly refused to allow such an amendment, since they had failed to show defendant's actual loss or that there was a lack of relationship between actual damages and the liquidated damages provided by the forfeiture clause. *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979).

Where seller and buyer of business litigated issues of breach of warranty of title to certain assets and fraudulent nondisclosure of security interest in certain other assets, the parties also at least implicitly tried the issue of rescission of the contract of sale; accordingly, the trial court did not err in granting rescission to buyer where evidence indicated that buyer was entitled to relief, even if it had not specifically requested it. *Cady v. Pitts*, 102 Idaho 86, 625 P.2d 1089 (1981).

Where the issue of governmental immunity was presented to and tried by the trial court in an action alleging negligence by city fire department, the issue of governmental immunity was properly presented on appeal even though city had failed to assert immunity as affirmative defense in its pleadings. *Chandler Supply Co. v. Boise*, 104 Idaho 480, 660 P.2d 1323 (1983), overruled on other grounds, *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986).

The plaintiff's failure to cite the particular statute of limitations upon which it relied as a defense to the defendant's counterclaim would normally result in the waiver of the defense of the statute of limitations; however, where the evidence showed that the statute of limitations issue was not only tried by consent of the parties, but it was actually conceded by the defendant to be valid, it should be deemed to have been raised in the pleadings. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984).

Consent implies, and minimal due process requires, notice to a litigant of the issues being raised. When issues are not raised by the pleadings, the evidence raising the legal issue must be clear enough so that both parties know of the issue and consent to the issue being tried. *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988).

—Motion to Amend.

Where the court agrees that an issue was tried with the implied consent of the parties, it should grant a motion to amend as to that issue. *Lynch v. Cheney*, 98 Idaho 238, 561 P.2d 380 (1977).

Failure to grant a motion to amend as to an

issue which was tried with the implied consent of the parties was not prejudicial error where the court made its finding and conclusion on that issue. *Lynch v. Cheney*, 98 Idaho 238, 561 P.2d 380 (1977).

Issues Tried by Express or Implied Consent.

Where teacher disputed termination of his teaching contract by board of trustees by bringing writ of mandamus action attacking the procedural aspects of the decision, it was clear that the substantive aspects of the board's decision were tried before the court by the implied, if not express, consent of the parties, so that upon remand by the Supreme Court for a trial de novo, the district court must allow the teacher to amend his complaint to incorporate an appropriate cause of action, since this rule permits amendment of pleadings to include issues tried by express or implied consent, even after judgment. *Kolp v. Board of Trustees*, 102 Idaho 320, 629 P.2d 1153 (1981).

Where the plaintiff trust beneficiary filed a complaint alleging jurisdiction pursuant to § 5-514 in a court which was not the court of registration for the trust and the defendant trustee consented to in personam jurisdiction with the knowledge that the complaint dealt with administration of the trust, the court had jurisdiction to order that costs and attorney fees not be charged against the trust since the issue of whether the defendant must pay costs and attorney fees was implicitly before the court under this rule. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

Failure to amend the pleadings to include issues tried by the express or implied consent of the parties does not affect the result of the trial of those issues, and whether an issue has been tried with the consent of the parties is a decision within the trial court's discretion. *Watson v. Idaho Falls Consol. Hosps.*, 111 Idaho 44, 720 P.2d 632 (1986).

In a wrongful discharge action, the court did not err in instructing the jury on the employee's theory that she had been terminated in violation of public policy, where, even though the employee did not plead a cause of action for a wrongful discharge based upon violation of public policy, she advanced the theory that the determination resulted from hospital retaliation for her pronoun activities at the time of summary judgment, in her deposition, and the issue was addressed by both parties in their trial briefs. *Watson v. Idaho Falls Consol. Hosps.*, 111 Idaho 44, 720 P.2d 632 (1986).

Where plaintiffs and vendor of defendant had orally agreed to sale of disputed property,

plaintiffs had taken possession of the disputed land, exercised control over it for approximately three years, made substantial improvements thereon, and paid vendor \$1,200 of the \$1,500 sale price, and where the actual parties to the agreement testified to its essential terms, the description of the land was certain and based on uncontradicted testimony and after the second payment of \$600 vendor gave plaintiffs a receipt stating who the parties were and that \$1,200 was received in payment for the disputed land leaving a balance of \$300 to be paid and evidence showed that defendant had knowledge of the agreement and had stated that he would take care of conveying title to the plaintiffs, failure of plaintiffs to plead misrepresentation on part of defendant as required by I.R.C.P. 9(b) did not preclude court from finding fraud on part of defendant in failing to convey the disputed land to plaintiffs in light of this rule since the issue of such misrepresentation was fully litigated with the consent of the parties and the court did not abuse its discretion in treating the issue as though it had been properly plead. *Mikesell v. Newworld Dev. Corp.*, 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992).

Where plaintiffs' complaint contained a prayer for relief seeking punitive damages and defendant never moved to strike such improper claim and plaintiffs did not file a pretrial motion for hearing to amend their complaint to include a complaint for punitive damages as their complaint already contained such a claim and it was clear from the record that during trial neither attorneys for plaintiff or defendant were aware of the provisions of § 6-1604(2) concerning the procedural requirement for punitive damages and during the trial both parties discussed punitive damages and the proof concerning punitive damages and even when third party raised a question about the applicability of § 6-1604(2) defendant did not object to plaintiffs' claim or the evidence submitted by plaintiffs in support of their claim at this time or at any time during the trial for noncompliance with § 6-1604(2), by failing to object defendants waived their right to object, and because the issue was fully tried by the parties, the court should have treated the issue as if it had been properly pled and determined whether an award of punitive damages was proper. *Mikesell v. Newworld Dev. Corp.*, 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992).

There is a distinction between an issue not formally raised below and an issue that was never raised below. Where an issue never surfaced below, it is not proper for it to be raised on appeal; however, when issues not raised are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

The focus under this rule is whether the parties expressly or impliedly consented to try the issue, not whether parties are adequately informed before the issue is tried with their consent. *Shabinaw v. Brown*, 125 Idaho 705, 874 P.2d 516 (1994).

Parties did not expressly or impliedly consent to trying a new and unpled assertion that counsel was ineffective with regard to an effort to withdraw the post-conviction petitioner's guilty plea because he did not indicate that he wished to amend the pleadings or move to alter or amend the judgment. *Monahan v. State*, 145 Idaho 872, 187 P.3d 1247 (2008).

In action by creditor to recover unpaid check, evidence was insufficient to show that restaurant owners' payment defense was tried by consent. The owners not only failed to plead a payment defense in an answer to the amended complaint, but did not even raise it in response to the owners' post-trial motion for reconsideration. *Nguyen v. Bui*, 146 Idaho 187, 191 P.3d 1107 (2008).

Unpleaded Remedies.

District court has the power to grant rescission as equitable relief regardless of whether it was specifically plead by either party. *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 188 P.3d 846 (2008).

Cited in: *Cox v. Mountain Vistas, Inc.*, 102 Idaho 714, 639 P.2d 12 (1981); *Brummett v. Ediger*, 106 Idaho 724, 682 P.2d 1271 (1984); *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880, 728 P.2d 769 (Ct. App. 1986); *Murr v. Selag Corp.*, 113 Idaho 773, 747 P.2d 1302 (Ct. App. 1987); *Strate v. Cambridge Tel. Co.*, 118 Idaho 157, 795 P.2d 319 (Ct. App. 1990); *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990); *Boise-Kuna Irrigation Dist. v. Gross*, 118 Idaho 940, 801 P.2d 1291 (Ct. App. 1990); *Doyle v. Ortega*, 125 Idaho 458, 872 P.2d 721 (1994); *Consolidated AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 912 P.2d 115 (1996); *O'Guin v. Bingham County*, 139 Idaho 9, 72 P.3d 849 (2003).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Conforming to Proof.
 Contractor's Lien.
 Discretion of Trial Court.
 Evidence As Correcting Insufficient Pleading.
 Failure to Request Leave to Amend.
 Fraud.
 Instructions to Jury.
 Issues Not Raised by the Pleadings.
 Parties to Suit.
 Relief Not in Prayer.
 Striking Part of Pleading.
 Time for Amendment.
 Timeliness of Objection.
 Variance.
 —Materiality.

Conforming to Proof.

It is a general rule that the right to amend pleadings to conform to proof should be exercised prior to the reception of the evidence if objected to when offered on the ground of variance, but an amendment cannot be injected into a case where there is no evidence to sustain it already in or proposed to be introduced, on the theory that it is made to conform to the proof. *Heath v. Potlatch Lumber Co.*, 18 Idaho 42, 108 P. 343 (1910).

Where, after the close of the evidence in the trial of the case, an amendment is proposed to the answer, and it appears that such proposed amendment would not be supported by the proof, it is not error to disallow the same. *Valentine v. Rosenhaupt*, 19 Idaho 130, 112 P. 685 (1910).

Claim and delivery action for recovery of a farm wagon; complaint alleged that the wagon was a 2 ¾-inch Winona wagon, while the proof showed that it was a 3-inch Winona wagon; the court properly allowed amendment to conform to the proof. *Trousdale v. Winona Wagon Co.*, 25 Idaho 130, 137 P. 372 (1913).

To avoid variance court may consider the answer amended to conform to the proofs. *Milwaukee Land Co. v. Bogle*, 60 Idaho 451, 92 P.2d 1065 (1939).

Where the complaint alleged fraudulent representations were made by the defendant and evidence at the trial disclosed that they were made by his agent, amendment of the complaint to show such fact would have facilitated a fair trial of the existing issues between the parties. *Callahan v. Wolfe*, 88 Idaho 444, 400 P.2d 938 (1965).

In an action for personal injuries received in an automobile accident brought by alleged guests, in which the original complaint charged gross negligence and wilful injury, it

was not error for the court, upon evidence concerning intoxication being introduced by both parties at the trial, to permit the amendment of the complaint to also charge the voluntary intoxication of the driver. *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966).

Contractor's Lien.

As an original contractor must file a claim of lien no later than 90 days after the completion of the improvement, in the absence of statutory authorization, a defective claim of lien may not be amended after the statutory period for filing the claim has expired and even though amendment of the complaint was permissible under the provisions of former identical rule, such amendment could not remedy the fatal defect in the claim of lien based on an improvement completed a year previously. *Ross v. Olson*, 95 Idaho 915, 523 P.2d 518 (1974).

Discretion of Trial Court.

The trial court has large discretion in permitting amendments to pleadings, and may permit such amendments at any stage of the proceedings almost as of course to make the pleadings correspond with the proof. *Pennsylvania-Coeur d'Alene Mining Co. v. Gallagher*, 19 Idaho 101, 112 P. 1044 (1910).

The matter of amendment to pleadings is within the sound discretion of the trial court. *Gaskill v. Jacobs*, 38 Idaho 795, 225 P. 499 (1924); *Durant v. Snyder*, 65 Idaho 678, 151 P.2d 776 (1944).

Amendment changing name of defendant company to meet proof is within discretion of trial court and will not be reviewed. *Pittenger v. Al. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924).

The granting of the motion at the conclusion of the introduction of evidence to conform the pleadings to the proof with respect to damages was within the sound discretion of the trial court under this rule. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 364 P.2d 146 (1961); *Pence v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Donahue v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Johnson v. Big Lost River Irrigation Dist.*, 83 Idaho 394, 364 P.2d 159 (1961).

In order to raise a theory which is neither pleaded nor tried by implied or express consent, it is necessary that a party request the court for leave to amend. *Reynolds v. Continental Mtg. Co.*, 85 Idaho 172, 377 P.2d 134 (1962).

Trial court has wide discretion in permitting amendments of pleadings at any stage of

the proceedings to conform to the proof. *Cameron Sales, Inc. v. Klemish*, 93 Idaho 451, 463 P.2d 287 (1970).

Evidence As Correcting Insufficient Pleading.

A divorce defendant's counterclaim on the ground of impotency which merely alleged that "the circumstances described in § 32-501(6) relate to plaintiff" was not rendered sufficient by the evidence under former identical rule where defendant failed to prove that the alleged impotency of plaintiff continued or was incurable. *Ferguson v. Ferguson*, 91 Idaho 33, 415 P.2d 676 (1966).

In an action for fraud in the sale of real estate, where the evidence on both sides on the issue of fraud was also competent, relevant, and material to the issue of breach of warranty of fitness, that plaintiffs had not pled breach of warranty was not a sufficient reason to deny plaintiffs relief on that theory. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

Evidence of desertion received without objection permitted the granting of a divorce on such ground even though not alleged as a ground in plaintiff's complaint. *Losee v. Losee*, 91 Idaho 77, 415 P.2d 720 (1965).

Where the right to damages appeared on the face of a sale and purchase agreement, the purchasers were not prejudiced by the sellers' failure specifically to plead them. *Scogings v. Andreason*, 91 Idaho 176, 418 P.2d 273 (1966).

In an action against a city for damages, the admission in open court of the defendant's attorney that the city had been duly notified of plaintiff's claim as required by statute had the effect of amending plaintiff's complaint to allege the giving of such notice. *McLean v. City of Spirit Lake*, 91 Idaho 779, 430 P.2d 670 (1967).

Where issue of plaintiff's capacity to sue because of its failure as a foreign corporation to comply with the requirements of § 30-504 (now repealed), was not raised by any of the pleadings, it was not error for trial court to refuse motion to amend although evidence on question was admitted where said admission was conditional and subsequently excluded. *Dairy Equip. Co. v. Boehme*, 92 Idaho 301, 442 P.2d 437 (1968).

In an action for the pasturing of cattle, in which the defendant cross-complained for alleged breaches of the pasturing agreement by plaintiff, it was not error for the court to find that there was an accord and satisfaction of the pasturing agreement, waiving any alleged breaches thereof, even though such defense to the cross-complaint was not pleaded, where evidence of it was introduced without objec-

tion. *Copenhagen v. Lavin*, 92 Idaho 681, 448 P.2d 774 (1968).

In a divorce action where there was ample evidence that the plaintiff was guilty of extreme mental cruelty, and such issue was tried by implied consent of the parties, it was not error for the court to grant the defendant a divorce on such grounds, even though not alleged in her cross-complaint. *Brammer v. Brammer*, 93 Idaho 671, 471 P.2d 58 (1970).

Failure to Request Leave to Amend.

The theory of usury having been neither pleaded nor tried by express or implied consent and the plaintiff having made no request for leave to amend in the lower court, he cannot, on appeal, be heard to complain; having failed to invoke the trial court's discretion there can be no ground for appeal in the premises and the assignment asserting error committed by the trial court in failing to find usury committed by the defendant was without merit. *Reynolds v. Continental Mtg. Co.*, 85 Idaho 172, 377 P.2d 134 (1962).

Fraud.

Action of trial court in entering judgment enforcing equipment lease contract against lessee was tantamount to finding against him on the issue of fraud, which he claimed was presented at the trial, although fraud was not pleaded by lessee and trial court made no finding thereon. *C.I.T. Corp. v. Hess*, 88 Idaho 1, 395 P.2d 471 (1964).

Instructions to Jury.

It was not error to instruct the jury on accord and satisfaction and compromise and settlement, although such defenses were not raised by defendant's pleadings, where there was evidence in the record tending to establish such defenses. *Nordling v. Whelchel Mines Co.*, 90 Idaho 213, 409 P.2d 398 (1965).

In action for damages for personal injuries allegedly sustained while working as employee for defendant where plaintiff did not allege violation of a company operating rule as ground relied on to establish negligence, but evidence of such a rule was presented, under this rule a factual issue existed as to whether such a rule had been violated and the trial court erred in not giving an instruction to the jury concerning the violation of the company's operating rules. *Dopp v. Union P.R.R.*, 95 Idaho 702, 518 P.2d 964 (1974).

Where an amendment which is offered for the purpose of conforming pleadings to the proof, does not present any new cause of action or issue and the opposing party has not been misled or deprived of the right to introduce any evidence which he might have desired to offer in consequence of amendment,

the disallowance of such an amendment is error. *Harrison v. Russell & Co.*, 17 Idaho 196, 105 P. 48 (1909); *Claris v. Oregon S. L. R.R.*, 54 Idaho 568, 33 P.2d 348 (1934), cert. denied, 297 U.S. 714, 56 S. Ct. 590, 80 L. Ed. 1000 (1936); *Hill v. Bice*, 65 Idaho 167, 139 P.2d 1010 (1943).

Issues Not Raised by the Pleadings.

Where it is apparent that all of the terms of both a written and an oral agreement were complied with by the parties, it is not error for the court to permit an amendment so as to allege the oral agreement. *Nohrnberg v. Boyle*, 42 Idaho 48, 246 P. 12 (1925).

In action on notes, evidence offered under general denials of indebtedness respecting sale of collateral under oral agreement subsequent to written agreement regarding deposit of collateral was improperly excluded, even if technically at variance with allegations of affirmative defense. *Brooks v. Beach*, 50 Idaho 185, 294 P. 505 (1930).

The testimony of one of the drivers that she was driving not over 30 miles per hour on the inside traffic lane when an automobile about a car's length ahead of her pulled from the outside traffic lane into her traffic lane causing her to slow down in an effort to prevent a collision whereupon her car skidded over the center line at which time the accident occurred, raised the issue of sudden emergency which, though not pleaded, since the issue in effect was tried by the implied consent of the parties, it must be treated as if it had been raised in the pleadings. *Morford v. Brown*, 85 Idaho 480, 381 P.2d 45 (1963).

Plaintiff's contention that failure to comply with condition in agreement of sale as to securing a new loan, was not asserted as an affirmative defense by the purchasers in their pleadings and not having been presented in the pleadings cannot be considered, was not sustained by the court, since it was the court's view that the question was properly at issue before the trial court, both parties having fully developed their evidence as to whether such loan application was accepted and such loan being a condition precedent to an obligation arising under the agreement to purchase, such contract was unenforceable. *McMinn v. Holley*, 86 Idaho 186, 384 P.2d 229 (1963).

Where the issue of trespass was tried by the implied consent of the parties it became a live issue in the case even though it was not raised by the pleadings where plaintiff proved the trespass, she was entitled to recover damages suffered by the trespass. *Green v. Beaver State Contractors*, 93 Idaho 741, 472 P.2d 307 (1970).

Where no objection was made to inquiries as to issue of mutual mistake, reformation of

the deed by the court was not in error even though not pleaded. *Collins v. Parkinson*, 96 Idaho 294, 527 P.2d 1252 (1974).

Parties to Suit.

Where filing of claim of lien on behalf of a corporation, and bringing of suit to foreclose such lien, should have been in the name of trustees, the complaint may be amended to substitute the trustees as plaintiffs, instead of the corporation. *Sullivan Constr. Co. v. Twin Falls Amusement Co.*, 44 Idaho 520, 258 P. 529 (1927).

There was no error in allowing respondent to amend by adding her husband, as party plaintiff, where community property was involved and he was a proper party to that part of the action affecting wife's separate property, although he was not a necessary party thereto. *McShane v. Quillin*, 47 Idaho 542, 277 P. 554 (1929).

Where a plaintiff had made out a prima facie case and identified the persons named individually as defendants and as constituting the firm that owned the truck which caused the damages, for which recovery was sought, he was entitled during the trial to amend his complaint so as to conform to such proof by making the individual defendants as constituting such firm party defendants. *Hill v. Bice*, 65 Idaho 167, 139 P.2d 1010 (1943).

Relief Not in Prayer.

Where the board of an irrigation district erroneously denied a petition for exclusion of nonirrigable land from the district because its contract with the U.S. department of the interior prohibited changes in the district boundaries without the consent of the secretary of the interior, the district court had jurisdiction, on appeal, to order the board to seek such consent even though such relief was not prayed for in plaintiffs' petition. *Lodge v. Miller*, 91 Idaho 662, 429 P.2d 394 (1967).

Striking Part of Pleading.

It is proper to allow a party to strike part of his pleading in order to conform to adduced proof if such is not prejudicial to his adversary. *Jeffery v. Ouldhouse*, 59 Idaho 50, 80 P.2d 685 (1938).

Time for Amendment.

It is clearly within the discretion of the trial judge to permit amendments to be made after the close of the evidence to conform to the proof. *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908); *Sweeney v. Johnson*, 23 Idaho 530, 130 P. 997 (1913); *Unfried v. Libert*, 23 Idaho 603, 131 P. 660 (1913); *Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 P. 1073 (1914).

Where application to amend a pleading to conform to the proof is made before the find-

ings and decree are signed by the judge, such application is not too late, and should not for that reason be denied, but otherwise if there is no proof to support same. *Snowy Peak Mining Co. v. Tamarack & Chesapeake Mining Co.*, 17 Idaho 630, 107 P. 60 (1910).

Timeliness of Objection.

In case a variance misleads the adverse party to his prejudice, it is his duty to show the fact to the court, and he cannot first raise the objection on motion for new trial or on appeal to the Supreme Court. *Aulbach v. Dahler*, 4 Idaho 654, 43 P. 322 (1896); *Johnson v. Gary*, 18 Idaho 623, 111 P. 855 (1910); *Maw v. Coast Lumber Co.*, 19 Idaho 396, 114 P. 9 (1911).

Objection on account of variance cannot be raised for the first time on motion for new trial or on appeal. *Duthweiler v. Hanson*, 54 Idaho 46, 28 P.2d 210 (1933); *Carey v. Lafferty*, 59 Idaho 578, 86 P.2d 168 (1938).

If, during the trial of cause, defendant is misled, to his prejudice, because of the variance between the allegations of the complaint and the proof, he should then and there notify the court of that fact, and ask for proper relief; failing to do that, he will not be permitted to raise such question on motion for a new trial or an appeal. *Naccarato v. Village of Priest River*, 68 Idaho 368, 195 P.2d 370 (1948); *Ford v. Connell*, 69 Idaho 183, 204 P.2d 1019 (1949).

Variance.

"Variance" means "material difference." It is not a variance when the proof does not show all of the points in a pleading. *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 133 P. 929 (1913).

As to whether or not there is a variance, all of the pleadings in the action will be looked to. *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 133 P. 929 (1913).

Where the suit is brought upon the theory of contract that the property was sold and delivered, and the evidence shows a tortious taking constituting conversion, there is no variance. *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 133 P. 929 (1913).

Variance between claim for workmen's compensation and proof does not warrant denial of an award. *Nistad v. Winton Lumber Co.*, 61 Idaho 1, 99 P.2d 52 (1939).

—Materiality.

Where the defendants induced the plaintiff to believe that they were jointly liable on a contract, and the complaint was accordingly drawn on that theory, evidence which showed that the contract was made with but one of the defendants could not have misled such defendant and was not a material variance. *Hewitt v. Maize*, 5 Idaho 633, 51 P. 607 (1897).

No variance between a pleading and the proof will be deemed material unless it actually misleads the adverse party to his prejudice in maintaining his action or defense on the merits. *Lewis, Cooper & Hancock v. Utah Constr. Co.*, 10 Idaho 214, 77 P. 336 (1904); *Joyce v. Rubin*, 23 Idaho 296, 130 P. 793 (1913); *Newman v. Great Shoshone & Twin Falls Water Power Co.*, 28 Idaho 764, 156 P. 111 (1916); *Carey v. Lafferty*, 59 Idaho 578, 86 P.2d 168 (1938); *Milwaukee Land Co. v. Bogle*, 60 Idaho 451, 92 P.2d 1065 (1939).

Variance arises when there is a substantial departure from the issue in the evidence adduced, and must be in some matter which in point of law is essential to the charge or claim. *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 133 P. 929 (1913).

Immaterial variance between allegations and proof is not ground for motion for nonsuit. *Merrill v. Fremont Abstract Co.*, 39 Idaho 238, 227 P. 34 (1924).

Where appellant has not shown that he was actually misled to his prejudice by allegations, complaint cannot be made as to alleged variance. *Peck v. Nixon*, 47 Idaho 675, 277 P. 1112 (1929).

Variance which does not appear to be material or prejudicial will be disregarded. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939).

A variance is fatal only where it has misled or may serve to mislead the adverse party. *Naccarato v. Village of Priest River*, 68 Idaho 368, 195 P.2d 370 (1948); *Ford v. Connell*, 69 Idaho 183, 204 P.2d 1019 (1949).

A party cannot complain of alleged variance when he has not shown that he was actually misled to his prejudice. *Wurm v. Pulice*, 82 Idaho 359, 353 P.2d 1071 (1960).

A party cannot complain of variance between pleading and proof in the absence of a showing that he was misled thereby to his prejudice. *Frost v. Mead*, 86 Idaho 155, 383 P.2d 834 (1963), overruled on other grounds, *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976).

RESEARCH REFERENCES

A.L.R. What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amend-

ment of pleadings under Rule 15(b) of Federal Rules of Civil Procedure. 20 A.L.R. Fed. 448.

Rule 15(c). Relation back of amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The relation back of an amendment joining or substituting a real party in interest shall be as provided in Rule 17(a). The delivery or mailing of process to the Idaho attorney general or designee of the attorney general, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the state of Idaho or any agency or officer thereof to be brought into the action as a defendant. (Amended effective January 8, 1976.)

JUDICIAL DECISIONS**ANALYSIS**

Additional Defendant Added.
Amended Cause of Action.
Applicability.
Dead Parties.
Defective Pleading.
Discretion of Trial Court.
Fictitious Party Pleadings.
Inapplicable to Motions.
New Cause of Action.
Notice.
Statute of Limitations.

Additional Defendant Added.

Where a named defendant is closely related to, or the officer or agent of, a corporation not named in the original complaint, and the claim of the plaintiff relates to activities of the corporation, and the interrelationship between the named defendant and the corporation is such that it cannot be said the corporation would be unduly prejudiced if required to defend against the claims asserted, then amending the complaint to add the corporation as a defendant falls within this rule. *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct. App. 1983).

Where suit was brought against individual defendant prior to effective date of I.R.C.P. 54(e)(1) and complaint was amended, after

such effective date, to add defendant's corporation as a party defendant, the amended complaint related back under this rule to the date of the original complaint and, consequently, I.R.C.P. 54(e)(1) governing award of attorney's fees was inapplicable with respect to both individual and corporate defendants. *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct. App. 1983).

Amended Cause of Action.

Where the tort theory with regard to which the plaintiffs sought to amend their complaint relied upon the same conduct being tortious as is asserted for the breach of contract claim, it was the underlying conduct, transaction, or occurrence of refusing to deliver the escrow documents which comprised the gravamen of both the contract claim and the asserted tort claim; therefore, the statute of limitations standing alone was not an adequate reason for denying the plaintiff's motion to amend as the amended cause of action related back and did not violate this rule. *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985).

In an action against governmental entities for violation of the plaintiff's civil rights stemming from his arrest, incarceration, and physical treatment in the county jail, the district court erred in refusing to permit the

amendment which alleged negligence on the part of the governmental entities, where the amended complaint did not attempt to add a new cause of action, but rather modified, by providing more detail, the claims set forth or attempted to be set forth in the original complaint, all parties under the amended complaint were aware of the suit as a result of the original complaint, and there was no indication that the motion to amend had come at a critical stage in the proceedings. *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986).

If the amended pleading sets forth a new cause of action unrelated to the original transaction or occurrence pled, the amendment does not relate back to the date of the original pleading. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991).

An Idaho Tort Claims Act claim that was contained in an amended complaint was incorrectly ruled to relate back to original complaint and should not have been denied as premature. *Farnworth v. Femling*, 125 Idaho 283, 869 P.2d 1378 (1994), cert. denied, 513 U.S. 816, 115 S. Ct. 73, 130 L. Ed. 2d 28 (1994).

If a claim or defense asserted in an amended pleading would be barred by the statute of limitations, under the terms of this rule, this limitation may be cured by relating back to the date of the original pleading. *Farnworth v. Femling*, 125 Idaho 283, 869 P.2d 1378 (1994), cert. denied, 513 U.S. 816, 115 S. Ct. 73, 130 L. Ed. 2d 28 (1994).

Sheriff was entitled to dismissal of a suit alleging breach of a settlement agreement and other causes of action because the filing of a bond one day after the lawsuit was initiated did not comply with the requirement of § 6-610(2) that bond be posted as a condition precedent to suit. *Allied Bail Bonds, Inc. v. County of Kootenai*, — Idaho —, 258 P.3d 340 (2011).

Applicability.

Where slip and fall plaintiff had mistakenly sued president and shareholder of corporation which owned hotel where she was injured, relation-back rule did not allow her to add corporation to suit after statute of limitations had run. *Winn v. Campbell*, 145 Idaho 727, 184 P.3d 852 (2008).

Dead Parties.

The Supreme Court declined to adopt the nullity rule that a suit against a decedent is a nullity because dead persons are not legal entities capable of being sued, thus, where a party has been named improperly, amendment and relation back should be allowed

where the requirements of this rule are met. *Trimble v. Engelking*, 130 Idaho 300, 939 P.2d 1379 (1997).

This rule applies when a decedent has been erroneously named as a defendant and the complaint is subsequently amended to substitute the decedent's estate as a party. *Damian v. Estate of Pina*, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

Where the court's order on remand included a direction to the district court to "fully explore its exercise of discretion under" this rule, and where the issue of the applicability of subsection (b) of this section was considered by the court on plaintiff's first appeal, the district court abused its discretion on remand when it failed to consider the applicability of subsection (b) of this section. *Trimble v. Engelking*, 134 Idaho 195, 998 P.2d 502 (2000).

Defective Pleading.

If a party is put on notice by the original complaint, an amendment to cure a defective pleading should not be prohibited unless the noticed party would be unduly prejudiced in maintaining its defense. *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986).

Discretion of Trial Court.

The decision to grant or deny a party's motion to amend a pleading is left to the trial court's discretion and the Supreme Court will not reverse such a ruling absent an abuse of this discretion. *Trimble v. Engelking*, 130 Idaho 300, 939 P.2d 1379 (1997).

The decision to grant or refuse permission to amend a complaint is left to the sound discretion of the trial court when a party proposes to amend its complaint after a responsive pleading is served or when the record contains no allegation, which, if proven, would entitle the party to the relief claimed; however, in the interest of justice, district courts should favor liberal grants of leave to amend a complaint. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Fictitious Party Pleadings.

Any amendment applied to fictitious party pleadings filed under I.R.C.P. 10(a)(4) will relate back to the date of the original filing only if the notice requirements of this rule are complied with. *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986).

Since it was the established practice to allow the amendment of a complaint designating the true name of a fictitiously described party to relate back to the filing of the original complaint without meeting the notice requirements of this rule, if it could be established that the amending party proceeded

with due diligence to discover the true identity of the fictitious party and promptly moved to amend and serve process upon the previously fictitiously described party, the rule that the notice requirements of this rule must be satisfied is to be applied prospectively. *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986).

A party simply cannot call an adverse party any name it chooses, without a designation that the chosen name is fictitious, and later amend the complaint to use the party's true name, expecting that amendment to relate back to the initial complaint. *Watts v. Lynn*, 125 Idaho 341, 870 P.2d 1300 (1994).

Regardless of whether I.R.C.P. 10(a)(4) allows a party to designate a fictitious name, this rule, being more specific, controls on the issue of whether an amended complaint relates back to the initial filing. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Because plaintiff did not proceed with due diligence to discover the identity of the fictitious John Doe party she had designated as a possible owner of the property, she did not meet the exception to the requirements of this rule. *Regjovich v. First Western Invs., Inc.*, 134 Idaho 154, 997 P.2d 615 (2000).

Inapplicable to Motions.

Motions are not pleadings in the sense used in this rule; therefore, this rule has no application to the amendment of motions. *O'Neil v. Schuckardt*, 116 Idaho 507, 777 P.2d 729 (1989).

An attempt to piggyback a late filed motion for new trial by amending a timely motion for judgment notwithstanding the verdict is not supported by Idaho Rules of Civil Procedure. *O'Neil v. Schuckardt*, 116 Idaho 507, 777 P.2d 729 (1989).

New Cause of Action.

Since the original complaint did not give notice of the legal theory advanced in the amended complaint, the amendment was a new cause of action which did not relate back. *Wing v. Martin*, 107 Idaho 267, 688 P.2d 1172 (1984).

An amended cross-claim against codefendant could not relate back to the codefendant's answer to the original complaint, where the cross-claim against codefendant was not asserted as a defense, but as an independent cause of action. *Frieberger v. American Triticale, Inc.*, 120 Idaho 239, 815 P.2d 437 (1991).

Notice.

Notice of the institution of an action pertains to an action that has already com-

menced, not one that the parties intend to file. *Hoopes v. Deere & Co.*, 117 Idaho 386, 788 P.2d 201 (1990).

The provision of this rule making relation back conditional upon the newly added defendant having received notice of the action "within the period provided by law for commencing the action against the party" means that such notice must have been received before the statute of limitations expired. *Damian v. Estate of Pina*, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

Where the decedent's mother became aware of a personal injury action when she was subpoenaed for a deposition more than two months after the expiration of the limitation period, this did not satisfy the rule's standard for notice, even if it was assumed that notice to the mother of a decedent would constitute notice to the estate. *Damian v. Estate of Pina*, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

Statute of Limitations.

Defendants named in a complaint amended after the statute of limitations has run must have some kind of notice or reason to know that an action has been instituted against them before the statute runs, whereas defendants named in a complaint filed before the statute runs need only receive notice (service of process) within a reasonable time after the complaint is filed; but this anomaly is overcome by the policy goal of uniformity with the federal courts and the policy of encouraging diligence and timeliness among plaintiffs. *Hoopes v. Deere & Co.*, 117 Idaho 386, 788 P.2d 201 (1990).

Given the fact that a motion for leave to file an amended complaint was not filed until five and one-half years after the events alleged to have constituted the new claims occurred, and because these new causes of action were sounded in tort, and were entirely different from the claim of an oral contract to lend money contained in the original complaint, and because the new claims relied in part upon new facts not alleged in the original complaint, the trial court properly concluded that the tort claims in the amended complaint did not relate back to the time of filing of the original complaint under this rule, and were barred by the statute of limitations. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 804 P.2d 900 (1991).

The relation back doctrine was not satisfied because plaintiff's original complaint was not served before the two-year statute of limitation for personal injury actions expired. *Norreen v. Price Dev. Co.*, 135 Idaho 816, 25 P.3d 129 (Ct. App. 2001).

The phrase “within the period provided by law for commencing the action” set forth in subdivision (c) means before the expiration of the applicable statute of limitations; the date marking the expiration of the period for ser-

vice of process is not the appropriate measure for determining the expiration of the limitations period. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2001).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

In General.

New Cause of Action.

Substitution of Party.

In General.

An amended complaint renders the original *functus officio* as a pleading and takes the place of the original and dates back by relation to the time of filing such original. *Woody v. Jamieson*, 4 Idaho 448, 40 P. 61 (1895), overruled on other grounds, *Farmers State Bank v. Gray*, 36 Idaho 49, 210 P. 1006 (1922).

It was not error for the trial court to allow the amendment of the trial pleadings, where such amendment would relate back, and relevancy to the issues under the amended pleading became apparent. *Cameron Sales*,

Inc. v. Klemish, 93 Idaho 451, 463 P.2d 287 (1970).

New Cause of Action.

Amendment of complaint to foreclose mechanic's lien to add cause of action for breach of contract did not create entirely new cause of action so as to preclude the relation back of the amendment to the date of the original pleading. *Mitchell v. Flandro*, 95 Idaho 228, 506 P.2d 455 (1972).

Substitution of Party.

Amendment or substitution of competent party introduces no new cause of action, but relates back to commencement of suit. *Muir v. Pocatello*, 36 Idaho 532, 212 P. 345 (1922); *McGrath v. West End Orchard & Land Co.*, 43 Idaho 255, 251 P. 623 (1926).

RESEARCH REFERENCES

A.L.R. Relation back of amended pleadings substituting true name of defendant for fictitious name used in earlier pleading so as to avoid bar of limitations. 85 A.L.R.3d 130.

Sufficiency of notice or knowledge required under Rule 15(c)(1)(2) of Federal Rules of Civil Procedure dealing with relation back of amendments changing parties against whom claim is asserted. 11 A.L.R. Fed. 269.

Amendment of pleading to add, substitute, or change capacity of, party plaintiff as relating back to date of original pleading, under Rule 15(c) of Federal Rules of Civil Procedure, so as to avoid bar of limitations. 12 A.L.R. Fed. 233; 100 A.L.R. Fed. 880.

Rule 15(d). Supplemental pleadings.

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

STATUTORY NOTES

Cross References. General rules of pleading, Rule 8(a)(1).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Change in Relationship of Parties.
Occurrences After Commencement of Suit.

Change in Relationship of Parties.

Matters changing the relation of the parties to a suit, or either of them, in respect to the matter in litigation, which transpired since the filing of the original complaint, are proper matters for a supplemental complaint. *Dennison v. Willcut*, 3 Idaho 793, 35 P. 698 (1894).

Occurrences After Commencement of Suit.

Matters occurring after commencement of suit may be set up, in the discretion of the trial court, by way of amendment instead of

supplemental complaint where no new cause of action is alleged, but merely matters increasing damages. *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.2d 651 (1934).

The assignment of error of the trial court in allowing plaintiff to file a supplemental complaint was without merit since the record showed transactions and events which occurred after the filing of the original complaint, notably a revision of the original contract of sale of tractor upon which the original complaint was based and the repurchase of the contract by plaintiff from the bank to which the contract had been sold. *National Motor Serv. Co. v. Walters*, 85 Idaho 349, 379 P.2d 643 (1963).

RESEARCH REFERENCES

A.L.R. Construction and application of Rule 15 (d) of Federal Rules of Civil Procedure providing for allowance of supplemental

pleadings setting forth transactions, occurrences, or events subsequent to original pleading. 28 A.L.R. Fed. 129.

Rule 16(a). Pre-trial conferences, objectives.

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conference before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pre-trial activities;
- (4) improving the quality of the trial through more thorough preparation;
- (5) facilitating the settlement of the case; and
- (6) recommending and encouraging that the parties use some form of alternative dispute resolution and, in appropriate cases, ordering the parties to engage in mediation or a court conducted settlement conference. (Adopted March 28, 1986, effective July 1, 1986; amended April 19, 1995, effective July 1, 1995.)

STATUTORY NOTES

Cross References. Amended and supplemental pleadings, Rule 15(a).

Depositions pending action, scope of examination, Rule 27(b).

Interrogatories to parties, Rule 33(a).

JUDICIAL DECISIONS

ANALYSIS

Continuances.
 Motion for Partial Summary Judgment.
 Other Appropriate Matters.
 Sanctions.

Continuances.

Balanced against the obligation to do substantial justice is the need of the trial court, under its inherent power to regulate its calendar, to efficiently manage the cases before it; whether to grant a continuance or to allow, on short notice, a deposition to be taken immediately prior to trial are the types of matters a court must consider in attempting to efficiently manage its docket while doing substantial justice to the parties. *Department of Labor & Indus. Servs. ex rel. Hansen v. East Idaho Mills, Inc.*, 111 Idaho 137, 721 P.2d 736 (Ct. App. 1986).

Where in support for a motion for a continuance to permit deposition of an out-of-state witness, the defendant did not file an affidavit with the motion, the record did not show that the defendant made even reasonable efforts to assure the witness's presence, nor was there a particularized showing as to the substance and materiality of the witness's testimony, it was not an abuse of discretion for the magistrate to deny a continuance. *Department of Labor & Indus. Servs. ex rel. Hansen v. East Idaho Mills, Inc.*, 111 Idaho 137, 721 P.2d 736 (Ct. App. 1986).

Motion for Partial Summary Judgment.

Trial court's holding upon a pretrial motion for partial summary judgment in an eminent

domain action that, in accordance with zoning ordinances, following the taking of the property in question, it would not be possible to make deliveries to a supermarket on its one side was a decision on a pure question of law arrived at by construing the local zoning ordinance as to whether it forbids on-street delivery and, as long as the court correctly construed the zoning ordinance, was not in error. *State ex rel. Moore v. Bastian*, 98 Idaho 888, 575 P.2d 486 (1978).

Other Appropriate Matters.

Subdivision (b)(6) of this rule does not entitle a defendant or his agent contact with victims or witnesses of an alleged crime; in fact, such victims and witnesses may constitutionally refuse such an interview unless otherwise required by law. *LaBelle v. State*, 130 Idaho 115, 937 P.2d 427 (Ct. App. 1997).

Sanctions.

Trial court properly excluded plaintiff's expert's testimony where the plaintiffs failed to demonstrate an acceptable reason to extend the discovery deadlines previously imposed by the court. *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006).

Cited in: *Mitchell v. Bingham Mechanical & Metal Prods., Inc.*, 99 Idaho 516, 584 P.2d 1241 (1978); *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987); *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987); *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988); *Nilsson v. Mapco*, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988); *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Amendment of Pre-Trial Order.
 Disclosures Required of Parties.
 In General.
 New Issues on Appeal.
 Post Trial Amendment of Pre-Trial Order.
 Pre-Trial Conference.

Amendment of Pre-Trial Order.

Absent bad faith and prejudice to an opposing party, amendments to the pre-trial order to prevent manifest injustice should be liberally granted. *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

Disclosures Required of Parties.

The primary purpose of former similar rule was to simplify issues by getting adversaries together as to issues which are not really

disputed. To this end, the parties must fully disclose in good faith their substantial contentions and the gist of the evidence to support those contentions; but pre-trial procedure should not be rigidly applied to require detailing of claims and defenses in the manner of special pleading. *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

In General.

Under this rule the court may expedite justice, but it must always do substantial justice. *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

New Issues on Appeal.

A case having been submitted to the trial court on the issues presented by the parties as embodied in their pleadings and the pretrial

order, a theory presented for the first time on appeal will not be reviewed. *Earl v. Fordice*, 84 Idaho 542, 374 P.2d 713 (1962).

Post Trial Amendment of Pre-Trial Order.

Granting of motion of plaintiffs in water rights dispute for amendment of pre-trial order to conform to the evidence concerning ground water supply and effect thereon of defendants' pumping, and to include issue of whether defendants should be enjoined from pumping their wells, was proper where issue had been raised by parties in previous related proceeding, where defendants had themselves raised the issue in their notice of appeal to the district court, where the pre-trial order recognized and did not preclude trial of the issue, and where much evidence on the issue was received during the trial without objection. *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969).

Pre-Trial Conference.

Former similar rule authorized the holding

of a pre-trial conference, one of the purposes of which is simplification of the issues. *Earl v. Fordice*, 84 Idaho 542, 374 P.2d 713 (1962).

Trial court did not abuse discretion in denying plaintiff's motion to amend complaint, in view of fact that court had previously authorized an amendment of original complaint to enable plaintiffs to specifically allege the misrepresentations they were relying upon, and fact that a pre-trial conference was had, which contemplates settling of any amendments of the pleadings. *Andrus v. Irick*, 87 Idaho 471, 394 P.2d 304 (1964).

Where the parties stipulated at the trial that plaintiffs did not reside in Idaho during a portion of the time within which their action should have been brought, a finding by the court that the parties had agreed that plaintiffs' claim for certain years had been barred by the statute of limitations was erroneous. *Call v. Marler*, 89 Idaho 120, 403 P.2d 588 (1965).

RESEARCH REFERENCES

A.L.R. Pre-trial examination or discovery to ascertain from defendant in action for injury, death, or damages the existence and amount of liability insurance and the insurer's identity. 13 A.L.R.3d 822.

Failure of party or his attorney to appear at pretrial conference. 55 A.L.R.3d 303.

Consideration or submission at trial, under Rule 16 of Federal Rules of Civil Procedure, of issues not fixed for trial in pretrial order. 117 A.L.R. Fed. 515.

Rule 16(b). Scheduling and planning.

Except in cases exempted by order of the court as inappropriate, the judge or magistrate shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include

(4) The appointment of a special master under Rule 53 to assist the parties in the management of any discovery provided for in the Idaho Rules of Civil Procedure.

(5) the date or dates for conferences to review settlement or ADR options;

(6) the date(s) for other conferences, including a final pretrial conference and trial; and

(7) any other matters appropriate in the circumstances of the case.

The order shall be issued as soon as practical and, unless it is totally impractical, no more than 180 days after the filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate

upon a showing of good cause. (Adopted March 28, 1986, effective July 1, 1986; amended April 19, 1995, effective July 1, 1995; amended March 17, 2006, effective July 1, 2006.)

Rule 16(c). Subjects to be discussed at pre-trial conferences.

The participants at any conference under this rule may consider and take action with respect to:

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- (4) the avoidance of unnecessary proof and of cumulative evidence;
- (5) identification of witnesses and documents, the need and schedule for filing and exchanging pre-trial briefs, and the date or dates for further conferences and for trial;
- (6) the advisability of referring matters to a magistrate or master;
- (7) the possibility of settlement or the use of extrajudicial procedures including alternative dispute techniques to resolve the dispute;
- (8) the form and substance of the pre-trial order;
- (9) the disposition of pending motions;
- (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
- (11) such other matters as may aid in the disposition of the action;
- (12) mediation of child custody and visitation issues in domestic relations cases; and
- (13) any parties and/or witnesses needing an interpreter as provided by Idaho Court Administrative Rule 52.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. (Adopted March 28, 1986, effective July 1, 1986; amended June 26, 1991, effective September 1, 1991; amended April 19, 1995, effective July 1, 1995; amended March 17, 2006, effective July 1, 2006.)

JUDICIAL DECISIONS

Narrowing of Issues.

Where the record showed that the court had all of the documents before it at the first pre-trial conference, and the minutes of the conference showed that the parties discussed

the narrowing of the issues, the court did not abuse its discretion in limiting issues for trial. *Lloyd v. DeMott*, 124 Idaho 62, 856 P.2d 99 (Ct. App. 1993).

Rule 16(d). Final pre-trial procedure — Formulating issues.

A pre-trial conference shall be held in any action if requested by any party in writing at least 20 days before trial, or if ordered by the court at any time, and the court may direct the attorneys for the parties, or any party appearing without an attorney, to submit a pre-trial memorandum containing substantially the information enumerated in Rule 16(e) and to appear before it for a conference to consider:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses and the disclosure of the identity of persons having knowledge of the relevant facts and who may be called as witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; and
- (6) Such other matters as may aid in the disposition of the action.

After the conference, the court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions. (Adopted March 28, 1986, effective July 1, 1986.)

JUDICIAL DECISIONS**Narrowing of Issues.**

Where the record showed that the court had all of the documents before it at the first pre-trial conference, and the minutes of the conference showed that the parties discussed

the narrowing of the issues, the court did not abuse its discretion in limiting issues for trial. *Lloyd v. DeMott*, 124 Idaho 62, 856 P.2d 99 (Ct. App. 1993).

Rule 16(e). Pre-trial stipulation.

No later than three (3) days prior to the date set for the final pre-trial conference all parties to an action may file a written stipulation in lieu of the final pre-trial conference which shall include the following:

- (1) A statement that counsel have produced for examination by all other parties all exhibits required to be produced at a pre-trial conference, a list of which must be attached to the stipulation;
- (2) A statement that counsel have in good faith discussed settlement unsuccessfully;
- (3) A statement that all pre-trial discovery procedures under Rules 26 to 37 of the I.R.C.P. have been completed except that the parties may recite

good cause for the entry of an order allowing such discovery procedures to be taken within a specific time not beyond the time set for trial;

(4) A statement that all answers or supplemental answers to interrogatories under Rule 33 reflect facts known to the date of the stipulation;

(5) The estimated time of trial, whether a jury has been demanded and a statement of the dates on which the parties or their attorney could not be available for trial;

(6) A form of proposed order in lieu of pre-trial conference, which order shall contain at a minimum:

(A) A concise description of the nature of the action;

(B) A statement of all claims;

(C) Any admissions or stipulations of the parties;

(D) Any amendments to the pleadings and any issues of law abandoned by any of the parties;

(E) A statement of the issues of fact which remain to be litigated at the trial, and any dispute as to whether such issues are formed by the pleadings;

(F) A statement of the issues of law which remain to be litigated at the trial;

(G) Orders on all matters which will expedite the trial;

(H) A descriptive list of all exhibits proposed to be offered in evidence reciting which exhibits shall be received in evidence without objection and those to which no objection will be made on grounds other than irrelevancy or immateriality;

(I) A provision that counsel shall not offer any exhibits at the trial other than those listed in (H) above, except when offered for impeachment purposes or when otherwise permitted by the trial court in the interest of justice;

(J) A list of the names and addresses of all witnesses which each party may call to testify at the trial, except impeachment witnesses, and all other witnesses shall be excluded from testifying in the trial of the action unless permitted by the trial court in the interest of justice;

(K) Where good cause has been shown therefor in the stipulation, a provision for specific discovery procedures to be undertaken within a specified time;

(L) A provision for the insertion of the trial date. (Adopted March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended April 19, 1995, effective July 1, 1995.)

JUDICIAL DECISIONS

Use as Evidence.

Pretrial submissions do not constitute evidence unless so provided in the pretrial order

or so stipulated by the parties. *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984).

Rule 16(f). Pre-trial order.

After the pre-trial conference or the filing of a pre-trial stipulation, the court shall enter a final pre-trial order pursuant to Rule 16(d) in generally the form described in Rule 16(e)(6). The court shall forthwith cause copies of the signed pre-trial order to be served on all parties or their attorneys of record in the action. (Adopted March 28, 1986, effective July 1, 1986.)

JUDICIAL DECISIONS

Cited in: Nilsson v. Mapco, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988); Ross v. Coleman Co., 114 Idaho 817, 761 P.2d 1169 (1988).

Rule 16(g). Objections to pre-trial order.

Any party to an action may file written objections to a pre-trial order within 14 days from service thereof, which objections shall be heard prior to trial in the same manner as a motion under these rules. (Adopted March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

Cited in: Nilsson v. Mapco, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988).

Rule 16(h). Exhibits and witnesses.

In the event no final pre-trial conference is held, the court may enter an order directing the parties to file with the court and serve on all opposing counsel, or upon parties not represented by counsel, a list of all exhibits to be offered at trial and a list of the names and addresses of all witnesses which such party may call to testify at the trial, except for impeachment witnesses and exhibits. Any exhibits or witnesses discovered after such disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered. Failure to comply with this rule may be grounds for excluding an exhibit from admission into evidence or for excluding a witness from testifying in the trial of the action. Provided the court, for good cause shown and in order to prevent injustice may permit additional exhibits to be used or additional witnesses to testify at the trial. (Adopted March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended April 19, 1995, effective July 1, 1995.)

Cited in: Thomson v. Olsen, 147 Idaho 99, 205 P.3d 1235 (2009).

Rule 16(i). Sanctions.

If a party or party's attorney fails to obey a scheduling or pre-trial order, or if no appearance is made on behalf of a party at a scheduling or pre-trial

conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. (Adopted March 28, 1986, effective July 1, 1986.)

JUDICIAL DECISIONS

ANALYSIS

Exclusion of Exhibit.
Exclusion of witness
Sanctions.

Exclusion of Exhibit.

Under Idaho R. Civ. P. 37(b)(2)(B) and this rule, the trial court has authority to exclude an exhibit, as a procedural matter, irrespective of evidentiary considerations, once the trial court finds that a party failed to comply with a scheduling order. *Harris, Inc. v. Fox-hollow Constr. & Trucking*, — Idaho —, 264 P.3d 400 (2011).

Exclusion of witness

In personal injury action, trial court did not abuse its discretion in refusing to allow testimony from a witness disclosed by plaintiff after the deadline imposed in the scheduling order. Plaintiff had failed to exercise due

diligence to discover the witness earlier, allowing witness would impose additional costs on defendant, and the importance of the witness to plaintiff's case was questionable. *McKim v. Horner*, 143 Idaho 568, 149 P.3d 843 (2006).

Sanctions.

The district court did not abuse its discretion in precluding testimony from plaintiff's accident reconstruction expert as a sanction for noncompliance with the pretrial discovery order, where plaintiff did not disclose any of her expert witnesses, even her treating physicians, until the same date that she disclosed the accident reconstructionist, which was more than two months after the court-ordered deadline. *Priest v. Landon*, 135 Idaho 898, 26 P.3d 1235 (Ct. App. 2001).

Cited in: *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991).

Rule 16(j). Mediation of child custody and visitation disputes.

(1) **Definition of "Mediation".** Mediation under this rule is the process by which a neutral mediator appointed by the court or agreed to by the parties assists the parties in reaching a mutually acceptable agreement as to issues of child custody and visitation. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties, and not the decisions of the mediator,

(2) **Matters Subject to Mediation.** All domestic relations actions involving a controversy over custody or visitation of minor children at the pre-trial, trial and post-decree stages in the courts of this state shall be subject to mediation regarding issues of custody, visitation, or both.

(3) **Selection of Mediator.** The court shall permit the parties to select a mediator from the list of registered mediators compiled by the Supreme

Court and maintained by the Administrative Director of the Courts. If the parties are unable to select a mediator, the court shall appoint one.

(4) **Requirement to Attend Parent Education and Mediation Orientation.** The district court of any judicial district may provide by local rule that all parties to any domestic relations case involving children, whether or not a trial or contested case has been scheduled, be required to attend such parent education and mediation orientation, unless excused by the court.

(5) **Authority of the Court.** A court shall order mediation if, in the court's discretion, it finds that mediation is in the best interest of the children and it is not otherwise inappropriate under the facts of the particular case.

(6) **Qualifications of Mediator — Application and Documentation.**

(A) The Supreme Court will compile a list of registered mediators. Any applicant seeking to be placed on the Supreme Court Roster of registered mediators shall submit to the Administrative Director of the Courts, the following:

(i) An Application for Registration, which includes an affidavit of compliance executed by the applicant attesting that the applicant has fulfilled the requirements to be placed on the Supreme Court list of registered mediators.

(ii) A copy of the applicant's degree, license or certificate.

(iii) Proof of completion of the required mediation training as provided in sections (6)(B) and (6)(C) of this rule.

(B) **Qualifications — Professional Credentials.** To be placed on the list of registered mediators compiled by the Supreme Court, the applicant must have at least one of the following professional credentials:

(i) The applicant is recognized by Idaho Mediation Association as a Certified Professional Mediator (CPM), or membership in the Association for Conflict Resolution at the advanced practitioner level or other national organizations with equivalent standards for membership.

(ii) The applicant is a member of one of the following: the Idaho judiciary; licensed member of the Idaho State Bar Association; licensed psychologist; licensed professional counselor; licensed clinical professional counselor; licensed master social worker; licensed clinical or independent practice social worker; licensed marriage and family therapist; certified school counselor; or certified school psychologist.

(iii) The applicant possesses a bachelors degree.

(C) **Training.** There are two independent training criteria for all applicants as set forth more fully below. An applicant must complete the substantive training set forth in subsections (i) and (ii) below. In addition, such training shall be approved and/or provided by an accredited college or university, the Idaho Mediation Association, Association for Conflict Resolution, Association of Family and Conciliation Courts, the Idaho State Bar, or the Idaho Supreme Court, Administrative Office of the Courts.

(i) Applicants under subsections (6)(B)(i) and (iii) must have completed a minimum of 60 hours mediation training within the past two years, 20 of which must be in the field of child custody mediation. Applicants under subsection (6)(B)(ii) must have completed a minimum of 40 hours mediation training within the past two years, 20 of which must be in the field of child custody mediation. At least 40 of the training hours required under this section shall be acquired through a single training course.

(ii) At least 20 hours of the mediation training required for applicants under section (6)(B)(ii), and at least 40 hours of the training requirements for applicants under sections (6)(B)(i) and (iii), shall include the following; topics, at least 30 percent of which must be in the practice of mediation skills:

(a) Information gathering (intake; obtaining facts; screening issues);

(b) Mediator relationship skills (neutrality; confidentiality; non-judgmental);

(c) Communication skills (active listening; reframing issues: clarifying);

(d) Problem solving skills (identify problems, positions, needs, interests; brainstorm alternatives);

(e) Conflict management skills (theories of conflict management; mediation models; reducing tensions; power imbalances);

(f) Ethics (standards of practice; typical problems);

(g) Professional skills (substantive knowledge areas; case management; drafting agreements).

(iii) The 20 hours of child custody training required in section (6)(C)(i) shall include the following topics:

(a) Conflict resolution theory;

(b) Psychological issues in separation, divorce, and family dynamics;

(c) Domestic violence;

(d) Issues and needs of children;

(e) Child custody mediation processes and techniques;

(f) Family law, including custody and support;

(g) Mediation ethics — a minimum of two hours.

(D) Continuing Education of Mediators. Beginning the next July 1 after a mediator has been placed on the Supreme Court list of registered mediators, the mediator must take at least thirty (30) hours of child custody training in one or more of the areas as set forth in Section (C)(iii) in each and every three (3) years period following the July 1st date. This training must include a minimum of two hours of mediation ethics training. The mediator must file proof of compliance with this requirement with the Administrative Office of the Courts by July 1 of the year the continuing education is due. Along with proof of compliance, a mediator under section (6)(B)(ii) must also send proof of current licensing.

(E) The administrative district judge in each judicial district may, by administrative order, require mediators to comply with additional criteria beyond those stated in subsections (6)(B) and (6)(C) of this rule.

(F) Persons approved as child custody mediators prior to the effective date of the amendment to this rule shall not be required to satisfy the training requirements of parts (6)(B)(i), (6)(B)(ii) and (6)(B)(iii) of this rule, but shall be required to fulfill the additional continuing education requirements of part (6)(D) of this rule.

(7) Duties of Mediator.

(A) The mediator has a duty to define and describe for the parties the process of mediation and its cost during the initial conference before the mediation conference begins. The description should include the following:

(i) The difference between mediation and other forms of conflict resolution, including therapy and counseling;

(ii) The circumstances under which the mediator will meet alone with either of the parties or with any other person;

(iii) Any confidentiality of the mediation proceedings and any privilege against disclosure;

(iv) The duties and responsibilities of the mediator and of the parties;

(v) The fact that any agreement reached will be reached by mutual consent of the parties;

(vi) The mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement;

(vii) The information necessary for defining the disputed issues.

(B) The mediator has a duty to be impartial, and to advise all parties of any circumstances bearing on possible bias, prejudice or impartiality.

(i) The parties shall have the right to have counsel review any resulting agreement before its submission to the court.

(ii) Any agreement submitted to the court shall be subject to court review and approval. The court shall reject such agreement only if it is not in the best interests of the child or children involved.

(8) Communications Between Mediator and the Court.

(A) The mediator and the court shall maintain no contact or communication except that the mediator may, without comment or observation, report to the court:

(i) That the parties are at an impasse;

(ii) That the parties have reached an agreement. In such case, however, the agreement so reached shall be reduced to writing, signed by the parties and submitted to the court by one or both of the parties, if pro se; otherwise, through their attorneys, for the court's approval;

(iii) That one or both of the parties have failed to attend the mediation proceeding;

(iv) That meaningful mediation is ongoing;

(v) That the mediator withdraws from mediation.

(vi) The allegation or suspicion of domestic violence.

(9) **Contact Between Mediator, Attorneys and Other Persons.** The mediator and the attorneys for the parties may communicate with one another in the following manner:

(A) Any contacts between the attorneys and the mediator shall be either in writing or by conference call;

(B) Attorneys and other persons are excluded from mediation conferences unless their presence is requested by the mediator or ordered by the court.

(10) **Termination of Mediation — Status Report.** The court or the mediator may terminate mediation proceedings if further progress toward a reasonable agreement is unlikely. The mediator shall notify the court when the mediation has been concluded. Notice of the status of the mediation process shall be submitted to the court within 28 days from the date of the initial order requiring mediation. (Adopted June 26, 1991, effective September 1, 1991; amended January 29, 1993, effective January 1, 1993; amended April 19, 1995, effective July 1, 1995; amended March 31, 1998, effective July 1, 1998; amended March 9, 1999, effective July 1, 1999; amended July 29, 2003, effective August 1, 2003; amended April 27, 2011, effective July 1, 2011; amended April 27, 2012, effective July 1, 2012.)

Rule 16(k). Mediation of civil lawsuits.

(1) **Definition of Mediation.** Mediation under I.R.C.P. 16(k) is the process by which a neutral mediator appointed by the Court or agreed to by the parties assists the parties in reaching a mutually acceptable agreement. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties, and not the decisions of the mediator.

(2) **Matters Subject to Mediation.** All civil cases other than child custody and visitation disputes are eligible for referral to mediation under this subsection. Child custody and visitation disputes shall be mediated pursuant to I.R.C.P. 16(j);

(3) **Authority of the Courts.** The referral of a civil action to mediation does not divest the court of the authority to exercise management and control of the case during the pending mediation;

(4) **Referral to Mediation.** In its discretion a court may order a case to mediation, as follows:

(A) Upon motion by a party;

(B) At any I.R.C.P. 16 conference;

(C) Upon consideration of request for trial setting, pursuant to I.R.C.P. 40(b), if all parties indicate in their request or response that mediation would be beneficial; or

(D) At any other time upon seven (7) days notice to the parties if the court determines mediation is appropriate.

(5) **Selection of the Mediator.** The parties shall have twenty-eight (28) days from entry of the mediation order, or such other time as the court may allow, to select any person to act as mediator and report their selection to the court. If the parties do not select a mediator within twenty-eight (28) days, then the court shall appoint a mediator from the judicial district's list of mediators maintained pursuant to I.R.C.P. 16(k)(13)(A);

(6) **Scheduling of the Mediation Session(s).** Unless the court otherwise orders, the initial mediation session shall take place within forty-two (42) days of the reporting of the selection or the appointment of the mediator;

(7) **Reports.** Within seven (7) days following the last mediation session, the mediator or the parties shall advise the court, with a copy to the parties, whether the case has, in whole or in part, settled;

(8) **Compensation of Mediators.** Mediators shall be compensated at their regular fees and expenses, which shall be clearly set forth in the information and materials provided to the parties. Unless other arrangements are made among the parties or ordered by the court, the interested parties shall be responsible for a prorata share of the mediator's fees and expenses. If a mediator is not paid, the court, upon motion of the mediator may order payment;

(9) **Impartiality.** The mediator has a duty to be impartial, and has a continuing duty to advise all parties of any circumstances bearing on possible bias, prejudice or partiality;

(10) **Attendance at the Mediation Session(s).** The attorney(s) who will be primarily responsible for handling the actual trial of the matter, and all parties, or insurers, if applicable, with authority to settle, shall attend the session(s), unless otherwise excused by the mediator upon a showing of good cause;

(11) **Confidentiality.** The mediator shall abide by the confidentiality rules agreed to by the parties. Confidentiality protections of I.R.E. 408 and 507 shall extend to mediations under this Rule;

(12) **Sanctions.** The mediator shall be subject to sanctions, including removal from the roster of mediators, if the mediator fails to assume the responsibilities provided herein;

(13) **Qualifications of Mediators.** Each trial court administrator shall maintain a list of mediators who meet the qualifications of subsection A, and rosters from dispute resolution organizations that meet the criteria set forth in subsection B below;

(A) Mediation Registration — Qualifications of Court-Appointed Mediators

(i) The Administrative Director of the Courts shall compile and distribute at least annually a list of mediators. For that purpose, the Administrative Director of the Courts shall gather from all applicants an application demonstrating that the applicant:

(a) is a member of the Idaho State Bar;

(b) has been admitted to practice law for not less than five (5) years; and

(c) has attended a minimum of forty (40) hours of mediation training.

(ii) In order for a person to remain on the list of mediators maintained by the Administrative Director of the Court, the mediator must submit proof that the mediator has completed a minimum of five (5) hours of additional training or education during the preceding three (3) calendar years on one of the following topics: mediation, conflict management, negotiation, interpersonal communication, conciliation, dispute resolution or facilitation. This training shall be acquired by completing a program approved by an accredited college or university or by one of the following organizations: Idaho State Bar, or its equivalent from another state; Idaho Mediation Association, or its equivalent from another state; Society of Professionals in Dispute Resolutions; American College of Civil Trial Mediators; Northwest Institute for Dispute Resolution; Institute for Conflict Management; the National Academy of Distinguished Neutrals or any mediation training provided by the federal courts. Any program that does not meet this criteria may be submitted for approval either prior to or after completion. The requirement that continuing education for mediators include at least five (5) hours of training in mediation takes effect for renewals due on or after July 1, 2013.

(B) Mediation Registration — Sponsors of Additional Rosters of Mediators

(i) A public or private dispute resolution organization may make its roster of mediators available to the Administrative Director of the Courts for distribution to the trial court administrators if it documents that it has:

- (a) an established selection and evaluation process for neutrals;
- (b) a mechanism for addressing complaints brought against neutrals; and
- (c) a published code of ethics that the neutrals must follow.

A compilation of the organization's selection, evaluation, published code of ethics, and complaint processes that can be distributed to the parties shall be provided.

(C) A list and roster(s) of mediators distributed by the Administrative Director of the Courts, pursuant to subsections A and B, above, must contain the following information about each mediator:

- (a) name, address, telephone and FAX number(s);
- (b) professional affiliation(s);
- (c) education;
- (d) legal and/or mediation training and experience; and
- (e) fees and expenses. (Adopted June 12, 1996, effective July 1, 1996; amended March 31, 2006, effective July 1, 2006; amended April 27, 2012, effective July 1, 2012.)

Rule 16(l). Appointment of parenting coordinator in child custody and visitation disputes.

(1) **Definition of “Parenting Coordinator.”** A Parenting Coordinator under this rule is a qualified neutral person appointed by the court or agreed to by the parties to assist the parties in resolving issues relating to parenting. The Parenting Coordinator will aid the parties in identifying disputed issues, reducing misunderstandings, clarifying priorities, exploring possibilities for compromise and developing methods of collaboration in parenting. The Parenting Coordinator will make such decisions or recommendations as may be appropriate when the parties are unable to do so. The goal of the Parenting Coordinator should always be to empower the parents in developing and utilizing adaptive parenting skills so that they can resume the parenting and decision making role in regard to their own children. When it is not possible for the parents to agree, the Parenting Coordinator shall provide only the amount of direction and service required in order to serve the best interest of the child by minimizing the degree of conflict between the parties.

(2) **Reference to a Parenting Coordinator.** A reference to a Parenting Coordinator shall be the exception and not the rule. Such a reference shall be made only when

- a) the issues appear to be intractable or have been subject to frequent re-litigation; or
- b) the well-being of a minor child is placed at risk by the parents’ inability to co-parent civilly; or
- c) one or both parents has committed domestic violence; or
- d) one or both parents is chemically dependent or mentally ill; or
- e) when other exceptional circumstances require such appointment to protect the child’s best interests.

(3) **Matters in Which Appointment May be Made.** The court, upon agreement of the parties or after having found on the record that the circumstances specified in Section 2 are present, may appoint a Parenting Coordinator in any action involving custody of minor children. The appointment may be made at any stage in the proceeding after entry of an order, decree, or judgment establishing child custody.

(4) **Selection of Parenting Coordinator.** In the absence of an agreement by the parties, the court may only appoint qualified Parenting Coordinator who has met the requirements set forth in Section 6.

(5) **Authority of the court.**

(A) The appointment of a Parenting Coordinator does not divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case. A court may order the appointment of a Parenting Coordinator upon seven (7) days notice to the parties. If either party objects, the court will hold a hearing prior to making the appointment.

(B) By way of illustration and not limitation the order may authorize the Parenting Coordinator to determine such matters as:

- i. time, place and manner of pick up and delivery of the children;
- ii. child care arrangements;
- iii. minor alterations in parenting schedule with respect to week-night, weekend or holiday visitation which do not substantially alter the basic time share allocation;
- iv. participation by significant others and relatives in visitation;
- v. first and last dates for summer visitation;
- vi. schedule and conditions of telephone communication with the children;
- vii. manner and methods by which the parties may communicate with each other;
- viii. approval of out-of-state travel plans; and
- ix. any other issues submitted for immediate determination by agreement of the parties.

(C) By way of illustration and not limitation the order may authorize the Parenting Coordinator to make recommendations to the court on such matters as:

- i. Which parent may authorize counseling or treatment for a child;
- ii. Which parent may select a school;
- iii. Supervision of visitation;
- iv. Submission to a custody evaluation;
- v. Appointment of an attorney or guardian ad litem for a child; and
- vi. Financial matters including child support, health insurance, allocation of dependency exemptions and other tax benefits, liability for particular expenditures for a child.

(6) Qualifications of Parenting Coordinators.

(A)

(1) To be appointed as a Parenting Coordinator in the absence of a stipulation of the parties a person must be on the list of mediators compiled by the Supreme Court pursuant to Rule 16(j)(6)(B)(ii), 16(j)(6)(C)(i) and (ii). Parenting Coordinators must have participated in at least twenty (20) hours of training in domestic violence and lethality assessment as set out in (A)(2) below within two years of the initial application. They must also have a basic familiarity with child development as it pertains to issues of bonding, attachment, and loss in early life and future child development. Each parenting coordinator must, at his or her own expense, submit to a criminal history check as provided for in Rule 47, I.C.A.R.

(2) The twenty (20) hours of training required shall be in one or more of the following areas: (a) domestic violence; (b) violence in families; (c) child abuse; (d) anger management; (e) prediction or evaluation of future dangerousness; or (f) psychiatric causes of violence; and shall be acquired by completing a program approved or sponsored by one of the following associations: (a) Idaho Psychiatric Association; (b) Idaho Psychologists Association; (c) Idaho Nursing Association; (d) Idaho Association of Social Workers; (e) Idaho Counselors Association; (f)

Council on Domestic Violence and Victim Assistance; (g) Idaho State Bar; (h) Idaho Supreme Court; (i) an accredited college or university; or (j) any state or national equivalent of any of these organizations. Any program that does not meet the criteria set out in this subsection may be submitted for approval either prior to or after completion.

(B) If the application indicates the applicant lacks any of the necessary qualifications the application will be conditionally rejected. The applicant will be provided thirty (30) days after the conditional rejection to provide any additional documentation concerning his or her qualifications or criminal history. The rejection shall become final thirty (30) days after the conditional rejection unless the Supreme Court determines after reviewing any additional documentation submitted that the applicant is qualified and fit to perform as a Parenting Coordinator.

(7) Duties of Parenting Coordinator.

(A) The Parenting Coordinator has a duty to define and describe for the parties, in writing, the role of the Parenting Coordinator during the initial conference with the parties. The description should include the following:

1. The difference between a Parenting Coordinator and other forms of conflict resolution, including therapy, counseling, and mediation;

2. The circumstances under which the Parenting Coordinator will meet alone with either of the parties or with any other person;

3. Any confidentiality of the proceedings and any privilege against disclosure;

4. The duties and responsibilities of the Parenting Coordinator and of the parties;

5. The fact that the resolution of any disagreement not reached by mutual consent of the parties may be decided by the Parenting Coordinator subject to review by the court upon motion or petition of either party;

6. Their right to seek independent legal counsel prior to resolving the issues or in conjunction with formalizing an agreement;

7. The information necessary for defining and resolving the disputed issues; and

8. The duty to keep an adequate record of contacts with the parties and other interested persons in the case. Such documentation shall be privileged and confidential except upon order of the court to reveal it.

(B) The Parenting Coordinator has a primary duty to be impartial, and to advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality.

(C) Best interest of the children is defined by section 32-717, Idaho Code, and nothing in this rule is intended to supersede, replace, or invalidate section 32-717.

(D) The Parenting Coordinator may not make any modification to any order, judgment or decree; however the Parenting Coordinator may allow the parties to make minor temporary departures from a parenting plan if authorized by the court to do so, and the appointment order should specify

those matters which the Parenting Coordinator is authorized to determine. The order will specify which determinations will be immediately effective and which will require an opportunity for court review prior to taking effect.

(8) Procedure.

(A) The order appointing the Parenting Coordinator shall specify the procedure to be followed by the Parenting Coordinator. The procedure specified should be simple, swift, and inexpensive. The parties will be given an opportunity to be heard on every issue submitted to the parenting coordinator but the procedure to be followed can be informal, and need not comply with the rules of evidence and procedure. Unless requested by the parties, no record need be made except for the Parenting Coordinator's decision or recommendation. In emergencies and other circumstances involving severe time constraints the decisions may be made orally, but in a fashion communicated to both parties and followed by written confirmation within a reasonable time thereafter. Decisions with respect to matters submitted under paragraph 5(B) will be effective when communicated to the parties. Recommendations under paragraph 5(C) will be effective fourteen (14) days after submission to the court.

(B) The Parenting Coordinator may report to the court:

1. The status of the case, including, but not limited to, those specific duties set forth in the Parenting Coordinator's order of appointment. The order appointing the parenting coordinator shall require at least one status report to be made to the court and the parties by the Parenting Coordinator every six months;
2. Recommendations of the Parenting Coordinator;
3. That the Parenting Coordinator withdraws from the case.

(C) The parties shall have the right to have counsel review any action taken by the Parenting Coordinator. The Parenting Coordinator and the attorneys for the parties may communicate with one another in the following manner:

- (i) Any contacts between the attorneys and the Parenting Coordinator may be either in writing or by telephone call or in person and may be ex parte, provided, however, that both parties shall maintain a log of all contacts in the case;
- (ii) Attorneys are excluded from conferences with the parties unless the Parenting Coordinator requests their presence.

(9) Termination of Parenting Coordinator — Status report.

(A) The court or the Parenting Coordinator may terminate the appointment if further efforts by the Parenting Coordinator would be contrary to the best interests of the children, if the children have reached the age of majority, or if the parties stipulate to such termination.

(B) Either party may petition the court for termination of the Parenting Coordinator's appointment whenever the Parenting Coordinator has exceeded his/her mandate or has acted in a manner inconsistent with this Rule, or has demonstrated bias.

(10) **Role of Counsel.** Counsel for either party shall not by this rule be constrained from continuing to represent and advocate for their clients in a manner consistent with their professional ethics.

(11) **Compensation of Parenting Coordinators.** Parenting Coordinators shall be compensated at their regular fees and expenses, which shall be clearly set forth in the information and materials provided to the parties. Unless other arrangements are made among the parties or ordered by the court, the interested parties shall be responsible for a pro rata share of the Parenting Coordinator's fees and expenses, commensurate with their respective contributions to total child support. If a Parenting Coordinator is not paid, the court, upon motion of the Parenting Coordinator, may order payment. Any dispute regarding payment of the fees and costs of the parenting coordinator shall be subject to review by the court upon request of the parenting coordinator or either party.

(12) **Statistical records.** The Supreme Court shall monitor and keep records of the outcomes of Parenting Coordinator appointments for purposes of quality control and to provide information upon which to evaluate the costs and benefits of such appointments. Each Parenting Coordinator will provide such information as may be requested by the Supreme Court for these purposes. (Adopted July 1, 2002; amended November 1, 2002; effective November 1, 2002; amended April 22, 2004, effective July 1, 2004; amended April 27, 2012, effective July 1, 2012.)

Rule 16(m). Alternative Dispute Resolution Screening.

1. **Authority of the court.** In all domestic relations cases involving children, the presiding judge may order the parties to participate in ADR screening for the purpose of assessing whether parents are appropriate or prepared to engage in mediation. The secondary purpose is to provide additional recommendations to parents and the court which may enhance the appropriateness of mediation, or to provide alternatives for resolving issues which will broaden parenting options.

2. **Qualifications of ADR Screeners.** ADR Screeners are appointed by the judge. To be eligible for appointment as an ADR Screener, the applicant must be currently licensed by the state of Idaho as a psychologist, licensed master social worker, or licensed professional counselor practitioner.

3. Standards for ADR Screening Referral Reports.

(a) **Content.** An ADR report is generated from a structured and standard interview that is conducted with each biological parent. The content of the interview with both parents is provided to the court in the form of a written report. No ADR report will be filed if one or both parties fail to appear at the interview. Attached to the report is a NCIC criminal history check on each parent and the needs of the child(ren) based on reports by the parties and observations of the ADR Screener. The recommendations provided to the court and parents are designed to protect child(ren) from the potentially negative impact of parental conflict and the adversarial process. ADR Screening and Referral Reports will not

make recommendations for custody and visitation. The ADR report should be used as a case management tool.

(b) **Factors.** Factors considered in determining the appropriateness of mediation or other recommendations for alternatives to resolving issues include, but are not limited to, the following:

1. Compliance of both parties with the ADR process.
2. Issues of domestic violence, including party's ability to maintain impulse control and/or anger management.
3. Use of, or allegations surrounding the use of, drugs and alcohol.
4. Ability of each parent to articulate his or her own needs and concerns and consider the needs of their child(ren).
5. Parties' mental health and emotional stability.

4. **Disclosure of Report.** The ADR screening report is exempt from disclosure pursuant to I.C.A.R. 32(d)(14)(B). (Amended April 22, 2004, effective July 1, 2004, amended March 24, 2005, effective July 1, 2005.)

Rule 16(n). Registration of private civil litigation evaluators.

1. **Application for registration as a private civil litigation evaluator.** The Administrative Director of the Courts will compile a list of private civil litigation evaluators. Persons interested in being placed on this list must submit an application to the Administrative Director of the Courts on a form prescribed by the Supreme Court. Applicants shall furnish, in addition to information, proof that the applicant possesses the qualifications for registration on the Supreme Court's list of private civil case evaluators as set forth in this rule. An applicant shall also be required to identify his or her area(s) of legal expertise and experience.

2. **Qualifications of private civil litigation evaluators.** In order for a person to be placed on the Supreme Court's list of private civil litigation evaluators, a person must certify by application that he or she is an active member of the Idaho State Bar in good standing and has held such membership for a minimum period of seven (7) years; or is a justice or judge who has retired from the Idaho judiciary or who has been designated a senior judge by the Idaho Supreme Court pursuant to Section 1-2005 or 1-2221, Idaho Code.

In addition, an applicant must be familiar with the Small Lawsuit Resolution Act (Section 7-1501 et seq., Idaho Code) and the rules, practice and procedures of the Idaho Supreme Court governing proceedings in the district courts of the State of Idaho; and have the background experience and training to fairly, impartially and competently evaluate a civil case pursuant to the provisions of the Small Lawsuit Resolution Act.

3. **Roster of civil litigation evaluators.** The Administrative Director of the Courts shall maintain a roster of civil litigation evaluators who meet the requirements of this rule. The roster shall indicate, in addition to other information, the county or counties in which evaluators will accept appointments. The Administrative Director shall publish a copy of the roster, including information relating to the evaluator, on the Idaho Supreme Court's website.

4. **Oath of evaluator.** In each case, prior to undertaking an evaluation, a private civil litigation evaluator must sign a written oath that he or she will faithfully and impartially discharge the obligations and duties of an evaluator in a timely manner as prescribed by law, and to represent that he or she does not have a conflict of interest regarding the parties or the subject matter of the dispute that would prevent him or her from rendering a fair and impartial opinion in the conflict. The oath of the evaluator shall be substantially in the following form:

I, _____, hereby accept appointment as evaluator in the above-captioned case. I certify that I meet the qualifications and shall fulfill the obligations of an evaluator, including the impartial and timely discharge of the duties of an evaluator. I have been informed of the identities of the parties to the case and the subject matter of the dispute and I have no conflict of interest nor any bias that would prevent me from rendering a fair and impartial opinion in the conflict.

SUBSCRIBED AND SWORN to before me this ____ day of _____, ____.

Signature

Signature

(Adopted July 1, 2002, effective July 1, 2002; amended April 22, 2004, effective July 1, 2004.)

Rule 16(o). Supervised access to children.

- (a) **Coverage.** This rule shall apply in cases, other than those brought under the Child Protective Act and Juvenile Corrections Act, in which the court orders supervised access to children.
- (b) **Purpose.** This rule sets forth the duties and obligations for providers of supervised access to children. The best interest of children is the paramount consideration in deciding the manner in which supervision is provided.
- (c) **Scope of service.** These standards govern supervised access. Each court may adopt local court rules that are not inconsistent with these standards and which are necessary to implement these standards.
- (d) **Definitions.**
 - (i) *Supervised Access* is any contact between a supervised party and one or more children in the presence of an approved provider.
 - (ii) *Provider* includes any individual or entity appointed to provide supervised access between a supervised party and one or more children. Although accountable to the court, a provider is not a party to the court proceeding.
 - (iii) *Exchange Supervision/Supervised Transfer* is supervised access designed to facilitate the movement of one or more children between

persons with the right to access those children. In this role, the provider waits at a neutral location and makes the exchange. Objective reports may be filed with the court regarding the behavior of the parties and the well-being of the child. Exchanges may take place at a variety of locations and times. The length of time between the first half of the exchange between parties and the return half may fluctuate between several hours or several weeks.

(iv) *Non-Professional Provider* is any provider who is not paid for providing supervised access services.

(v) *Professional Provider* is any provider paid for providing supervised access services.

(vi) *Therapeutic Provider* is a professional provider who is also a licensed mental health professional (including a psychologist, licensed master social worker, licensed professional counselor, marriage and family therapist, or an intern working under direct supervision of one of these professionals) and is ordered to provide Therapeutic Supervision.

(vii) *Therapeutic Supervision* includes the provision of supervised access services between the child and supervised party, as well as therapeutic intervention and modeling to help improve the parent-child interactions. A therapeutic provider may, when ordered, make evaluations and recommendations for further parent-child contact.

(viii) *Supervised Party* refers to a person who is authorized to have contact with a child only by supervised access or who is subject to an order for supervised exchanges/transfers.

(e) **Court control of supervised access.** The court shall make the final decision as to who the provider will be, the manner in which supervised access is provided, and any terms or conditions thereof. The court may consider recommendations by the attorney or guardian ad litem for the child, the parties and their attorneys, family court services staff, evaluators, therapists, and reports submitted by providers of supervised access services.

(f) **Qualifications of providers.**

(i) Unless otherwise ordered by the court or stipulated to by the parties, all individuals providing supervised access must:

(A) Be 21 years of age or older;

(B) If transporting a child, have proof of minimum automobile insurance, possess a valid current driver's license, not have been convicted of or pled guilty to driving under the influence of alcohol, drugs or other intoxicating substances within the last five years, and utilize an approved child car seat and/or seat belt for the child as required by law;

(C) Have no current or past civil, criminal, or juvenile protection or restraining order against him or her regarding a child involved in the case or a party to the case;

(D) Have no current ex parte domestic violence protection order against him/her;

(E) Have no current or past domestic violence protection order against him/her entered at/after an adjudicatory hearing held after notice to him/her;

(F) Have no current or past criminal “no contact” order against him or her;

(G) Never have been a supervised party; and

(H) Communicate in a language that the non-custodial party and the child understand or have a neutral interpreter over the age of 18 present to assist with communication, including for the hearing-impaired.

(ii) In addition to the above, all professional providers must comply with the provisions of Idaho Court Administrative Rule 47 regarding Criminal History checks. A denial, either conditional or unconditional as defined by I.C.A.R. 47 precludes employment as a supervised access provider.

(g) **Education and training of providers.** When the court orders supervised access, each court must make available to the providers the terms and conditions of supervised access under subsections (n) and (o) and the legal responsibilities and obligations of a provider as provided in sections (p), (q) and (r). In addition, effective January 1, 2005, the professional provider of supervised access must have completed 13 hours of training in supervised access including the following topics:

(i) The role of a professional and therapeutic provider;

(ii) Child abuse reporting laws;

(iii) Record-keeping procedures;

(iv) Screening, monitoring, and termination of access;

(v) Developmental needs of children;

(vi) Legal responsibilities and obligations of a provider;

(vii) Cultural sensitivity;

(viii) Conflicts of interest;

(ix) Confidentiality requirements and limitations;

(x) Dynamics of domestic violence, child abuse, sexual abuse and substance abuse;

(xi) Techniques for dealing with high conflict or difficult situations;

(xii) Effects of separation, divorce, on children and their parents;

(xiii) Local court practices and relevant state law;

(xiv) Maintaining a neutral role; and

(xv) Ethical principles involved in supervision of access.

(h) **Safety and security procedures.** All providers must make reasonable efforts to ensure the health, safety and welfare of the child, custodial and non-custodial parties, and providers during supervised access. In addition, professional providers must do all of the following:

(i) Establish, with the assistance of the local law enforcement agency if possible, a written protocol that describes what emergency assistance and responses can be expected from the local police or sheriff's department. The protocol should specifically address procedures to follow in the event a child is abducted during the process of supervised access.

(ii) Establish and set forth in writing minimum safety and security procedures and inform the parties of these procedures prior to the commencement of supervised access;

(iii) Obtain prior to providing services:

(A) Copies of any protective orders and no contact orders;

(B) Current court orders pertaining to the child;

(C) A report of any written records of allegations of domestic violence or abuse; and

(D) In the case of a child's chronic health condition, an account of his or her health needs.

(iv) Conduct a comprehensive intake and screening to assess the nature and degree of risk for each case. The procedures for intake should include separate interviews with the parties before access begins. During the interview, the provider shall obtain identifying information of the parties and the child(ren) and explain the reasons for temporary suspension or termination of access as specified subsection (s) of this section. If the child is of sufficient age and capacity, the provider shall include the child in an age-appropriate orientation prior to the first supervised access. The provider has the discretion to conduct an orientation of the process with the child separate and apart from the parties;

(i) **Ratio of children to provider.** A professional provider may determine the appropriate ratio of children to provider for supervised access based on:

(i) The degree of risk present in each case;

(ii) The nature of supervision required in each case;

(iii) The number and ages of the children to be supervised during a visit;

(iv) The number of people having contact with the child during access;

(v) The duration and location of supervised access; and

(vi) The experience of the provider.

(j) **Conflict of interest — Non-professional providers.** When appointing a non-professional provider the court should evaluate the provider's ability to act independently of the supervised person and in a neutral and unbiased fashion.

(k) **Conflict of interest — Professional providers.** All professional providers must maintain an engaged but unbiased role. Generally, discussions between a provider and the parties outside the actual supervision situation should be limited to arranging access and providing for the safety of a child. Unless otherwise ordered by the court or stipulated to by the parties, professional providers shall not:

(i) Be financially dependent on the person being supervised party;

(ii) Be an employee of or work for the supervised party in a capacity other than providing supervision;

(iii) Be otherwise employed in another capacity in a case involving the same parties; or

(iv) Be a close relative of, or be involved in or have had an intimate relationship with, the supervised party.

(l) **Maintenance and disclosure of records.**

(i) The professional provider must keep, and it is recommended that all providers keep, a record for each case, including the following:

(A) A written record of each contact, including the date, time and duration of the contact;

(B) Who attended;

(C) A summary of activities;

(D) Actions taken by the provider, including any interruptions, temporary suspension or termination, and reasons for these actions;

(E) An account of critical incidents, including physical or verbal altercations and threats;

(F) Violations of protective or court visitation/access orders;

(G) Any failure of the parties to comply with the terms and conditions of the supervised access order; and

(H) Any incidents of abuse.

(ii) Records and reports shall be limited to facts, observations and direct statements made by the parties and/or the children, except where a therapeutic provider has been authorized by the court to evaluate and make recommendations regarding the adult/child interactions. All contacts by the provider in person, in writing, or by telephone with any party, the children, the court, attorneys, mental health professionals, and referring agencies must be documented in the case file.

(iii) If ordered by the court, or requested by either party or the attorney for either party or the attorney for the child, a report about the supervised access must be produced and sent to all parties, their attorneys, the attorney for the child, and the court. Such reports shall not include recommendations regarding future access unless ordered by the court and submitted by a therapeutic provider.

(iv) Information gathered and observations made as a result of appointment as a provider shall not be disclosed to anyone except as required by law, court order, or upon consent of both the parties.

(m) **Evidentiary privilege.** Communications between parties and providers of supervised access are not protected by any privilege that would not otherwise apply.

(n) **Delineation of terms and conditions.** The provider is responsible for following all of the terms and conditions of any supervised access order. The provider shall:

(i) Monitor conditions to reasonably ensure the health, safety and welfare of the child;

(ii) Follow the frequency and duration of the access as ordered by the court;

(iii) Remain neutral;

(iv) Insure that all contact between the child and the supervised party is within the provider's hearing and sight, and that discussions are audible to the provider;

(v) Communicate in a language that the child and non-custodial party understand;

(vi) Allow no derogatory comments about another party, his or her family, the caretaker, the child or the child's siblings;

(vii) Allow no discussion of the court case or possible future outcomes;

(viii) Allow neither the provider nor the child to be used to gather information about another party or a caretaker, or to transmit documents, information, or personal possessions;

(ix) Allow no spanking, hitting, or threatening of the child;

(x) Allow no access to occur while the supervised party appears to be under the influence of alcohol or illegal drugs;

(xi) Allow no emotional, verbal, physical, or sexual abuse;

(xii) Insure that the parties follow any additional rules set forth by the provider or the court; and

(xiii) Allow no other person to have access, unless such access has been specifically approved by the court or by all parties in writing.

(o) **Safety considerations for cases involving sexual abuse.** All providers must adhere to the following additional terms and conditions in cases involving allegations of sexual abuse:

(i) Allow no exchanges of gifts, money or cards;

(ii) Allow no photographing, audio taping, or videotaping of the child;

(iii) Allow no physical contact with the child that appears inappropriate or sexualized, such as lap sitting, hair combing, stroking, hand holding, prolonged hugging, wrestling, tickling, horse-playing, changing diapers or clothes, or accompanying the child to the bathroom;

(iv) Allow no whispering, passing notes, hand signals, or body signals that appear inappropriate or sexualized; and

(v) Allow no supervised access in the location where the alleged sexual abuse occurred.

(p) **Responsibilities and obligations of a provider.** All providers of supervised access must:

(i) Inform the parties before commencement of supervised access that while communications are confidential, no privilege exists;

(ii) Report suspected child abuse to the appropriate agency, as required by law, and inform the parties of the provider's obligation to make such reports;

(iii) Comply with and enforce the terms of this rule and the court's order; and

(iv) Suspend or terminate access as appropriate under subsection (s).

(q) **Additional responsibilities of professional providers.** In addition to the preceding responsibilities and obligations set forth under subsection (p), the professional provider must:

(i) Prepare a written contract that informs each party of the terms and conditions of supervised access and that is signed by all parties before the commencement of supervised access;

(ii) Review custody and visitation/access orders relevant to the supervised access;

(iii) Implement an intake and screening procedure under subsection (h)(iii);

(iv) Develop a written protocol for suspension or termination of access services; and

(v) Provide general information to the parties about how they may be referred back to the court when access has been suspended or terminated.

(r) Discharge of the supervisor.

(i) If a previously named provider cannot accept the appointment for whatever reason, that provider shall within five days of the notice of appointment, or receipt of the notice to the supervisor, or order, file a declination of appointment. A provider need not give a specific reason for declining an appointment to provide supervised access.

(ii) If at any time after the acceptance of the appointment or before providing supervised access services the provider is no longer willing or able to act as a supervisor, the provider shall notify the court by filing a written resignation with the court and mailing a copy to the parties and their attorneys.

(iii) Upon motion of a party, or the court on its own motion, a supervisor may be removed for failure or inability to comply with this rule, the conditions of appointment or because the services are no longer needed.

(s) Temporary suspension or termination of supervised access. All providers must make reasonable efforts to provide a safe environment for all participants. Access may be temporarily interrupted, rescheduled at a later date, or terminated if a provider determines that the rules for the access have been violated; the child has become acutely distressed; or the health, safety or welfare of the child or provider is at risk. When suspending or terminating access, providers shall:

(i) Notify the court and state the reasons for suspension or termination of supervised access in writing, and provide copies to all parties, their attorneys, and any attorney for the child; and

(ii) Record all interruptions or terminations of access in their case file or, in the case of non-professional providers inform the court of such interruptions or terminations of access. (Adopted March 24, 2005, effective July 1, 2005; amended April 26, 2007, effective July 1, 2007.)

Comments: This Rule is intended to establish the framework for court-ordered supervised access to children. Each court is encouraged to make available to all providers of supervised access to children informational materials about the role of the provider, the terms and conditions of supervised access and the legal responsibilities and obligations of a provider. In addition to the extent dictated by local needs and conditions, Courts may develop local rules not inconsistent with this rule to govern supervised access to children.

Courts should consider the following best practices in ordering supervised access:

1. Generally it is not in the best interests of children to have “supervised exchanges/transfers” occur at law enforcement agencies.

Courts should look for other neutral locations for exchanges/transfers.

2. At the current time, the rule does not impose requirements for the amount of training or for the timing of training. Judges should ensure that professional providers’ training is recent and relevant to the role they will play in any particular case.

3. No new evidentiary privilege is created by this rule. Communications of professional providers may be privileged under other provisions of Idaho law. Even where no privilege applies, providers should maintain appropriate confidentiality regarding the case except when ordered by the court, subpoenaed to produce records or testify in court, requested by a mediator or evaluator in conjunction

with a court-ordered mediation, investigation or evaluation, required by child protective services, requested by law enforcement or

necessary to report suspected child abuse to the appropriate agency as required by law.

Rule 16(p). Informal custody trial.

(1) An **Informal Custody Trial** is an optional alternative trial procedure that is voluntarily agreed to by the parties, counsel and the court to try child custody and child support issues. The model requires that the application of the Idaho Rules of Evidence and the normal question and answer manner of trial be waived. Once the waiver is obtained the matter proceeds to trial by consent as follows:

a. The moving party is allowed to speak to the court under oath as to his or her desires as to child custody and child support determination. The party is not questioned by counsel, but may be questioned by the court to develop evidence required by the Idaho Child Support Guidelines and child custody evidence required by Idaho Code § 32-717.

b. The court then asks counsel for that party, if any, if there are any other areas the attorney wants the court to inquire about. If there are any, the court does so.

c. The process is then repeated for the other party.

d. If there is a Guardian ad Litem or other expert, the expert's report is entered into evidence as the court's exhibit. If either party desires, the expert is sworn and subjected to questioning by counsel, parties or the court.

e. The parties may present any documents they want the court to consider. The court shall determine what weight, if any, to give each document. The court may order the record to be supplemented.

f. The parties are then offered the opportunity to respond briefly to the comments of the other party.

g. Counsel or self-represented parties are offered the opportunity to make legal argument.

h. At the conclusion of the case, the court will make a decision.

(2) **Consent and waiver.** The consent to and waiver to the Informal Custody Trial shall be given verbally on the record under oath or in writing on a form adopted by the Supreme Court. (Adopted effective September 29, 2008.)

JUDICIAL DECISIONS

Cited in: *Schneider v. Schneider*, — Idaho —, 258 P.3d 350 (2011).

Rule 17(a). Real party in interest.

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, personal representative, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in this capacity without joining the party for whose benefit

the action is brought; and when a statute of the state of Idaho so provides, an action for the use or benefit of another shall be brought in the name of the state of Idaho. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (Amended December 19, 1975, effective January 1, 1976.)

STATUTORY NOTES

- Cross References.** Capacity to sue or be sued, Rule 17(b).
Class actions, representation, Rule 23(a).
Infants or incompetent persons, Rule 17(c).
- Motor vehicle owner, Rule 19(b).
Necessary joinder of parties, Rule 10(a)(1).
Unknown owners or heirs as parties, Rule 17(d).

JUDICIAL DECISIONS

ANALYSIS

- Applicability.
- Assignor of Real Property Interest.
- Contingent Interest.
- Forfeiture Action.
- General Contractor.
- Genuine Issue of Material Fact As to Real Party in Interest.
- Holder of Title.
- Intent of Rule.
- Owner of Distribution Rights.
- Reasonable Time.
- Relation Back.
- Requirements of Agreement.
- Successor Bank.
- Tax Sale Challenge.

Applicability.

This rule was inapplicable where an amended complaint named a decedent's estate as a defendant in a personal injury action, since this rule addresses the substitution of plaintiffs, not defendants. *Damian v. Estate of Pina*, 132 Idaho 447, 974 P.2d 93 (Ct. App. 1999).

In a breach of contract dispute between a pension services company and a home builder, a trial court properly allowed the joinder of five account holders of the pension services company which had acted as the account holders' agent, where the addition of the parties did not change the issues before the court and the court took steps to limit the adverse impact on the home builder. *Am. Pension Servs. v. Cornerstone Home Builders, Llc*, 147 Idaho 638, 213 P.3d 1038 (2009).

Assignor of Real Property Interest.

A landowner who quitclaimed to his chil-

dren his interest in a piece of property as that interest would be defined after settlement of a pending suit was still a real party in interest in the suit since he retained ownership of the property until the suit was decided. *Baker v. Pendry*, 98 Idaho 745, 572 P.2d 179 (1977).

Contingent Interest.

Because co-plaintiffs held only a mere expectancy in the assets of the family trust, this contingent interest did not make them "actually and substantially interested in the subject matter", and they were not entitled to the benefits of a successful suit. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999).

Forfeiture Action.

Civil forfeiture statutes, e.g. § 37-2744, do not authorize the Department of Law Enforcement to bring a forfeiture action in its own name as representative of and for the benefit of another governmental entity, and, under this rule, forfeiture actions must be prosecuted in the name of the real party in interest, which in this case was the county. Where forfeiture judgment was reversed and remanded to district court, the county could be joined as a party plaintiff pursuant to I.R.C.P. 19(a)(1) and department's argument that defendant's appeal should be dismissed as moot because the property (res) of the action was no longer in the department's control could be obviated by proper pleading. *State, Dep't of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

General Contractor.

Where lessor claimed that contractor was

not the real party in interest as to approximately \$15,000 of the cost of improvements, as this sum represented work done by three subcontractors, and the record merely showed that the subcontractors had not filed timely liens nor had they sued the contractor, these facts alone were not sufficient for the court to conclude that the contractor was free from all liability to the subcontractors, and the argument that the contractor was not the real party in interest as to the full amount of its claim was rejected. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

Genuine Issue of Material Fact As to Real Party in Interest.

Genuine issue of material fact existed as to whether real party in interest was corporation, or husband and wife individually who had operated the corporation; thus, husband and wife plaintiffs were reinstated relative to all claims remaining in the action. *Tolmie Farms, Inc. v. J.R. Simplot Co.*, 124 Idaho 607, 862 P.2d 299 (1993).

Holder of Title.

The liberal construction requirement of I.R.C.P. 1(a) indicated that this rule and I.R.C.P. 19(a)(1) and 21 should be read to require the granting of a motion by plaintiffs, in an action to impress an easement on adjoining property, to substitute a corporation owned by plaintiffs as a party plaintiff where the corporation held title to the property on which the plaintiffs resided and where defendants would not have been prejudiced by the substitution; accordingly, the trial court erred in denying the motion to substitute and in dismissing the action based on the plaintiffs' lack of title. *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981).

Where credit cardholder argued that a bank was not a real party in interest in its attempt to collect on an account; the trial court properly held the bank was the real party in interest; even though it had previously assigned the receivables from the cardholder's account to a trust, it was still the owner of the account and, upon default by the cardholder, was contractually entitled to collect the account balance. *Citibank (South Dakota), N.A. v. Carroll*, 148 Idaho 254, 220 P.3d 1073 (2009).

Intent of Rule.

This rule is designed to prevent forfeiture when determination of the proper party is difficult or when an understandable mistake has been made in selecting the party plaintiff. *Conda Partnership, Inc. v. M.D. Constr. Co.*, 115 Idaho 902, 771 P.2d 920 (Ct. App. 1989).

Owner of Distribution Rights.

Plaintiff was real party in interest and had standing to maintain action, although he did not bring the action as a corporate officer of his recently defunct corporation, because plaintiff stated in his deposition that he purchased the beer distribution rights at issue, not that the corporation bought them, there was no conclusive record that those rights became a corporate asset when the corporation was later formed, and the oral contract plaintiff entered into with respect to the distribution rights was not defined to be a franchise fee or a consulting fee. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

Reasonable Time.

In a suit between a partnership and a contractor, a two-year period between the contractor's objection to the designated plaintiff and the partnership's motion to substitute partners as real party in interest was not unreasonable where the partnership gave an understandable explanation and acted in good faith, where there was no indication that contractor had suffered any real prejudice, and where a great injustice would have resulted if a legitimate claim was defeated by a simple error of form. *Conda Partnership, Inc. v. M.D. Constr. Co.*, 115 Idaho 902, 771 P.2d 920 (Ct. App. 1989).

What constitutes a reasonable time for joining or substituting the real party in interest depends upon the facts of each case. *Conda Partnership, Inc. v. M.D. Constr. Co.*, 115 Idaho 902, 771 P.2d 920 (Ct. App. 1989).

Relation Back.

The trial court did not abuse its discretion in finding that this rule's relation back doctrine did not apply where there was no evidence of a factual mistake in naming plaintiff, and therefore properly granted summary judgment in favor of respondents based on the running of the statute of limitation harbored in 11 U.S.C. § 108(a). *Tingley v. Harrison*, 125 Idaho 86, 867 P.2d 960 (1994).

Requirements of Agreement.

Although insured seed cooperative assigned its rights under seedmen's policy to the farmer-growers and thus was not the real party in interest, because the release agreements specifically required the cooperative to continue to pursue and finance the declaratory judgment action and thus contained a ratification by the farmers of the cooperative's continued prosecution of the action, this rule did not require the case be dismissed. *Union Whse. & Supply Co. v. Illinois R.B. Jones, Inc.*, 128 Idaho 660, 917 P.2d 1300 (1996).

Successor Bank.

Where defendant bank took over the institution that made a loan to plaintiff and her husband, defendant bank, by assuming all of the other bank's assets, accounts, and liabilities, became the real party in interest in an action to recover upon the note evidencing the loan to plaintiff and her husband. *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989).

Tax Sale Challenge.

Taxpayers whose property was sold at a tax

sale lacked standing to challenge the sale where they claimed no interest in the property. *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 985 P.2d 1145 (1999).

Cited in: *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980); *Elce v. State*, 110 Idaho 361, 716 P.2d 505 (1986); *Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc.*, 114 Idaho 453, 757 P.2d 716 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Assignee of Chose in Action.
 Attorney and Client.
 Banks.
 Bonds.
 Certificates of Indebtedness Incurred by State Engineer.
 Cestui Que Trust.
 Community Property.
 Contracts.
 Corporations.
 Counties.
 Defenses Available.
 Detachment of Lands from Village.
 Distributor of Oil Products.
 Express Trust or Contract for Benefit of Another.
 Foreign Corporations.
 Foreclosure Action.
 In General.
 Municipal Corporations.
 Owner of Legal Title.
 Public Charities.
 Representative of Littoral Owners.
 Right of Possession.
 Taxpayers.
 Transfer During Pendency of Action.
 Trust Estate.
 Warranty.
 Wrongful Death Statute.

Assignee of Chose in Action.

The assignee of chose in action may bring suit in his own name without alleging that he gave any consideration for the assignment. *Brumback v. J.B. Oldham & Co.*, 1 Idaho 709 (1878).

The assignee of a valid assignment is the real party in interest to bring an action, and the assignor is not the real party in interest and has no standing to prosecute the action on the chose in action. *McCluskey v. Galland*, 95 Idaho 472, 511 P.2d 289 (1973).

Attorney and Client.

Where an attorney has collected moneys for

his clients and deposited the same in a bank and sues to collect the money so deposited from the bank, his clients, for whom the money was deposited, are proper parties plaintiff. *Cunningham v. Bank of Nampa*, 13 Idaho 167, 88 P. 975 (1907).

Banks.

Bank, and not stockholders, is the real party in interest entitled to prosecute suit to recover claims for tax paid and not justly due. *First Second Bank v. Fremont County*, 55 Idaho 76, 37 P.2d 1101 (1934).

Bonds.

Under former statute providing that action shall be brought in the name of the real party in interest, the people of the territory were the proper party plaintiff in an action on an official bond of a county treasurer running to "the people of the United States in the territory of Idaho," and it was proper to further allege that the action was brought for the use of the county. *People v. Slocum*, 1 Idaho 62 (1866), overruled on other grounds, *Spotswood v. Morris*, 10 Idaho 129, 77 P. 216 (1904).

An action on an injunction bond given in a suit against the mayor and common council of a city in their official capacity is properly brought in the name of the city as the real party in interest. *Boise City v. Randall*, 8 Idaho 119, 66 P. 938 (1901).

Certificates of Indebtedness Incurred by State Engineer.

The holder of certificates of indebtedness incurred by the state engineer in a water suit and representing a judgment for costs is the legal owner of judgment and may sue thereon in his own name. *Idaho Trust & Sav. Bank v. Ridenbaugh*, 29 Idaho 647, 161 P. 868 (1916); *Idaho Trust & Sav. Bank v. Nampa & Meridian Irrigation Dist.*, 29 Idaho 658, 161 P. 872 (1916).

Cestui Que Trust.

The cestui que trust may be joined as a

party plaintiff in an action by the trustee. *Cunningham v. Bank of Nampa*, 13 Idaho 167, 88 P. 975 (1907).

Community Property.

Where an action is brought by a married woman to recover a judgment on promissory notes, and decree foreclosing mortgage is given to secure notes, and the answer of defendant avers that real estate covered by mortgage is community property, and sets up an offset or counterclaim against husband and asked to have him made a party plaintiff, it is error for court to deny such motion. *Campbell v. Kerns*, 13 Idaho 287, 90 P. 108 (1907).

Contracts.

No one but a party to a contract can avail himself of the defense of usury. *Anderson v. Oregon Mtg. Co.*, 8 Idaho 418, 69 P. 130 (1902).

A third person may enforce a contract made for his benefit even though not knowing of said contract at the time of its making, where he is not only the real, but the only party in interest. *Jones v. Adams*, 67 Idaho 402, 182 P.2d 963 (1947).

Corporations.

Owners of fee of land on which artesian wells are located, who retain control and management of flow to place of distribution and who own virtually all the stock of a corporation to which the right to use the water has been conveyed, may bring a suit to enjoin interference with the flow of water. *Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915).

Counties.

An action for the benefit of a county, and where the demand sued upon is a property of the county, must be in the corporate name of the county. *United States ex rel. McDonald v. Shoup*, 2 Idaho 493, 21 P. 656 (1889).

Defenses Available.

The fact that the plaintiff is not the real party in interest is a proper matter of defense. *Holton v. Sand Point Lumber Co.*, 7 Idaho 573, 64 P. 889 (1901).

Detachment of Lands from Village.

Persons applying for detachment of lands from corporate limits of village and those who oppose the application are the real parties in interest. *Chaney v. Middleton*, 58 Idaho 289, 72 P.2d 850 (1937).

Distributor of Oil Products.

Distributor of oil products who delivered same to defendant was real party in interest in suit to recover balance due on account

where it was shown that amount due oil company had been paid by distributor prior to suit. *Caughey v. George Jensen & Sons*, 74 Idaho 132, 258 P.2d 357 (1953).

Express Trust or Contract for Benefit of Another.

Under federal equity rule and the rule of civil procedure for the federal district court in Idaho and Idaho statutes, every action is required to be prosecuted in the name of the real party in interest, but a trustee of an express trust, or the party in whom or in whose name a contract has been made for the benefit of another, may sue in his own name without joining the party for whose benefit the action is brought. *Farmers Underwriters Ass'n v. Wanner*, 30 F. Supp. 358 (D. Idaho 1938).

Foreign Corporations.

In a suit by the state against a foreign corporation on an official bond for the use and benefit of all persons aggrieved by the wrongful act or default of the principal, the state sues as trustee of an express trust and the particular persons aggrieved do not need to be joined as parties. *State v. Title Guar. & Sur. Co.*, 27 Idaho 752, 152 P. 189 (1915), appeal dismissed, *Title Guaranty & Surety Co. v. Idaho*, 240 U.S. 136, 36 S. Ct. 345, 60 L. Ed. 2d 566 (1916).

Foreclosure Action.

In foreclosure action the evidence showed that plaintiff was the owner of the notes and mortgages and hence the real party in interest, as against contention that plaintiff was in the collection business and held the notes and mortgages for collection only. *Allis-Chalmers Mfg. Co. v. Harris*, 56 Idaho 769, 59 P.2d 345 (1936).

In General.

The person who will be entitled to the benefits of the action if successful, one who is actually and substantially interested in the subject-matter, is the "real party in interest" in the action. *Carrington v. Crandall*, 63 Idaho 651, 124 P.2d 914 (1942).

The real party in interest is the one who has a real, actual, material or substantial interest in the subject matter and whose satisfaction of a judgment secured will bar further suit on the same subject matter. *Caughey v. George Jensen & Sons*, 74 Idaho 132, 258 P.2d 357 (1953).

Municipal Corporations.

Where a municipal corporation has paid money on a void contract and the properly constituted authorities refuse to sue to recover the money so paid, any taxpayer may

sue on behalf of the corporation. *Independent Sch. Dist. No. 5 v. Collins*, 15 Idaho 535, 98 P. 857 (1908).

Owner of Legal Title.

Owner of legal title to subject matter is usually considered the real party in interest. *Caughey v. George Jensen & Sons*, 74 Idaho 132, 258 P.2d 357 (1953).

Public Charities.

In this state the attorney-general has no power to commence suits to protect public charities where property intended for their use is not being properly applied. *Hedin v. Westdala Lutheran Church*, 59 Idaho 241, 81 P.2d 741 (1938).

Representative of Littoral Owners.

One drawing to and uniting the respective interests of littoral owners and others, is as cognizable as a real party in interest as one suing for the benefit of others in a class suit. *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948).

Right of Possession.

Where A delivers property to an express company with direction to deliver the same to B he thereby vests the rights of possession in B, and the latter will be entitled to demand, sue for and receive the same. *Pratt v. Northern Pac. Express Co.*, 13 Idaho 373, 90 P. 341 (1907).

Taxpayers.

Any resident taxpayer may sue to determine the legality of acts of a city official. *Moore v. Hupp*, 17 Idaho 232, 105 P. 209 (1909).

Transfer During Pendency of Action.

Where the plaintiff transferred the land and water rights by absolute deed during the pendency of an action to quiet the title to water rights, and no application was made that the real party in interest be made a party to the action and the plaintiff objected to the transferee being made a party, the plaintiff was not, under these circumstances, the "real party in interest" and was not entitled to maintain the action, notwithstanding the fact that the conveyance may have been made without consideration. *Carrington v. Crandall*, 63 Idaho 651, 124 P.2d 914 (1942).

Trust Estate.

The right of action for the recovery of real property wrongfully conveyed by a former trustee was in the successor trustee and not in the beneficiaries. *Jones v. State*, 91 Idaho 823, 432 P.2d 420 (1967).

Warranty.

Where a party purchased a stallion and at the same time received from the vendor a contract of warranty, and thereafter and before using him sold the animal without assigning the contract of warranty to the purchaser, he may sue on the contract of warranty as the real party in interest. *Olson v. Hurd*, 20 Idaho 47, 116 P. 358 (1911).

Wrongful Death Statute.

Where mother and husband were the only heirs of deceased, who was killed by husband, the mother was entitled to prosecute the action under the wrongful death statute. *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944).

RESEARCH REFERENCES

A.L.R. Proper party plaintiff, under real party in interest statute, to action against tortfeasor for damage to insured property where insured has paid part of loss. 13 A.L.R.3d 140.

Proper party plaintiff, under real party in interest statute, to action against tortfeasor for damage to insured property where loss is entirely covered by insurance. 13 A.L.R.3d 229.

Corporate name, right of bondholders to maintain action to prevent use by another corporation. 72 A.L.R.3d 8.

Trustees as proper parties to maintain action, modern status of the business trust. 88 A.L.R.3d 704.

Inducing breach of contract, who may maintain action for. 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Rule 17(b). Capacity to sue or be sued.

The capacity of a party, other than one acting in a representative capacity, to sue or be sued, shall be determined by the law of this state.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Deposits in Court.
 Married Women.
 Partnerships.

Deposits in Court.

The clerk of a court holding money on deposit in the court holds the same not as an individual but as an officer of the court, and may not be sued for money so held. *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325 (1936).

Married Women.

Wives may sue for protection of community property where husband fails or neglects to institute proper actions. *Muir v. Pocatello*, 36 Idaho 532, 212 P. 345 (1922).

Wife is not bound by decree foreclosing mortgage on community property, though made a party defendant, but not served or not voluntarily appearing. *Civils v. First Nat'l Bank*, 41 Idaho 690, 241 P. 1023 (1925).

Where plaintiff brought an action for damages to her person and character for torts

committed against her during coverture, she may join her husband as a party defendant, if he participated in the wrongs, as Constitution and statutes as a whole removed common law rule that a married woman could not sue her husband for wrongs committed by him against her person. *Lorang v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949).

Partnerships.

In suit against individual partners for alleged breach of contract, where suit was dismissed against two of the partners, a judgment could not be entered against the remaining partner since, by dismissal against two of the partners, no joint judgment could be taken. *Balley v. Davis*, 75 Idaho 73, 267 P.2d 631 (1954).

In a suit against a partnership in its common name the complaint or summons does not have to name the partners if summons is served on at least one of the partners. *Lucky Five Mining Co. v. H. & H. Mines, Inc.*, 75 Idaho 423, 273 P.2d 676 (1954).

Rule 17(c). Infants or incompetent persons.

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative the person may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

STATUTORY NOTES

Cross References. Capacity to sue, Rule 9(a).

Depositions, notice and service on, Rule 27(a)(2).

Service of process on, Rule 4(d)(3).

JUDICIAL DECISIONS

Cited in: *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appointment of Guardian Ad Litem.
Nonresident Guardian Ad Litem.
Over Age Fourteen.
Representation by Attorney.

Appointment of Guardian Ad Litem.

There must be a pending action in which the infant has been served with process before the appointment of a guardian ad litem, further, the court must acquire jurisdiction over the infant before the statute can apply because the appointment of a guardian ad litem is a matter of procedure and not of jurisdiction. *Trolinger v. Cluff*, 56 Idaho 570, 57 P.2d 332 (1936).

Nonresident Guardian Ad Litem.

It is not error to appoint a nonresident as

guardian ad litem, although there is a general guardian, where the court is satisfied that the interest of the minor requires it. *Pine v. Callahan*, 8 Idaho 684, 71 P. 473 (1902).

Over Age Fourteen.

Infant over the age of fourteen years served with process and appearing in person and by counsel is bound by the judgment although no guardian ad litem was appointed to represent him. *Trolinger v. Cluff*, 56 Idaho 570, 57 P.2d 332 (1936).

Representation by Attorney.

Infant must appear by guardian and must be made a party to the action and appear for his ward; infant's representation by attorney is insufficient. *Hutton v. Davis*, 56 Idaho 231, 53 P.2d 345 (1935).

RESEARCH REFERENCES

A.L.R. Incapacity caused by accident in suit as affecting notice of claim required as condition of holding local governmental unit liable for personal injury. 44 A.L.R.3d 1108.

Local government tort liability: minority as affecting notice of claim requirement. 58 A.L.R.4th 402.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce to annulment of marriage, or to make compromise or settlement in such suit. 32 A.L.R.5th 673.

Rule 17(d). Unknown owners or heirs as parties.

In all actions or proceedings to obtain title or possession, or to remove adverse claim of title, or to quiet title, or for partition, or for sale, or for foreclosure of any incumbrance, or enforcement of any trust, or specific performance of any contract, or for any other disposition of any property, real, personal, or mixed, situated within the state of Idaho including choses in action either situated within or due or claimed to be due from persons, firms or corporations resident within the state of Idaho, persons may be made parties defendant either on the filing of the complaint, counterclaim or cross-claim, as the case may be, or at any time thereafter by amendment thereof, by the name and description of unknown owners, or unknown heirs or unknown devisees of any deceased person, or by any of such designations.

STATUTORY NOTES

Cross References. Capacity to sue, Rule 17(b).

Counterclaims and cross-claims, Rules 13(a)-13(i).

Designation of unknown owners or heirs, Rule 10(a)(5).

Designation of unknown persons by pleading, Rule 10(a)(5).

Unknown party, statement of fact in pleading, Rule 10(a)(4).

Rule 18(a). Joinder of claims.

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

STATUTORY NOTES

Cross References. Claim against party severed, separate trial, Rule 21.

Counterclaim and cross-claim, Rules 13(a)-13(i).

Form of action, Rule 2.

General rules of pleading, Rule 8(a)(1).

Interpleader, Rule 22.

Joinder of parties, Rules 19(a)(1)-19(b).

Joinder of remedies, fraudulent conveyances, Rule 18(b).

Judgment on multiple claims, Rule 54(b).

Permissive joinder of parties, Rule 20(a).

Separate trial of claims, Rule 42(b).

Separate trials, Rule 20(b).

Third-party practice, Rules 14(a), 14(b).

Transfer of action brought in probate or justice's court, Rule 8(a)(2).

JUDICIAL DECISIONS**Mandamus and Damages.**

Although a litigant may combine a claim for damages with a petition for a writ of mandamus, it is not mandatory that the damage and mandamus proceedings be consolidated. *Heaney v. Board of Trustees*, 98 Idaho 900, 575 P.2d 498 (1978).

Cited in: *Loomis v. Union P.R.R.*, 97 Idaho 341, 544 P.2d 299 (1975); *Keesee v. Fetzek*, 106 Idaho 507, 681 P.2d 600 (Ct. App. 1984); *Cole v. Kunzler*, 115 Idaho 552, 768 P.2d 815 (Ct. App. 1989).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Additional Parties.

Alternative Demands.

Assignability.

Contracts — Express and Implied.

Counterclaims.

Cross-Complaint.

Defenses All to Be Set Out.

Defenses Not New Matter.

Failure to Join Claims.

Injuries to Property.

Joinder of Ex Contractu and Ex Delicto Actions.

Mandamus.

Misjoinder.

Mortgages.

New Matter in General Denial.

Proper Joinder.

Real Property Actions.

Several Causes of Action.

Single Cause of Action.

Additional Parties.

The court may order a new party brought in on the cross-complaint where it appears either from the pleadings or proof that a complete determination of the rights of all the

parties cannot be made without making other persons parties, in which case it is the duty of the court to order such person brought in, and this may be accomplished by allowing the filing of a cross-complaint. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892).

Alternative Demands.

Plaintiffs joining demands for rescission of an alleged fraudulent contract and for damages for the alleged fraud were entitled to go to trial on both claims, but full satisfaction attained by means of one of the alternate remedies would eliminate the other. *Moon v. Brewer*, 89 Idaho 59, 402 P.2d 973 (1965).

Assignability.

Assignability of cause of action is not test of right to unite or join them in one complaint. *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254 (1926).

Contracts — Express and Implied.

A cause of action arising on an express contract for the payment of a fixed and specified salary may be united in the same action with a cause of action for the same services on an implied contract to pay the reasonable

value of such services. *Darknell v. Coeur d'Alene & St. Joe Transp. Co.*, 18 Idaho 61, 108 P. 536 (1910); *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938).

Counterclaims.

Office and functions of counterclaim are well defined and it is not optional with pleader to plead cross-complaint where by terms of former statute, it is, in truth and in fact, counterclaim. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

Cross-Complaint.

A cross-complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but need not necessarily seek relief against all or any of the original plaintiffs or defendants. *Hunter v. Porter*, 10 Idaho 72, 77 P. 434 (1904).

Where the insurer acts with reasonable promptness in filing a cross claim so that the injured insured and injured third parties are not prejudiced, the insurer is entitled to have the question of the validity of its policy and its liability thereunder determined prior to the trial of an action against the insurer upon a liability alleged to be covered by the policy so that the insurer may know whether it is obligated to defend the insurer as provided by the policy. *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 365 P.2d 824 (1961).

Defenses All to Be Set Out.

The defendant may set up as many defenses or counterclaims as he may have, but they must be separately stated in separate counts. *Jones v. Caldwell*, 20 Idaho 5, 116 P. 110 (1911).

Defenses Not New Matter.

In an action of claim and delivery a defense based on possession by virtue of a lien is not new matter, which must be affirmatively pleaded, but may be shown in evidence under denials in the answers. *Lindsay v. Wyatt*, 1 Idaho 738 (1878).

Failure to Join Claims.

Former statute relating to the joinder of causes of action in force at the time plaintiffs filed their first cause of action did not mandatorily require a joinder of plaintiffs' causes of action, i.e., for damages on the one hand, and for injunctive relief on the other, that statute being permissive in its language; likewise the former rule was permissive, therefore failure to join a claim did not result in merger or bar its assertion in another action. *Koseris v. J.R. Simplot Co.*, 85 Idaho 1, 375 P.2d 130 (1962).

Injuries to Property.

A plaintiff may join in the same action all

injuries to property arising out of the same contract. *Frepons v. Grostein*, 12 Idaho 671, 87 P. 1004 (1906).

Several causes of action for fraud in sale of stock, being injuries to estate or property, which would survive, may be joined in one action. *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254 (1926).

Joinder of Ex Contractu and Ex Delicto Actions.

The joining of causes of action arising ex contractu and ex delicto in one complaint is not authorized. *Stearns v. Graves*, 61 Idaho 232, 99 P.2d 955 (1940).

Mandamus.

Application for writ of mandate is a special proceeding and may not be united in the same complaint with an action to quiet title or with one for injunctive relief. *Lewis v. Mountain Home Coop. Irrigation Co.*, 28 Idaho 682, 156 P. 419 (1916).

If a district court has jurisdiction of an action by a member of an Indian tribe to compel his seating on a tribal council, he may join thereto an action for damages for being deprived of his office and, when the action to compel his seating becomes moot because of the expiration of the term for which he claims to have been elected, the court may still hear the claim for damages. *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 441 P.2d 167 (1968).

Misjoinder.

Where a certain person is a necessary party to one cause of action but is neither a proper nor necessary party to three other causes of action stated in the complaint, the causes of action are misjoined. *Beane v. Givens*, 5 Idaho 774, 51 P. 987 (1898).

An action for waste on real property cannot be united with an action for damages for an assault, and an action for injuries to property cannot be united with an action for damages for injuries to the person. *Kruger v. St. Joe Lumber Co.*, 11 Idaho 504, 83 P. 695 (1905).

Mortgages.

Where suit is brought to recover the penalty prescribed by statute for failure of the mortgagee to satisfy the mortgage on the record and to procure an adjudication of satisfaction of the mortgage, the mortgagee must assert by counterclaim in said suit any right which he may have for the foreclosure of the mortgage, and cannot thereafter maintain an independent action to foreclose the mortgage. *Stevens v. Home Sav. & Loan Ass'n*, 5 Idaho 741, 51 P. 779 (1898).

New Matter in General Denial.

Answer containing general denial and set-

ting forth new matter should not be stricken. *Peterson v. Bell*, 50 Idaho 521, 298 P. 379 (1931).

New matter may be introduced under general denial, if in aid of controverting cause of action alleged by plaintiff, but if in aid of confession and avoidance, then it cannot be introduced unless it is pleaded affirmatively. *Boise City v. Better Homes, Inc.*, 72 Idaho 441, 243 P.2d 303 (1952).

Proper Joinder.

Cause of action against plaintiff's agents for fraudulently retained rents and profits was properly joined with actions for rental value of plaintiff's property exceeding amount for which rented by defendants, unpaid balance of proceeds of loan secured by them, and amount paid on commissions claimed for negotiating sale thereof. *McShane v. Quillin*, 47 Idaho 542, 277 P. 554 (1929).

Cause of action for the possession of real and personal property and its rental value during the time a defendant had possession thereof, and for the recovery of horses or their value, were not improperly joined where they arose out of the same transaction. *Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426 (1942).

Real Property Actions.

A complaint in a suit brought to obtain a deed to property sold under execution, from the sheriff, and to determine plaintiff's right to such a deed as against the sheriff and an adverse claimant, states but one cause of action. *Brady v. Linehan*, 5 Idaho 732, 51 P. 761 (1898).

Where a number of parties have, at divers times and acting severally, gone upon a certain tract of land and each taken severally a part thereof and erected improvements thereon, and one or more of the parties have individually and on their own account removed certain improvements placed on the land, a cause of action for the removal of the improvements against the party guilty thereof cannot be joined with an action against all of the defendants for a restitution of the premises. *White v. Whitcomb*, 13 Idaho 490, 90 P. 1080 (1907), *aff'd*, 214 U.S. 15, 29 S. Ct. 599, 53 L. Ed. 889 (1909).

A plaintiff may unite several causes of action to recover specific real property with or without damages for withholding the same, or for waste committed thereon, and the rents and profits thereof where the same judgment is asked against all of the defendants. *White v. Whitcomb*, 13 Idaho 490, 90 P. 1080 (1907), *aff'd*, 214 U.S. 15, 29 S. Ct. 599, 53 L. Ed. 889 (1909).

Several Causes of Action.

Under former law a party may state as many causes of action as he may have if they are of a character to be properly embraced in the same complaint. *People v. Slocum*, 1 Idaho 62 (1866), overruled on other grounds, *Spotswood v. Morris*, 10 Idaho 129, 77 P. 216 (1904).

Several causes of action arising out of injuries to property, affecting all parties to the action and not requiring different places of trial, may be joined, although the plaintiff acquired some of them by assignment. *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919).

Cause of action may be stated in different counts in order to meet any possible phase of evidence and no election will be required. *Tsuboi v. Cohn*, 40 Idaho 102, 231 P. 708, 39 A.L.R. 851 (1924).

Single Cause of Action.

In an action on an injunction bond, sums of money paid to two attorneys for fees in the injunction suit constitute but one cause of action. *Dangel v. Levy*, 1 Idaho 722 (1878), *aff'd*, 154 U.S. 671, 14 S. Ct. 1204, 38 L. Ed. 1093 (1881).

Allegations showing separate items of damages growing out of the same facts may be alleged as a part of the same cause of action. *Unfried v. Libert*, 20 Idaho 708, 119 P. 885 (1911).

Party may not split up single cause of action and maintain separate actions thereon, but every wrong furnishes a cause of action and all damages arising from single wrong, though at different times, make but one cause of action, but wrongs perpetrated at different times by same or different persons furnish separate causes of action. *Dahlquist v. Mattson*, 40 Idaho 378, 233 P. 883 (1925).

RESEARCH REFERENCES

A.L.R. Right of defendant under Rules 14 (a) and 18 (a) of Federal Rules of Civil Procedure to assert against third party properly in

case, claim for damages in excess of, or different from, those sought by original plaintiff. 12 A.L.R. Fed. 877.

Rule 18(b). Joinder of remedies — Fraudulent conveyances.

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to the plaintiff, without first having obtained a judgment establishing the claim for money.

DECISIONS UNDER PRIOR RULE OR STATUTE

Mortgage Foreclosure Not Personal Judgment.

Decree of foreclosure of a mortgage is in no sense a personal judgment, and no personal

judgment can be entered until after the foreclosure sale. Perkins v. Bundy, 42 Idaho 560, 247 P. 751 (1926).

RESEARCH REFERENCES

A.L.R. Waiver of, by failing to promptly raise, objection to splitting cause of action. 40 A.L.R.3d 108.

Rule 19(a)(1). Persons to be joined if feasible.

A person who is subject to service of process shall be joined as a party in the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. (Amended March 1, 2000, effective July 1, 2000; amended April 22, 2004, effective July 1, 2004.)

STATUTORY NOTES

Cross References. Class actions, representation, Rule 23(a).

Defense of failure to join indispensable party, Rule 12(b).

Interpleader of persons having claims, Rule 22.

Intervention by parties, Rules 24(a)-24(c).

Misjoinder and nonjoinder of parties, Rule 21.

Motor vehicle owner, Rule 19(b).

Permissive joinder of parties, Rule 20(a).

Substitution of parties, Rules 25(a)(1)-25(e).

JUDICIAL DECISIONS

ANALYSIS

Bringing in New Parties.
Feasibility of Service.
Forfeiture Action.
Holder of Title.
Lienholder.
Owner of Servient Estate.
Prejudice to Absentee.
Timing of Motion.

Bringing in New Parties.

This rule was apparently designed to serve the function of a former law, which provided for bringing in additional parties, and provides for joinder of persons subject to service of process if necessary to complete relief to those who are already parties, and provides that the court itself may so order. *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981).

It is necessary for a trial court to determine whether a party entering a suit is admitted by intervention or substitution before the propriety of that procedure may be determined; therefore, because the record did not clearly reflect by what procedure the district court allowed the party to enter the suit, the case was remanded. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

Disposition of the case was not precluded by the absence of the city or the federal government, and the disposition of the case would not impede their ability to protect their own interests or subject them to substantial risk; a determination that the Ada County Highway District had acquired a roadway could be rendered without joining the power company or the bank and the disposition of the case did not impede their ability to protect their own interests or subject them to substantial risk. *Ada County Highway Dist. v. Total Success Invs., LLC*, 145 Idaho 360, 179 P.3d 323 (2008).

Feasibility of Service.

Where the debtor and other guarantors, who were within the scope of persons to be joined if feasible under this rule, were named as parties but not effectively joined by service of process, and the record was silent as to whether service was feasible, the appellate court would not presume error from a silent record, and accordingly, would not presume that service was feasible. *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982).

Forfeiture Action.

Civil forfeiture statutes, e.g. § 37-2744, do

not authorize the Department of Law Enforcement to bring a forfeiture action in its own name as representative of and for the benefit of another governmental entity, and, under I.R.C.P. 17(a), forfeiture actions must be prosecuted in the name of the real party in interest, which in this case was the county. Where forfeiture judgment was reversed and remanded to district court, county could be joined as a party plaintiff pursuant to this rule and the department's argument that defendant's appeal should be dismissed as moot because the property (res) of the action was no longer in the department's control could be obviated by proper pleading. *State, Dep't of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

Holder of Title.

The liberal construction requirement of I.R.C.P. 1(a) indicated that this rule and I.R.C.P. 17(a), and 21 should be read to require the granting of a motion by plaintiffs, in an action to impress an easement on adjoining property, to substitute a corporation owned by plaintiffs as a party plaintiff where the corporation held title to the property on which the plaintiffs resided and where defendants would not have been prejudiced by the substitution; accordingly, the trial court erred in denying the motion to substitute and in dismissing the action based on the plaintiffs' lack of title. *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981).

Lienholder.

Even if another lienholder had possessed a genuine interest, his or her absence in the eminent domain action would not have been a jurisdictional defect. *State ex rel. Moore v. Howell*, 111 Idaho 963, 729 P.2d 438 (Ct. App. 1986).

Owner of Servient Estate.

Owner of a servient estate was not an indispensable party in an action brought by a lessee seeking the ability to use an easement because a determination of whether the lessee had a right to use the easement could have been made without affecting the lessor's rights since no quiet title action was necessary. *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 152 P.3d 581 (2007).

Prejudice to Absentee.

When the issue of the nonjoinder of an indispensable party is raised following trial, of the three purposes behind Rule 19 — to protect the absentee from prejudice resulting

from the judgment, to protect the parties from harassment by successive suits and to advance judicial economy by avoiding multiple litigation — only the first, prejudice to the absentee, would require reversal of the district court's denial of joinder or the modification of its judgment. *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 688 P.2d 1191 (Ct. App. 1984).

Timing of Motion.

The issue of nonjoinder of an indispensable

party may be raised even after the trial on the merits has been concluded. *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 688 P.2d 1191 (Ct. App. 1984).

Cited in: *Owyhee County v. Rife*, 100 Idaho 91, 593 P.2d 995 (1979); *Gilbert v. Nampa Sch. Dist. No. 131*, 104 Idaho 137, 657 P.2d 1 (1983); *Nilsson v. Mapco*, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988); *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236 (2000).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Beneficiary of Insurance Policy.

Bringing in New Parties.

—Time.

Carey Act Lien.

Community Property.

Foreclosure of Liens.

Grantee in Deed.

Husband and Wife.

Indispensable Parties.

Indorser on Promissory Note.

Insurers.

Loss of Property by Carrier.

Mandatory Duty of Court.

Mortgagors.

Municipal Franchises.

Obstruction of Road.

Parties Not Necessary.

Real Parties in Interest.

Stockholders of Corporation.

Tort-Feasors Acting Independently.

Water Rights.

Workmen's Compensation.

Beneficiary of Insurance Policy.

In a suit by the daughter of the insured to recover the proceeds of a life insurance policy against the insurance company on the ground that same had been assigned to her, but had been paid by the insurance company to the husband of the insured as the original beneficiary, the husband should have been made a party to the proceeding on a motion by the insurance company. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

Bringing in New Parties.

Where it appears, either from the pleadings or proof, that a complete determination of the rights of all the parties cannot be made without making other persons parties, it is the duty of the court to order such persons brought in. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892).

—Time.

Other parties may be brought in at any

stage of the action before decision of the court or verdict of the jury, when it is ascertained that they are necessary parties. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892); *Smith v. Rader*, 31 Idaho 423, 173 P. 970 (1918).

Carey Act Lien.

Where an action is brought by Carey Act Construction Company to foreclose a lien upon all of the right, title, and interest of a Carey Act settler, even though the title is in the United States, it is not a necessary party since it cannot be affected by the judgment. *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914).

Community Property.

Where an action is brought by a married woman to recover a judgment on promissory notes, and decree foreclosing mortgage is given to secure notes, and the answer of defendant avers that real estate covered by mortgage is community property, and sets up an offset or counterclaim against husband and asks to have him made a party plaintiff, it is error for court to deny such motion. *Campbell v. Kerns*, 13 Idaho 287, 90 P. 108 (1907).

Foreclosure of Liens.

The mortgagor and every other person having an interest in the mortgaged property should be made defendants in a suit to foreclose a chattel mortgage. *Bank of Roberts v. Olaveson*, 38 Idaho 223, 221 P. 560 (1923).

Grantee in Deed.

Grantee in deed is necessary party to action by grantor to quiet title. *Murray Hill Mining Co. v. Paragon Mining Co.*, 43 Idaho 20, 248 P. 446 (1926).

Husband and Wife.

Motion to make wife of defendant party in action for injury resulting from sale of ammunition by wife in absence of defendant from store was properly denied as it did not appear necessary to make her a party either to pro-

tect her rights or to obtain a complete determination of the controversy. *Carron v. Guido*, 54 Idaho 494, 33 P.2d 345 (1934).

A wife was a necessary party to an action for fraud in the sale of real and personal property owned by her and her husband. *Moon v. Brewer*, 89 Idaho 59, 402 P.2d 973 (1965).

Indispensable Parties.

A failure to make a person a party to a suit where he is a proper but not an indispensable party does not affect the judgment against those properly made parties. *Frost v. Idaho Irrigation Co.*, 19 Idaho 372, 114 P. 38 (1911).

Any person who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved, or who refuses to join as a plaintiff when he would properly belong to that side of the controversy may be made a defendant, but where he is made a defendant when he should be made a plaintiff, the reason therefore should be alleged. *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914).

Where, in action by assignee on a note given in payment for furnace, defendant alleged fraud on the part of the seller, it was error not to require the seller to be made a party to the action. *C.I.T. Corp. v. Elliott*, 66 Idaho 384, 159 P.2d 891 (1945).

Indorser on Promissory Note.

Liability of indorser on promissory note is several and action may be brought against maker without joining indorser as party defendant. *Scott v. Smith*, 35 Idaho 388, 206 P. 812 (1922).

Insurers.

Insurance company bound for payment of loss on buildings is proper party to action to recover against railroad company causing loss. *Allen-Wright Furn. Co. v. Hines*, 34 Idaho 90, 200 P. 889 (1921).

Loss of Property by Carrier.

Where in an action against a carrier for the loss of property intrusted to it there is any question or doubt as to the party to whom the carrier is liable, all necessary parties may be brought in and required to set up their interests and determine their respective rights and thus protect the carrier from the assertion of any further claim by other parties; thus, if action is brought by the consignor, the carrier may bring the consignee in as a party to have his right adjudicated and protect the carrier from further liability to him. *Pratt v. Northern Pac. Express Co.*, 13 Idaho 373, 90 P. 341 (1907).

Mandatory Duty of Court.

By virtue of the former statute, the court had the power and duty, of its own motion, to call into court all persons interested in the controversy and not legally made parties thereto, to the end that their rights might be adjudicated without the necessity of resorting to another action. So, when it became apparent that a determination of an action could not be completely and fully made without other persons being brought in as parties, who were not parties thereto, then the court could, of its own motion, and it was its duty, to order such persons brought in and made parties. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892).

Mortgagors.

The mortgagor and every other person having an interest in the mortgaged property should be made defendants to an action to foreclose a chattel mortgage. *Bank of Roberts v. Olaveson*, 38 Idaho 223, 221 P. 560 (1923).

Municipal Franchises.

In a proceeding whereby it was sought by a private corporation, who had a franchise under an ordinance, to mandamus the city clerk to furnish certain information in respect to a referendum petition and the entire vote cast for the mayor at the last preceding general election, the city had such an interest that it should be made a party. *Kerley v. Wetherell*, 61 Idaho 31, 96 P.2d 503 (1939).

Obstruction of Road.

In an action to enjoin defendant from obstructing an alleged county road that crossed his land, other landowners whose lands the road also crossed were not necessary parties. *County of Bonner v. Dyer*, 92 Idaho 699, 448 P.2d 986 (1968).

Parties Not Necessary.

It is not necessary to join stockholders of corporation where there is no privity of contract as to such parties and the corporation has made only defense possible. *Seyberth v. American Commander Mining & Milling Co.*, 42 Idaho 254, 245 P. 392 (1926).

In action to quiet possession to mining claim it is not necessary to make parties those persons to whom plaintiff intended to convey his interest when his title was perfected for their rights are in no way prejudiced. *Sellers v. Taylor*, 48 Idaho 116, 279 P. 617 (1929).

Real Parties in Interest.

It is not all persons who have an interest in the subject-matter of the suit but in general those only who have an interest in the object of the suit who are ordinarily required to be

made parties. *Idaho Irrigation Co. v. Dill*, 25 Idaho 711, 139 P. 714 (1914).

One drawing to and uniting the respective interests of littoral owners and others, is as cognizable as a real party in interest as one suing for the benefit of others in a class suit. *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948).

Stockholders of Corporation.

Stockholders of corporation, who have been favored in stock assessment which is void for not being uniform, are not necessary parties to action to set aside assessment as illegal and recover shares illegally sold. *Seyberth v. American Commander Mining & Milling Co.*, 42 Idaho 254, 245 P. 392 (1926).

Tort-Feasors Acting Independently.

An action at law for damages cannot be maintained against several defendants jointly when each acts independently of the other there is no concert or unity of design between them, and the tort does not become joint because afterwards its consequences united with the consequences of several other torts committed by several other persons. *Verheyen v. Dewey*, 27 Idaho 1, 146 P. 1116 (1915).

Water Rights.

Settlers along a stream who have acquired the right to appropriate and use the water of such stream as the common source of supply have such a common interest in having the rights of the respective appropriators determined and quieted as to entitle them to join as plaintiffs in a suit for that purpose, although each owns his separate land and water right in his own individual capacity. *Frost v. Alturas Water Co.*, 11 Idaho 294, 81 P. 996 (1905).

Where a complete determination of the rights of all water users on a stream cannot be

had without their presence, it is the imperative duty of the trial court to make the necessary order to bring them in, that their rights may be adjudicated. *Weiser Irrigation Dist. v. Middle Valley Irrigation Ditch Co.*, 28 Idaho 548, 155 P. 484 (1916).

An irrigation district that brought an action against a water master to require distribution in accordance with its adjudicated rights, and joined as a defendant drainage district the recipient of the water allegedly diverted from the irrigation district is not required to join as defendants water users of the drainage district, since their rights are dependent upon the rights of the drainage district from which they obtained use of the water, and they could have no defense not available to the drainage district. *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935).

Workmen's Compensation.

Where an insurance carrier of an employer carries workmen's compensation, such carrier has a substantial interest as subrogee in the subject of an action for damages for death or injury of the one for whom compensation has been paid, and such insurance carrier is properly joinable as plaintiff. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940).

Under the provisions of the Workmen's Compensation Act, permitting an injured employee at his option to claim compensation or proceed against tortfeasor and subrogating the employer who has paid compensation to the rights of the employee, an injured employee who had received compensation was properly joined as a party plaintiff with the employer and insurance carrier, in an action against the tort-feasor for causing the injury to the employee. *O'Connell v. Ivankovich*, 62 Idaho 328, 111 P.2d 888 (1941).

RESEARCH REFERENCES

A.L.R. Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation. 63 A.L.R.3d 373.

Liability for false imprisonment under warrant as affected by mistake as to identity of person arrested. 39 A.L.R.4th 705.

What constitutes "proper case" within meaning of provision of Rule 19 (a) of Federal

Rules of Civil Procedure that when person who should join as plaintiff refuses to do so, he may be made involuntary plaintiff "in a proper case". 20 A.L.R. Fed. 193.

Who must be joined in action as person "needed for just adjudication" under Rule 19 (a) of Federal Rules of Civil Procedure. 22 A.L.R. Fed. 765.

Rule 19(a)(2). Determination by court whenever joinder not feasible.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed,

the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Amended March 1, 2000, effective July 1, 2000; amended April 22, 2004, effective July 1, 2004.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.

Necessary Party Not Joined.

Discretion of Court.

Where the guaranty signed by the guarantor provided that the obligations of the guarantors were joint and several, and independent of the obligations of the borrower, and that a separate action could be brought against them, and considering the bank's evident lack of a remedy had its action seeking to recover on the guaranty been dismissed, the district court did not abuse its discretion in allowing the action to proceed and in implicitly determining that the debtor and the other guarantors were not indispensable parties

under this rule. *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982).

Necessary Party Not Joined.

Pursuant to this rule, even if the judgment in a declaratory judgment action by the insurer against the insured was held void, it would not benefit the creditors; the coverage dispute was resolved by an agreement memorialized in the written release agreement, and the judgment entered in the declaratory judgment action did not incorporate any of the terms of the settlement, but merely dismissed the action with prejudice. Setting that judgment aside would not affect the validity of the release agreement. *Hartman v. United Heritage Prop. & Cas. Co.*, 141 Idaho 193, 108 P.3d 340 (2005).

RESEARCH REFERENCES

A.L.R. Validity, construction, and application of Rule 19 (b) of Federal Rules of Civil Procedure, as amended in 1966, providing for determination to be made by court to proceed

with or dismiss action when joinder of person needed for just adjudication is not feasible. 21 A.L.R. Fed. 12.

Rule 19(a)(3). Pleading reasons for nonjoinder.

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined. (Amended March 1, 2000, effective July 1, 2000; amended April 22, 2004, effective July 1, 2004.)

Rule 19(a)(4). Exception of class actions.

This rule is subject to the provisions of Rule 23. (Amended March 1, 2000, effective July 1, 2000; amended April 22, 2004, effective July 1, 2004.)

Rule 19(b). Motor vehicle owner.

In an action against an owner of a motor vehicle under I.C., § 49-2417, the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service can be had upon said operator

within this state. (Amended March 1, 2000, effective July 1, 2000; amended April 22, 2004, effective July 1, 2004.)

DECISIONS UNDER PRIOR RULE OR STATUTE

Purpose.
Purpose of legislature in requiring operator of car to be made a party defendant where owner of car is sued on ground of imputed

negligence of operator, is to satisfy judgment first against property of operator. *Wilde v. Hansen*, 70 Idaho 8, 211 P.2d 153 (1949).

RESEARCH REFERENCES

A.L.R. Who is “owner” within statute making owner responsible for injury or death

inflicted by operator of automobile. 74 A.L.R.3d 739.

Rule 20(a). Permissive joinder of parties — Permissive joinder.

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

STATUTORY NOTES

Cross References. Interpleader of parties, Rule 22.
Intervention of parties, Rules 24(a), 24(b).
Misjoinder and nonjoinder of parties, Rule 21.

Necessary joinder of parties, Rule 19(a).
Separate trials, Rule 20(b).
Substitution of parties, Rules 25(a)(1)-25(e).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Administrators.
Assault and Battery.
Community of Interest.
Failure to Join Proper Party.
Husband and Wife.
Indorser on Promissory Note.
Insurance Policy Beneficiary.
Joinder of Cestui Que Trust.
Joinder of Husband as Defendant.
Parties Affected by Judgment.
Purpose.
Sureties on Depository Bond.

Verdict Against Several Defendants.
Water Rights.

Administrators.
In action brought by administrator appointed by court without jurisdiction, administrator appointed by proper court cannot be brought in subsequent to commencement of action. *Rogers v. Mellon*, 43 Idaho 466, 258 P. 166 (1927).

Assault and Battery.
In an action for damages for assault and battery alleged to have been committed in a

club, where the defendant answered with a counterclaim for assault and battery alleged to have been committed by the plaintiff and charged that employees of the club served plaintiff with liquor until he became belligerent and prone to violence, failed to restrain him in his attack upon defendant, and that one of the employees struck defendant with a stick, rendering him unconscious, it was error for the court to dismiss the counterclaim against the club and such employees and to deny defendant's motion to add the club and such employees to his counterclaim. *Warren v. Hall*, 92 Idaho 222, 440 P.2d 342 (1968).

Community of Interest.

Where settlers along a stream claim the waters from the stream to irrigate their lands they all have such a common interest in the adjudication of the water rights of the stream that they may all be joined as defendants in a suit by other appropriators of waters from the same stream, brought for the purpose of determining such rights. *Frost v. Alturas Water Co.*, 11 Idaho 294, 81 P. 996 (1905).

Failure to Join Proper Party.

A failure to make a person a party to a suit where he is a proper but not an indispensable party does not affect the judgment against those properly made parties. *Frost v. Idaho Irrigation Co.*, 19 Idaho 372, 114 P. 38 (1911).

Husband and Wife.

It was proper to join a wife and her husband as defendants in an action where claims for fraud in the sale of property by the husband and wife were joined with claims for damages for action of the husband in interfering with plaintiffs' business on the property in question, even though it might develop that a personal judgment could not be entered against her. *Moon v. Brewer*, 89 Idaho 59, 402 P.2d 973 (1965).

Indorser on Promissory Note.

Liability of indorser on promissory note is several and action may be brought against maker without joining indorser as party defendant. *Scott v. Smith*, 35 Idaho 388, 206 P. 812 (1922).

Insurance Policy Beneficiary.

In a suit by the daughter of the insured to recover the proceeds of the life insurance policy against the insurance company on the ground that same had been assigned to her, but had been paid by the insurance company to the husband of the insured as the original beneficiary, the husband should have been made a party to the proceeding on a motion by the insurance company. *Anderson v. Idaho*

Mut. Benefit Ass'n, 77 Idaho 373, 292 P.2d 760 (1956).

Joinder of Cestui Que Trust.

The cestui que trust may be joined as a party plaintiff in an action by the trustee. *Cunningham v. Bank of Nampa*, 13 Idaho 167, 88 P. 975 (1907).

Joinder of Husband as Defendant.

Where plaintiff brought an action for damages to her person and character for torts committed against her during coverture, she may join her husband as a party defendant, if he participated in the wrongs, as constitution and statutes as a whole removed common law rule that a married woman could not sue her husband for wrongs committed by him against her person. *Lorang v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949).

Parties Affected by Judgment.

Where a sheriff sold property under execution sale and refused to make a deed therefor to the purchaser, the execution defendants whose property was sold, and a third party who claims adversely to the plaintiff, might be joined as defendants in an action by the purchaser to obtain a sheriff's deed to the property. *Brady v. Linehan*, 5 Idaho 732, 51 P. 761 (1898).

Purpose.

To prevent a multiplicity of suits about the same subject-matter and to settle complicated controversies in one action when practicable, any person who has claims in interest in the subject-matter in an action adverse to the plaintiff may be joined as a defendant with other persons who are proper parties defendant to the action. *Brady v. Linehan*, 5 Idaho 732, 51 P. 761 (1898).

Sureties on Depository Bond.

The fact that bondsmen could be joined in one action, does not change their liability from several to joint, and a judgment rendered thereon remains as to each, several and distinct, and will be treated as several and distinct even though it attempts to impose joint liability upon the bondsmen; such attempted imposition of joint liability upon the bondsmen is surplusage. *Evans v. City of Am. Falls*, 52 Idaho 7, 11 P.2d 363 (1932).

Verdict Against Several Defendants.

In action for false arrest and false imprisonment where plaintiff did not request any instruction regarding relief against one or more defendants according to their respective liabilities, there was no error in instructing the jury that a verdict for the plaintiff must be against all the defendants. *Sima v. Skaggs*

Payless Drug Center, Inc., 82 Idaho 387, 353 P.2d 1085 (1960).

Water Rights.

Separate parties who own and hold their lands separately and each of whom has a separate written contract with a water company whereby the company separately agrees to furnish each with water for the irrigation of his land, cannot join in a common action to compel the company to deliver them a sufficient amount of water to properly irrigate

their lands. *Creer v. Bancroft Land & Irrigation Co.*, 13 Idaho 407, 90 P. 228 (1907).

Where several land owners agree among themselves to unite in interest and construct their own ditch or lateral and make a joint application to a ditch company for sufficient water for all their land, they may join as plaintiffs in an action to compel the company to deliver the quantity of water applied for at their headgate. *Helphery v. Perrault*, 12 Idaho 451, 86 P. 417 (1906).

Rule 20(b). Separate trials.

The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice, and may direct a final judgment upon a claim of or against one or more parties in accordance with the provisions of Rule 54(b).

STATUTORY NOTES

Cross References. Judgment upon multiple claims, Rule 54(b).

Separate trials, Rule 42(b).

JUDICIAL DECISIONS

Habeas Corpus.

Where several prisoners joined in seeking a writ of habeas corpus, the district court could sever the claims of the various petitioners if

the interests of justice so dictated. *George v. State Bd. of Cor.*, 98 Idaho 452, 566 P.2d 1110 (1977).

DECISIONS UNDER PRIOR RULE OR STATUTE

Discretion of Court.

In an action for damages for personal injuries and property damage with a third-party complaint by defendants against another party, consideration of plaintiffs' motion to separate for trial the third-party action from their action against defendants was within

the sound discretion of the trial court and, absent abuse of such discretion, overruling such motion was not cause for reversal. *Fawcett v. Irby*, 92 Idaho 48, 436 P.2d 714 (1968), overruled on other grounds, *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985).

Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

STATUTORY NOTES

Cross References. Intervention of right, Rule 24(a).

Motor vehicle owner, Rule 19(b).

Necessary joinder of parties, Rule 19(a).

Permissive intervention, Rule 24(b).

Permissive joinder of parties, Rule 20(a).

JUDICIAL DECISIONS

ANALYSIS

Due Process.
Habeas Corpus.
Proper Joinder of Party.
Service Necessary.
Substitution of Party.

Due Process.

The court may, pursuant to this rule, add any party to an action at any stage of the proceeding so long as the terms of the joinder are just. However, this rule does not give the court license to join an additional party in violation of that party's constitutional right to procedural due process; that right must be complied with if the terms of the joinder are to be just. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Habeas Corpus.

Where several prisoners filed a request for a writ of habeas corpus, such request should not have been denied solely on the ground that more than one petitioner had joined in the complaint. *George v. State Bd. of Cor.*, 98 Idaho 452, 566 P.2d 1110 (1977).

Proper Joinder of Party.

In an action for waste brought by a lessor against a lessee, who had assigned the lease without the lessor's consent, where the assignee received a summons and complaint from the lessee/assignor and where the assignee was present at trial and had a chance to defend itself, the court properly allowed the

lessor to amend its complaint and add the assignee as a third-party defendant after the trial; however, the correct authority for this action is this rule, which was not invoked by the lessor nor the trial court or on appeal but which the Supreme Court invoked to uphold the trial court's ruling. *Consolidated AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 912 P.2d 115 (1996).

Service Necessary.

A party which is to be joined must be served with summons and complaint in accordance with I.R.C.P., Rules 3 and 4, and be given an opportunity to respond and to defend itself. Without service of process, the court in fact has no jurisdiction over the purportedly joined party. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Substitution of Party.

The liberal construction requirement of I.R.C.P. 1(a) indicated that I.R.C.P. 17(a), 19(a)(1) and this rule should be read to require the granting of a motion by plaintiffs, in an action to impress an easement on adjoining property, to substitute a corporation owned by plaintiffs as a party plaintiff where the corporation held title to the property on which the plaintiffs resided and where defendants would not have been prejudiced by the substitution; accordingly, the trial court erred in denying the motion to substitute and in dismissing the action based on the plaintiffs' lack of title. *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Action on Bond.
Appeal.
Contract Action.
Insurer and Motorist.
Lien Foreclosure.
Personal Injury Action.
Waiver.

Action on Bond.

An action by the state to the use of various parties claiming under an indemnity bond given the state for their protection is not a misjoinder of causes of action, nor a misjoinder of parties plaintiff. *State v. Title Guar. & Sur. Co.*, 27 Idaho 752, 152 P. 189 (1915), appeal dismissed, 240 U.S. 136, 36 S. Ct. 345, 60 L. Ed. 2d 566 (1916).

Appeal.

Where appellants took the position in the

court below that community property was involved and that the husband was a necessary party, and the court permitted an amendment joining the husband, a misjoinder could not be urged on appeal. *McShane v. Quillin*, 47 Idaho 542, 277 P. 554 (1929).

Contract Action.

Amended complaint by real estate agent to recover \$3,000 from individual owners and \$2,000 from the administrator of an estate pursuant to a contract entered into between the plaintiff agent and the defendant parties to the contract was not demurrable on the ground of misjoinder of causes of action or misjoinder of parties defendant. *Abbott v. Grant*, 73 Idaho 77, 245 P.2d 797 (1952).

Insurer and Motorist.

In an action by insureds against their insurer for damages resulting from an automo-

bile collision under the uninsured motorist clause of their policy and against the uninsured motorist in tort, the trial court properly granted a separate trial as to each of the two defendants. *Carter v. Cascade Ins. Co.*, 92 Idaho 136, 438 P.2d 566 (1968), overruled on other grounds, *Associates Disct. Corp. v. Yosemite Ins. Co.*, 96 Idaho 249, 526 P.2d 854 (1973).

Lien Foreclosure.

Joining original owner and his vendee together with one holding chattel mortgage on property in action to foreclose lien is not misjoinder. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

Personal Injury Action.

In an action against the owner and driver of an automobile and the owner's insurance liability company for injuries to one struck by

the automobile, the insurance company was improperly joined as a party defendant. *Stearns v. Graves*, 61 Idaho 232, 99 P.2d 955 (1940).

Waiver.

In a suit on note, failure to object to non-joinder of plaintiff's husband waives such defect. *Stafford v. Field*, 70 Idaho 331, 218 P.2d 338 (1950).

In suit by remainderman against co-remaindermen to recover proportionate share of purchase price of sale of right of way by co-remaindermen to state based on agreement signed only by defendants and life tenant, there could be no objection to misjoinder of parties defendant for failure to make life tenant a party where objection was not raised by answer. *Woodland v. Spillman*, 75 Idaho 286, 271 P.2d 819 (1954).

RESEARCH REFERENCES

A.L.R. Necessity of leave of court to add or drop parties by amended pleading filed before responsive pleading is served, under Rules 15

(a) and 21 of Federal Rules of Civil Procedure. 31 A.L.R. Fed. 752.

Rule 22. Interpleader.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

STATUTORY NOTES

Cross References. Deposit in court, Rule 67.

Interpleader, payment into court, § 5-321.
Intervention as matter of right, Rule 24(a).

Permissive intervention, Rule 24(b).
Permissive joinder of parties, Rule 20(a).
Substitution of parties, death, Rules 25(a)(1), 25(a)(2).

JUDICIAL DECISIONS

Cited in: *Travelers Ins. Co. v. Johnson*, 97 Idaho 336, 544 P.2d 294 (1975); *Johnson v. Hartford Ins. Group*, 99 Idaho 134, 578 P.2d

676 (1978); *Suitts v. First Sec. Bank*, 100 Idaho 555, 602 P.2d 53 (1979).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Creditors' Claims.
Mortgagees.

Creditors' Claims.

It was proper for the escrow agent of the parties to a sale of real estate to interplead against the holders of judgment liens against the vendors to determine their respective rights and priorities as to the paid-in purchase money held in escrow although, at the

time of filing the interpleader, none of such judgment creditors was actively pressing a claim to such funds. *First Sec. Bank v. Rogers*, 91 Idaho 654, 429 P.2d 386 (1967).

Mortgagees.

In action to contest summary foreclosure of chattel mortgage, a prior mortgagee was not required to be interpleaded, since any interest the defendant had would be subject to such prior mortgage. *Roberts v. American Mach. Co.*, 81 Idaho 555, 347 P.2d 759 (1959).

RESEARCH REFERENCES

A.L.R. Excessiveness or inadequacy of attorneys fees in matter involving real estate — modern cases. 10 A.L.R.5th 448.

Rule 23(a). Prerequisites to a class action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATUTORY NOTES

Cross References. Capacity to sue or be sued, Rule 17(b).

Derivative actions by shareholders, Rule 23(f).

Dismissal or compromise, Rule 23(e).

JUDICIAL DECISIONS

ANALYSIS

Failure to Satisfy Conditions.

Private Actions.

—Antitrust.

Statute of Limitations.

Worker's Compensation Actions.

Failure to Satisfy Conditions.

Where appellants' pleadings did not allege compliance with this rule and Rules 23(b) and 23(f), I.R.C.P., and even under a very generous reading of the allegations stated in their pleadings it could not be said that they alleged satisfaction of the conditions and prerequisites of a class action clearly stated by the rules, where it did not appear that the appellants sought a judicial determination of whether the class action could be maintained as contemplated by I.R.C.P. 23(c)(1), and

aside from the statement in the title of their pleadings that the appellants were responding to the confirmation petition on behalf of themselves and other landowners within their respective districts, the appellants did nothing in the proceedings below to establish satisfaction of the prerequisites and conditions stated in this rule and Rules 23(b) and 23(f), I.R.C.P., the action could not be maintained as a class or derivative action. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Private Actions.

Where the plaintiffs brought an action to have a parcel of land maintained as a common recreational area only to enforce their own rights, not the rights which other lot owners held, this rule was not applicable, as plaintiffs are never required to seek the vindication of a

class. *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 719 P.2d 1169 (1986).

—Antitrust.

While a private antitrust case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are always strictly individualized. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Statute of Limitations.

The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. *Pope*

v. Intermountain Gas Co., 103 Idaho 217, 646 P.2d 988 (1982).

Worker's Compensation Actions.

Although the industrial commission has the power to adopt a rule which would permit a class action proceeding before it, the commission has not yet chosen to adopt such a rule; accordingly, the industrial commission did not have the authority to entertain a class action type proceeding concerning a controversy arising under the workmen's compensation law. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

Cited in: *Ware v. Idaho State Tax Comm'n*, 98 Idaho 477, 567 P.2d 423 (1977).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Littoral Owners.
Notice.
Representation.

Littoral Owners.

One drawing to and uniting the respective interests of littoral owners and others is as cognizable as a real party in interest as one suing for the benefit of others in a class suit. *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948).

An action by a corporation and several individuals, who were among some 600 owners, lessees, and purchasers of lots and cottages along the shores of twin lakes, against an irrigation district in order to stabilize the water level of the lakes was a class action

within the meaning of former similar rule. *Twin Lakes Imp. Ass'n v. East Greenacres Irrigation Dist.*, 90 Idaho 281, 409 P.2d 390 (1965).

Notice.

The court can and should give notice to members in a class action that unless they expressly opt out of the litigation they will be bound by the action of those who participate. *Bush v. Upper Valley Telecable Co.*, 96 Idaho 83, 524 P.2d 1055 (1974).

Representation.

Under former similar rule a city had the right to bring an action to enforce a trust to be used primarily for the recreation of the youth of the area. *Sawyer v. Huff*, 86 Idaho 328, 386 P.2d 563 (1963).

RESEARCH REFERENCES

A.L.R. Attorneys' fee in class actions. 38 A.L.R.3d 1384.

Maintainability in state court of class action for relief against air or water pollution. 47 A.L.R.3d 769.

Application of Full Faith and Credit Principles to Class-Action Litigation and Judgments. 50 A.L.R.6th 281.

Propriety, under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action for violation of federal antitrust laws. 6 A.L.R. Fed. 19.

Propriety, under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking relief against pollution of environment. 7 A.L.R. Fed. 907.

Effect of breach of ethics or other misconduct by plaintiffs' attorney on status of class action under Rule 23 of Federal Rules of Civil Procedure. 16 A.L.R. Fed. 883.

Discovery for purposes of determining whether class action requirements under Rule 23(a) and (b) of Federal Rules of Civil Procedure are satisfied. 24 A.L.R. Fed. 872.

Right to jury trial under Federal Constitution where two or more petty offenses, each having penalty of less than 6 months' imprisonment, have potential aggregate penalty in excess of 6 months when tried together. 26 A.L.R. Fed. 736.

Right of class member, in class action under Rule 23 of Federal Rules of Civil Procedure, to appeal from order approving settlement with class. 30 A.L.R. Fed. 846.

Mootness of class representative's claim pending litigation as precluding maintenance of class action under Rule 23 of Federal Rules of Civil Procedure, as amended in 1966. 33 A.L.R. Fed. 484.

Propriety of permitting individual action to

continue as class action under Rule 23 of Federal Rules of Civil Procedure upon individual's claim becoming moot. 33 A.L.R. Fed. 570.

Propriety, under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking relief from racial discrimination. 74 A.L.R. Fed. 42.

Propriety, Under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as Amended in 1966, of Class Action Seeking Relief Against Pollution of Environment. 19 A.L.R. Fed. 2d 303.

Satisfaction of Numerosity Requirement in ERISA Class Actions. 26 A.L.R. Fed. 2d 381.

Satisfaction of superiority requirement for class actions under Fair Debt Collection Practices Act, 15 U.S.C.S. §§ 1692 et seq. 51 A.L.R. Fed 2d 1.

Satisfaction of commonality requirement for class actions under Fair Debt Collection Practices Act, 15 U.S.C.S. §§ 1692 et seq. 54 A.L.R. Fed 2d 479.

Rule 23(b). Class actions maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATUTORY NOTES

Cross References. Intervention as of right, Rule 24(a). Permissive intervention, Rule 24(b).

JUDICIAL DECISIONS

ANALYSIS

Failure to Satisfy Conditions.
 Opportunity to Opt Out.
 Workmen's Compensation Actions.

Failure to Satisfy Conditions.

Where appellants' pleadings did not allege compliance with this rule and Rules 23(a) and 23(f), I.R.C.P., and even under a very generous reading of the allegations stated in their pleadings it could not be said that they alleged satisfaction of the conditions and prerequisites of a class action clearly stated by the rules, where it did not appear that the appellants sought a judicial determination of whether the class action could be maintained as contemplated by Rule 23(c)(1), I.R.C.P., and aside from the statement in the title of their pleadings that the appellants were responding to the confirmation petition on behalf of themselves and other landowners within their respective districts, the appellants did nothing in the proceedings below to establish satisfaction of the prerequisites and conditions stated in this rule and Rules 23(a) and 23(f), I.R.C.P., the action could not be maintained as a class or derivative action.

Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978).

Opportunity to Opt Out.

Where the district court's certification order gave class members the opportunity to opt out of the suit, it could only be assumed that class action certification was under subdivision (3) of this rule, since the right to opt out attaches only to class members involved in a class action brought under subdivision (3) of this rule, and not to class members in class actions brought under subdivision (1) or (2) of this rule. Pope v. Intermountain Gas Co., 103 Idaho 217, 646 P.2d 988 (1982).

Workmen's Compensation Actions.

Although the industrial commission has the power to adopt a rule which would permit a class action proceeding before it, the commission has not yet chosen to adopt such a rule; accordingly, the industrial commission did not have the authority to entertain a class action type proceeding concerning a controversy arising under the workmen's compensation law. Monroe v. Chapman, 105 Idaho 269, 668 P.2d 1000 (1983).

RESEARCH REFERENCES

A.L.R. Consumer class actions based on fraud or misrepresentations. 53 A.L.R.3d 534.

Propriety of class action in state courts to assert tenants' rights against landlord. 73 A.L.R.3d 852.

Propriety of state court class action by holders of bonds against indenture trustee. 73 A.L.R.3d 880.

Propriety, under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking relief against pollution of environment. 7 A.L.R. Fed. 907.

Propriety, under Rules 23 (a) and 23 (b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking relief from racial discrimination. 8 A.L.R. Fed. 461, 74 A.L.R. Fed. 42.

Propriety, Under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as Amended in 1966, of Class Action Seeking Relief Against Pollution of Environment. 19 A.L.R. Fed. 2d 303.

Rule 23(c). Determination by order whether class action to be maintained: notice: judgment: actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member

that (A) the court will exclude the member from the class if the member requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly. (Amended December 19, 1975, effective January 1, 1976.)

STATUTORY NOTES

Cross References. Voluntary dismissal of actions, Rule 41(a)(1).

JUDICIAL DECISIONS

ANALYSIS

Failure to Satisfy Conditions.
Parties Bound by Decision.
Review of Certification Determination.

Failure to Satisfy Conditions.

Where appellants' pleadings did not allege compliance with Rules 23(a), 23(b) and 23(f), I.R.C.P., and even under a very generous reading of the allegations stated in their pleadings it could not be said that they alleged satisfaction of the conditions and prerequisites of a class action clearly stated by the rules, where it did not appear that the appellants sought a judicial determination of whether the class action could be maintained as contemplated by subsection (1) of this rule, and aside from the statement in the title of their pleadings that the appellants were responding to the confirmation petition on behalf of themselves and other landowners within their respective districts, the appellants did nothing in the proceedings below to establish satisfaction of the prerequisites and conditions stated in Rules 23(a), 23(b) and 23(f), I.R.C.P., the action could not be maintained as a class or derivative action. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Parties Bound by Decision.

In view of appellate court's conclusion that antitrust case was not properly certified as a class action, only those plaintiffs who were designated class representatives, or those who presented evidence and failed to prove their case below, would be bound thereby. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

In class actions, ordinarily the class will be determined and given notice early in the proceedings and prior to deciding the merits; however, where the defendant precipitates or acquiesces to a decision on the merits prior to deciding the class questions, that defendant may not later complain of prematurity; such defendant assumes the risk that an unfavorable judgment will benefit the class ultimately determined. *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 739 P.2d 301 (1987).

Review of Certification Determination.

If the district court properly applies the relevant criteria, its order denying or granting a motion to maintain a class action should be reversed only for an abuse of discretion. However, where the district court provides no basis for determining whether it properly

considered the relevant requirements for certification, appellate courts will make an independent review of the record to determine

whether certification as a class action was appropriate. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

RESEARCH REFERENCES

A.L.R. Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

What constitutes “best notice practicable,” required by Rule 23(c)(2) of Federal Rules of Civil Procedure in class actions brought under Rule 23(b)(3). 32 A.L.R. Fed. 102.

Propriety, Under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as Amended

in 1966, of Class Action Seeking Relief Against Pollution of Environment. 19 A.L.R. Fed. 2d 303.

Appealability of Determination Regarding Confirmation of Action as Class Action Under Federal Rule of Civil Procedure Rule 23 and its Enabling Legislation (28 USCS § 1292(e)). 22 A.L.R. Fed. 2d 303.

Rule 23(d). Orders in conduct of actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

STATUTORY NOTES

Cross References. Class actions, representation, Rule 23(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

Notice to Class Members.

Former similar rule authorized notice to members in a class action that unless they expressly withdrew from the litigation, they

would be bound by the action of those who participate. *Bush v. Upper Valley Telecab Co.*, 96 Idaho 83, 524 P.2d 1055 (1974).

RESEARCH REFERENCES

A.L.R. Propriety of incentive awards or incentive agreements in class actions. 60 A.L.R.6th 295.

Rule 23(e). Dismissal or compromise.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23(f). Derivative actions by shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the state of Idaho which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action which plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

JUDICIAL DECISIONS**Failure to Satisfy Conditions.**

Where appellants' pleadings did not allege compliance with this rule and Rules 23(a) and 23(b), I.R.C.P., and even under a very generous reading of the allegations stated in their pleadings it could not be said that they alleged satisfaction of the conditions and prerequisites of a class action clearly stated by the rules, where it did not appear that the appellants sought a judicial determination of whether the class action could be maintained as contemplated by Rule 23(c)(1), I.R.C.P.,

and aside from the statement in the title of their pleadings that the appellants were responding to the confirmation petition on behalf of themselves and other landowners within their respective districts, the appellants did nothing in the proceedings below to establish satisfaction of the prerequisites and conditions stated in this rule and Rules 23(a) and 23(b), I.R.C.P., the action could not be maintained as a class or derivative action. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

RESEARCH REFERENCES

A.L.R. Circumstances excusing demand upon other shareholders which is otherwise prerequisite to bringing of stockholder's derivative suit on behalf of corporation. 48 A.L.R.3d 595.

Requirement of Rule 23.1 of Federal Rules

of Civil Procedure that plaintiff in shareholder derivative action "fairly and adequately represent" shareholders' interests in enforcing corporation's right. 15 A.L.R. Fed. 954.

Notice to shareholders and court approval

of dismissal or compromise of derivative actions, under Rule 23.1 of Federal Rules of Civil Procedure. 26 A.L.R. Fed. 465.

Rule 23(g). Actions relating to unincorporated associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Rule 24(a). Intervention of right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATUTORY NOTES

Cross References. Interpleader, Rule 22. Necessary joinder of parties, Rule 19(a). Permissive intervention, Rule 24(b).	Procedure, Rule 24(c). Substitution of parties in case of death, Rules 25(a)(1), 25(a)(2).
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JUDICIAL DECISIONS

ANALYSIS

Method of Joining Suit.
Non-Civil Action.
Paternity Action.
Timeliness.

Method of Joining Suit.

It is necessary for a trial court to determine whether a party entering a suit is admitted by intervention or substitution before the propriety of that procedure may be determined; therefore, because the record did not clearly reflect by what procedure the district court allowed the party to enter the suit, the case was remanded. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

Non-Civil Action.

Although a proceeding brought by a city to set aside an order issued pursuant to § 1-2218, which obligated the city to provide facilities for a magistrate division of the district

court, was not truly a civil action, the district judges have an inherent power, codified in § 1-1622, to consider the standards in this rule and allow a county which would be adversely affected by the set aside, to intervene. *City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise)*, 147 Idaho 794, 215 P.3d 514 (2009).

Paternity Action.

This rule, §§ 56-203A, 56-203B, 56-203C, and 7-1110 constitute a proper basis for the state to intervene as a matter of right in a paternity action against defendant by mother of child seeking paternity declaration and past and future child support payments; magistrate did not err in granting state's motion to intervene. *Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6 (1996).

Timeliness.

There was no abuse in the finding of the Snake River Basin Adjudication Court that the generalized interest of irrigation compa-

nies in a sublease was insufficient to support intervention of right, since a motion to participate is an alternative method to filing a response with no specific timetable, and the court had indicated that any motion to participate would only be considered timely if filed within the response period, absent extraordinary circumstances. *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000).

Cited in: *Isaacson v. Obendorf*, 99 Idaho 304, 581 P.2d 350 (1978); *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983); *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 106 P.3d 443 (2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appealability.
Assignees.
Availability of Other Remedy.
Beneficiary of Insurance Policy.
Condemnation Proceedings.
Debt.
Deposit in Court.
Filing.
Grounds.
Mandamus.
Pending Action.
Relation Back.
Riparian Rights.
Taxpayers.

Appealability.

An order denying an application for leave to file a complaint in intervention is a final judgment and appealable. *Poage v. Cooperative Publishing Co.*, 57 Idaho 561, 66 P.2d 1119, 110 A.L.R. 1322 (1937).

Assignees.

An assignee has such an interest as entitles him on proper application to intervene. *Pence v. Sweeney*, 3 Idaho 181, 28 P. 413 (1891).

Availability of Other Remedy.

The fact that an intervenor has some other and adequate remedy for the protection of his property and right is no bar to his right to intervene. *Potlatch Lumber Co. v. Runkel*, 16 Idaho 192, 101 P. 396 (1909).

Beneficiary of Insurance Policy.

In a suit by the daughter of the insured to recover the proceeds of a life insurance policy against insurance company on the grounds that the same had been assigned to her but had been paid by the insurance company to the husband of the insured as the original beneficiary, the husband should have been made a party to the proceeding on a motion by the insurance company. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

Condemnation Proceedings.

Former section applied to proceedings in

condemnation and entitled local highway district to a hearing in a proceeding to lay out, alter or change main trunk or other highways through its territory. *State ex rel. McKelvey v. Barnes*, 55 Idaho 578, 45 P.2d 293 (1935).

Debt.

The owner or claimant of property attached in an action for debt has such an interest against both parties to the main action as entitles him to intervene for the purpose of asserting his right and title to the attached property. *Potlatch Lumber Co. v. Runkel*, 16 Idaho 192, 101 P. 396 (1909); *First Nat'l Bank v. Denbrae Sheep Co.*, 44 Idaho 447, 258 P. 365 (1927).

Deposit in Court.

Where a fund is deposited in court pursuant to stipulation, to abide the result of the action, a third person claiming an interest in said fund is entitled to intervene in the action. *Pence v. Sweeney*, 3 Idaho 181, 28 P. 413 (1891).

Filing.

An intervenor must take the case as he finds it at the time he files his petition in intervention. *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325 (1936).

Petition in intervention is filed in time when it is filed before the trial. *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325 (1936).

The fact that party waited one year and then filed a motion for intervention the day before trial does not make it untimely. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974).

Grounds.

The interest which entitles a person to intervene in a suit against other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose in the direct legal operation and effect of the judgment. *People v. Green*, 1 Idaho 235 (1869); *Pitcock v. Buck*, 15 Idaho 47, 96 P. 212 (1908).

It is proper to allow intervention where one shows merely that he "may" be bound by the judgment or representation as to him "may"

be inadequate. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974).

Mandamus.

In a proceeding for a writ of mandate, to compel the city clerk of Boise to certify to the city council the number of names on a petition for referendum on an ordinance granting a franchise to a private company to operate a public utility therein, and the number of votes cast for mayor at the last preceding general municipal election, the private company who sought to operate the utility under the franchise had such an interest in the matter at litigation as entitled it to intervene. *Kerley v. Wetherell*, 61 Idaho 31, 96 P.2d 503 (1939).

State tax commission was not entitled to intervene in proceeding by taxpayers to mandate county auditors to pay refund judgment, though allegations in complaint to intervene were true, if judgment remained valid. *A & H Food Mkt. v. Riggs*, 71 Idaho 416, 233 P.2d 420 (1951).

Pending Action.

Separate action instituted by a party does not prevent such party intervening in another

action between other parties involving the same subject-matter and similar conflicting interests. *Kaesemeyer v. Smith*, 22 Idaho 1, 123 P. 943 (1912).

Relation Back.

A petition in intervention will relate back to time of original complaint where there is community of interest or privity of contract between original plaintiff and petitioner. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974).

Riparian Rights.

All persons having determined rights in waters of river are entitled to intervene in action to enjoin interference with divergence of stream feeding such river. *Independent Irrigation Co. v. Baldwin*, 43 Idaho 371, 252 P. 489 (1926).

Taxpayers.

One or more taxpayers can intervene in a proceeding for a declaratory judgment as to the validity of payments made by county commissioners to themselves for services rendered on highway jobs. *Nampa Hwy. Dist. No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956).

RESEARCH REFERENCES

A.L.R. Right of insurer issuing "uninsured motorist" coverage to intervene in action by insured against uninsured motorist. 35 A.L.R.4th 757.

Liability insurer's right to intervene in action defended by insured upon insurer's refusal to assume defense of action against insured upon ground that claim upon which action is based is not within coverage of policy. 68 A.L.R.4th 389.

Right to Intervene in Court Review of Zoning Proceeding. 47 A.L.R.6th 439.

Construction of Federal Civil Procedure Rule 24(a)(2), as amended in 1966, insofar as dealing with prerequisites of intervention as a matter of right. 132 A.L.R. Fed. 147.

When is intervention as matter of right appropriate under Rule 24(a)(2) of Federal Rules of Civil Procedure in civil rights action. 132 A.L.R. Fed. 147.

Rule 24(b). Permissive intervention.

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

JUDICIAL DECISIONS

ANALYSIS

Child Protection Actions.
Limited Intervention.

Child Protection Actions.

Allowing permissive intervention in CPA proceedings is inconsistent with the CPA and the statutes governing the termination of parental rights, therefore, paragraph (b)(2) is inconsistent with the CPA and should not be applied in CPA actions. *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000).

Limited Intervention.

There was no abuse of discretion in the

decision allowing limited participation by irrigation companies where the special master concluded that their motion to participate was untimely as to the issue of whether physical diversion was required because that issue was raised in the original claim; master held that the motion to participate was timely as to the question of whether manipulation of water levels in a reservoir constituted diversion because that issue was first raised in the claimant's motion for summary judgment. *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Construction.
Interest in Subject Matter.
Rights of Intervenor.
Taxpayers.
Time for Intervention.
Zoning.

Construction.

Statutes providing for intervention should be liberally construed. *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960).

Interest in Subject Matter.

Under the language of the second subdivision of former identical rule there was no requirement that intervenor should have a direct or personal pecuniary interest in the subject of the litigation. *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960).

Rights of Intervenor.

One who is allowed to intervene in a suit between third persons becomes a party to such suit, and his rights are as comprehensive as those of the original parties so far as any action of the court interferes with said rights, and he is consequently entitled to a writ of review equally with the original parties to the suit. *Gold Hunter Mining & Smelting Co. v. Holleman*, 3 Idaho 99, 27 P. 413 (1891).

Taxpayers.

One or more taxpayers can intervene in a proceeding for a declaratory judgment as to the validity of payments made by county commissioners to themselves for services rendered on highway jobs. *Nampa Hwy. Dist. No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956).

Time for Intervention.

Motion for intervention filed prior to the filing of defendant city's answer to amended complaint was timely and not subject to objection that permitting intervention would unnecessarily and unreasonably delay the trial of issues between the original parties. *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960).

Zoning.

In an action against city to compel rezoning where owners of adjoining or adjacent property upon motion to intervene as defendants alleged that if property in controversy were rezoned they would be damaged and that proximity of their property gave them an interest substantially different from the interest of the defendant city as a whole, their defense and the main action had a question of law in common, and such owners had sufficient interest in the matter in litigation to entitle them to intervene. *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960).

RESEARCH REFERENCES

A.L.R. Right to Intervene in Court Review of Zoning Proceeding. 47 A.L.R.6th 439.

Rule 24(c). Procedure.

A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appealability of Order.
Motion to Make Party.
Showing by Petitioner.

Appealability of Order.

An order denying an application for leave to file a complaint in intervention is a final judgment and appealable. *Poage v. Cooperative Publishing Co.*, 57 Idaho 561, 66 P.2d 1119, 110 A.L.R. 1322 (1937).

Motion to Make Party.

In a suit by the daughter of the insured to recover the proceeds of a life insurance policy

against insurance company on the grounds that the same had been assigned to her but had been paid by the insurance company to the husband of the insured as the original beneficiary, the husband should have been made a party to the proceeding on a motion by the insurance company. *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

Showing by Petitioner.

Although prior judicial approval is required before filing of complaint, petitioner need only show that his complaint states a claim upon which relief may be granted. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974).

Rule 24(d) De facto custodian intervention.

(i) A request for *de facto* custodian status pursuant to Idaho Code Section 32-1704(1)(b) shall be brought by way of a Motion for Permissive Intervention if there is an existing Idaho order of child custody or a pending Idaho proceeding to establish custody with regard to the child or children that are the subject of the request. A child custody proceeding shall not include actions filed pursuant to title 16 of the Idaho Code. The Motion for Permissive Intervention shall be served pursuant to IRCP 7 in any pending child custody proceeding. The Motion for Permissive Intervention shall be served pursuant to IRCP 4 if the custody proceeding is closed. A Notice of Hearing shall be served along with the motion in accordance with IRCP 7(b)(3).

(ii) If the Motion for Permissive Intervention is granted, a Petition for De facto Custodian Status and Custody may be filed. The petition shall be served and adjudicated in substantially the same manner as an original proceeding. The petition and notice of hearing shall be served upon the parties pursuant to IRCP 4 unless otherwise ordered by the court. The Notice of Hearing shall direct the opposing party to file a written response within 20 days. (Adopted September 10, 2010, effective October 1, 2010.)

Rule 25(a)(1). Substitution of parties — Death.

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided

in Rule 4 for the service of a summons. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.

STATUTORY NOTES

Cross References. Incompetency, Rule 25(b).

Pleadings and papers, service and filing, Rules 5(a)-5(f).

Process, issuance and service, Rules 4(a)-4(i).

Public officers, death or separation from office, Rule 25(d).

Substitution at any stage, Rule 25(e).

Survival of action in event of death, Rule 25(a)(2).

Transfer of interest, Rule 25(c).

JUDICIAL DECISIONS

Cited in: State v. Korsen, 141 Idaho 445, 111 P.3d 130 (2005); Dypwick v. Swift Transp. Co., 147 Idaho 347, 209 P.3d 644 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Court Order.

Executor.

Nonresident Decedents.

Notice.

Requirement.

Court Order.

Motion and order for substitution of new party are necessary for proceeding and action. Holter v. Hauser, 33 Idaho 406, 195 P. 628 (1921).

Court order of substitution is not necessary to enable administrator to carry on his intestate's litigation by appeal. Oatman v. Hampton, 43 Idaho 675, 256 P. 529 (1927); Hanson v. Rogers, 54 Idaho 360, 32 P.2d 126 (1934).

Executor.

Substitution of wife as administratrix of her husband's estate is proper even though suit was originally instituted by wife as guardian of insane husband without any regular appointment as such. McGrath v. West End Orchard & Land Co., 43 Idaho 255, 251 P. 623 (1926).

Where one of defendants in proceeding by ditch company to enjoin obstruction of ditch died, Supreme Court vacated the setting and

continued case and executor thereafter was substituted by motion and the case reset for argument. Lower Payette Ditch Co. v. Smith, 73 Idaho 514, 254 P.2d 417 (1953).

Nonresident Decedents.

Court judicially notices that nonresident decedent, being defendant in pending action which survived death, had filed counterclaim, justifying appointment of administrator, there being res for administration. Russell v. Bow, 50 Idaho 264, 295 P. 437 (1931).

If nonresident decedent is plaintiff in pending action which survives death, court may appoint administrator; but where he is defendant there is no res for administration, precluding administrator. Russell v. Bow, 50 Idaho 264, 295 P. 437 (1931).

Notice.

Substitution of parties made ex parte without notice is void for want of jurisdiction. Withington v. Erickson, 57 Idaho 53, 63 P.2d 150 (1936).

Requirement.

The action cannot be continued in the name of the deceased in behalf of his heirs without substitution of a representative or successor in interest of deceased. Arthur v. Kilpatrick Bros. Co., 47 Idaho 306, 274 P. 800 (1929).

RESEARCH REFERENCES

A.L.R. Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits. 13 A.L.R.3d 848.

Effect of death of a beneficiary upon right of action under death statute. 13 A.L.R.4th 1060.

Applicable time limitations for service upon persons not parties, of motion and notice of

motion for substitution of parties on death under Rule 25 (a) (1) of Federal Rules of Civil Procedure. 13 A.L.R. Fed. 830.

Sufficiency of suggestion of death of party,

filed under Rule 25 (a) (1) of Federal Rules of Civil Procedure governing substitution of parties upon death. 105 A.L.R. Fed. 816.

Rule 25(a)(2). Death of coparty — Effect.

In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS	
Personal Injury Actions. Substitution of Executor.	thus assignable. MacLeod v. Stelle, 43 Idaho 64, 249 P. 254 (1926).
Personal Injury Actions.	Substitution of Executor.
Injuries of personal nature which do not survive are such as injury to person, malicious prosecution, false imprisonment, libel, slander and the like; but injury which lessens estate of injured party does survive and is	Where one of defendants in proceeding by ditch company to enjoin obstruction of ditch died, Supreme Court vacated the setting and continued case and executor thereafter was substituted by motion and the case reset for argument. Lower Payette Ditch Co. v. Smith, 73 Idaho 514, 254 P.2d 417 (1953).

Rule 25(b). Incompetency.

If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.

STATUTORY NOTES

Cross References. Parties, incompetent persons, Rule 17(c). Pleading special matters, capacity, Rule 9(a).	Substitution of parties, Rule 25(a)(1). Summons, upon incompetent, Rule 4(d)(3).
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Rule 25(c). Transfer of interest.

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

STATUTORY NOTES

Cross References. Death of coparty, effect, Rule 25(a)(2).	Substitution of parties on death, Rule 25(a)(1).
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JUDICIAL DECISIONS

Basis for Adding Party.

Where the oral pronouncements from the court, and its subsequently entered written orders, were unclear and inconsistent on the issue as to whether a party was entered into a suit through intervention under IRCP 24(a),

joinder under IRCP 19(a)(1), or substitution under this rule, the suit must be remanded to the district court for clarity. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Bank Directors.

Notice.

Transfer of Right of Action.

Bank Directors.

Supreme Court in appeal from order of trial court upholding validity of election of bank directors granted a motion to substitute successors in interest to director who had resigned pending appeal, though permitting resigned director to remain as a nominal plaintiff. *Doolittle v. Morley*, 76 Idaho 138, 278 P.2d 998 (1955).

Notice.

Orders substituting as litigants the successors in interest of parties to actions were not usually granted in the first instance upon ex parte applications but were within the scope of former statute requiring notice to the opposing party of the time and place of a hearing

of a motion for such order. *Withington v. Erickson*, 57 Idaho 53, 63 P.2d 150 (1936).

Under former statute, substitution of party as successor in interest of litigant made ex parte and without notice to opposing party was void. *Withington v. Erickson*, 57 Idaho 53, 63 P.2d 150 (1936).

Transfer of Right of Action.

Where the plaintiff transferred the land and water rights by absolute deed during the pendency of an action to quiet the title to water rights, and no application was made that the real party in interest be made a party to the action and the plaintiff objected to the transferee being made a party, the plaintiff was not, under these circumstances, the "real party in interest" and was not entitled to maintain the action, notwithstanding the fact that the conveyance may have been made without consideration. *Carrington v. Crandall*, 63 Idaho 651, 124 P.2d 914 (1942).

Rule 25(d). Public officers — Death or separation from office.

When a public officer in an official capacity is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action shall be continued and maintained by or against the officer's successor.

STATUTORY NOTES

Cross References. Designation of governmental parties, Rule 3(b).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeals.

Mandamus.

Appeals.

Whether, as a matter of right, a successor in office may be substituted for his predecessor as a party to an appeal to the Supreme Court in a mandamus proceeding, was not decided; but substitution was granted as no objection

was made and no substantial right was violated. *Independent Sch. Dist. No. 2 v. Butler*, 53 Idaho 187, 22 P.2d 685 (1933).

Mandamus.

In mandamus to compel district judge to vacate certain orders, and in prohibition to restrain him from proceeding in the case, his successor in office cannot be substituted. *Boise-Kuna Irrigation Dist. v. Hartson*, 48 Idaho 572, 285 P. 456 (1929).

Rule 25(e). Substitution at any stage.

Substitution of parties under the provisions of this rule may be made by the trial court either before or after judgment or, pending an appeal, by the Supreme Court.

JUDICIAL DECISIONS

Method of Determining.

It is necessary for a trial court to determine whether a party entering a suit is admitted by intervention or substitution before the propriety of that procedure may be determined; therefore, because the record did not clearly

reflect by what procedure the district court allowed the party to enter the suit, the case was remanded. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Manner of Substitution.
Procedure for Substitution.
Substitution on Appeal.

Manner of Substitution.

Motion and order for substitution of new party are necessary before proceeding in action. *Holter v. Hauser*, 33 Idaho 406, 195 P. 628 (1921).

Procedure for Substitution.

Order substituting as litigants successors

in interest by parties to the action cannot be made ex parte; it must be procured on motion after notice to the opposing party. *Withington v. Erickson*, 57 Idaho 53, 63 P.2d 150 (1936).

Substitution on Appeal.

Supreme Court, in appeal from order of trial court upholding validity of election of bank director, granted a motion to substitute successor in interest to director who had resigned pending appeal, though permitting resigned director to remain as a nominal plaintiff. *Doolittle v. Morley*, 76 Idaho 138, 278 P.2d 998 (1955).

Rule 26(a). Discovery methods.

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

STATUTORY NOTES

Cross References. Affidavits supplemented or opposed by depositions, Rule 56(e).

Amending pleadings when required by justice, Rule 15(a).

Continuance to permit depositions to be taken, Rule 56(f).

Depositions before action or pending appeal, Rules 27(a)(1)-27(b).

Depositions upon oral examination, certification and filing, Rule 30(f)(1).

Effect of errors and irregularities in depositions, Rules 32(b), 32(d).

Evidence on motion by deposition, Rule 43(e).

Examination and cross-examination, Rule 30(c).

Examination, record of, Rule 30(c).

Failure of party to attend, Rule 37(d).

Failure to attend deposition, expenses, Rule 30(g)(1).

Failure to serve subpoena, expenses, Rule 30(g)(1).

Interrogatories to parties, Rule 33.

Objections to admissibility, Rule 32(b).

Orders for protection of deponents, Rule 26(c).

Persons before whom depositions taken, Rules 28(a)-28(e).

Pleading to contain short and plain statement of claim, Rule 8(a)(1).

Refusal to answer, consequences, Rule 37(a).

Scope of examination, Rule 26(b)(1).

Stipulations regarding the taking of depositions, Rule 29.

Subpoena for taking depositions, Rules 45(d)(1), 45(d)(2).

Terminating or limiting examination, motion to, Rule 30(d).

Testimony of witnesses to be taken orally in open court, Rule 43(a).

Time and place of taking deposition, Rule 30(a).

Use of depositions, Rule 32(a).

Written interrogatories, Rules 31(a)-31(d).

JUDICIAL DECISIONS

ANALYSIS

Applicability.

Attorney-Client Privilege.

Exclusion of Expert Testimony.

Applicability.

District court properly imposed sanctions against the attorney because Idaho R. Civ. P. 11(a)(1) was specifically designed to be a management tool by which the district court could, among other things, punish actions such as the attorney's evasive discovery answer, which constituted litigative misconduct. The attorney's interrogatory answer violated his certification under Idaho R. Civ. P. 26(b)(1) that his discovery response was warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law. *Lester v. Salvino*, 141 Idaho 937, 120 P.3d 755 (Ct. App. 2005).

Attorney-Client Privilege.

In a product liability case, a trial court did not compel the production of suspension orders regarding the preservation of test data where they were not subject to discovery

because they were protected by the attorney-client privilege; the communications were confidential and were made for the purpose of rendering professional legal advice. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 116 P.3d 27 (2005).

Exclusion of Expert Testimony.

In a medical malpractice case, the decision to strike plaintiff's expert's supplemental affidavit was an abuse of discretion because the denial ignored that Idaho law contemplated that expert opinions could change and develop during the course of litigation. The pretrial order and subsequent decision also denied plaintiffs an opportunity to respond to or rebut the defendant's evidence. *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006).

Trial court properly excluded plaintiff's expert's testimony where the plaintiffs failed to demonstrate an acceptable reason to extend the discovery deadlines previously imposed by the court. *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006).

Cited in: *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976); *Jen-Rath Co. v. KIT Mfg. Co.*, 137 Idaho 330, 48 P.3d 659 (2002).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Construction.

Incompetent Testimony.

Use in Evidence.

Construction.

Former Rule 33, by providing that interrogatories may relate to any of the matters inquired into under former Rule 26(b), was coextensive with the discovery procedure of former similar rule providing for the taking of a deposition "for the purpose of discovery or for use as evidence or for both." *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

Incompetent Testimony.

Incompetency of witness to testify under

§ 9-202 as to any matter of fact occurring before death of deceased was not waived by executrix's action of taking and filing discovery deposition even though deposition was not introduced in evidence. *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

Use in Evidence.

Former similar rule and former rules 26(b), (d), (e), (f), 32(c)(1), 33, and 43(a) presupposed the admission in evidence of a deposition or part thereof desired to be used, or upon which some aspect of the trial may be predicated, by an adverse party, but with the objection thereto saved, particularly by former rules 26(f) and 43(a), should answers to interrogatories be self-serving. *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

RESEARCH REFERENCES

A.L.R. Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings. 21 A.L.R.3d 912.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness. 23 A.L.R.3d 389.

Application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures. 23 A.L.R.3d 1172.

Personal representative's loss of rights under dead man's statute by prior institution of discovery proceedings. 35 A.L.R.3d 955.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial. 36 A.L.R.3d 1367.

Discovery of Deleted E-mail and Other Deleted Electronic Records. 27 A.L.R.6th 565.

Discovery for purposes of determining whether class action requirements under Rule 23(a) and (b) of Federal Rules of Civil Procedure are satisfied. 24 A.L.R. Fed. 872.

Pretrial deposition — discovery of opinions of opponent's expert witness. 33 A.L.R. Fed. 403.

Rule 26(b)(1). Scope of discovery in general.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATUTORY NOTES

Cross References. Motion to terminate or limit examination, Rule 30(d).

Orders for protection of parties and deponents, Rule 26(c).

Physical and mental examination of persons, report of findings, Rule 35(b)(1).

JUDICIAL DECISIONS

ANALYSIS

Applicability.
Identity of Witness.
Insurance Documents.

Applicability.

This rule limits the scope of discovery available to civil litigants. *Aeschliman v. State*, 132 Idaho 397, 758 P.2d 749, 973 P.2d 749 (Ct. App. 1999).

Identity of Witness.

The identity of each witness is discoverable and is not the work product of an attorney.

Wiseman v. Schaffer, 115 Idaho 537, 768 P.2d 800 (Ct. App. 1989).

Insurance Documents.

District court did not err in breach of an insurance contract case when it refused to allow the insured to obtain discovery from the insurance companies about the underwriting process in connection with the builder's risk policy; the district court did allow the insured to look at the underwriting file; the other discovery requests were too burdensome. *Villa Highlands, LLC v. Western Cmty. Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appraisers' Reports.
 Attorney's "Work Product".
 Extent of Inquiry.
 Questions Concerning Liability Insurance Coverage.
 Use in Evidence.

Appraisers' Reports.

Copies of reports prepared by the state's appraisers, the appraisal figure of each appraiser, together with the computations, comments and circumstances reported were privileged in that the conclusions of the appraisers for the purpose of the condemnation proceeding were considered as those of experts. *State ex rel. Rich v. Bair*, 83 Idaho 475, 365 P.2d 216 (1961).

Attorney's "Work Product".

In a personal injury damage case, names of witnesses secured by defendant's attorney, photographs taken of the scene of the accident, and copies of police reports were not part of such attorney's "work product" so as to be immune from discovery under former similar section. *Sanders v. Ayrhart*, 89 Idaho 302, 404 P.2d 589 (1965).

Extent of Inquiry.

It was not reversible error for the trial court to quash a subpoena duces tecum which called for production of all statements of all parties in possession of an insurance adjuster

and to refuse a request that defendant's attorney produce such documents without a statement by plaintiff's attorney as to what evidence he expected such documents to contain, although the propriety of such refusal could not be based on former similar rule. *Openshaw v. Adams*, 92 Idaho 488, 445 P.2d 663 (1968).

Questions Concerning Liability Insurance Coverage.

While information concerning the existence and amount of liability insurance coverage of a defendant in a tort action is useful to plaintiff in evaluating his claim, and may be conducive to settlement of the controversy, it was not "relevant to the subject-matter of the pending action" within the meaning of former similar rule. *Sanders v. Ayrhart*, 89 Idaho 302, 404 P.2d 589 (1965).

Use in Evidence.

Former rule regarding scope of discovery and former Rules 26(a), (d), (e), (f), 32(c)(1) [rescinded], 33, and 43(a) presupposed the admission in evidence of a deposition or part thereof desired to be used, or upon which some aspect to the trial might have been predicated, by an adverse party, but with the objection thereto saved, particularly by former Rules 26(f) and 43(a), should answers to interrogatories have been self-serving. *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

RESEARCH REFERENCES

A.L.R. Scope of defendant's duty of pretrial discovery in medical malpractice action. 15 A.L.R.3d 1446.

Discovery in civil case, of material which is or may be designed for use in impeachment. 18 A.L.R.3d 922.

Identity of witnesses whom adverse party plans to call to testify at civil trial, as subject of pretrial discovery. 19 A.L.R.3d 1114.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege. 25 A.L.R.3d 1401.

Pretrial discovery of defendant's financial worth on issue of damages. 27 A.L.R.3d 1375.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another. 37 A.L.R.3d 1373.

Discovery, in medical malpractice action, of

names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff. 74 A.L.R.3d 1055.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician. 81 A.L.R.3d 944.

Discovery or inspection of state bar records of complaints against or investigations of attorneys. 83 A.L.R.3d 777.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings. 58 A.L.R.4th 653.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings. 63 A.L.R.4th 712.

Discoverability of Metadata. 29 A.L.R.6th 167.

Pretrial deposition-discovery of opinions of opponent's expert witness. 33 A.L.R. Fed. 403.

Rule 26(b)(2). Insurance agreements.

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. (Amended December 19, 1975, effective January 1, 1976.)

RESEARCH REFERENCES

A.L.R. Pretrial examination or discovery to ascertain from defendant in action for injury, death, or damages, existence and amount of liability insurance and insurer's identity. 13 A.L.R.3d 822.

Rule 26(b)(3). Trial preparation — Materials.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, including communications between the attorney and client, whether written or oral.

A party may obtain without the required showing a statement previously made by that party concerning the action or its subject matter. Upon request, a person not a party may obtain without the required showing a statement previously made by that person concerning the action or its subject matter. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded. (Amended December 19, 1975, effective January 1, 1976.)

STATUTORY NOTES

Compiler’s Notes. The words in parentheses so appeared in the rule as adopted.

JUDICIAL DECISIONS

Undue Hardship.

Trial court did not abuse its discretion when it prohibited defendant from taking a police officer’s video deposition in another state where defendant scheduled the deposition late in the proceedings, could have taken the officer’s deposition at any time over the

previous two years, and it was unduly burdensome to expect plaintiff to have traveled to California on short notice the week before trial to participate in the deposition. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

Cited in: *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004).

Rule 26(b)(4). Trial preparation — Experts.

Discovery of facts known and opinions held by experts expected to testify, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory and/or deposition, including:

(A)(i) A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(iii) No party shall contact an expert witness of an opposing party without first obtaining the permission of the opposing party or the court. (Amended April 19, 1995, effective July 1, 1995; amended February 26, 1997, effective July 1, 1997; amended March 31, 2006, effective July 1, 2006.)

JUDICIAL DECISIONS

ANALYSIS

Admissibility
Applicability.
Identity of Witness.

Admissibility

In a workers’ compensation case, an employee was not entitled to strike an IME doctor’s medical opinions in a post-hearing deposition under Idaho R. Civ. P. 26(b)(4) and (e) because no new opinions were expressed; the doctor merely expounded upon those previously offered. *Watson v. Joslin Millwork,*

Inc., 149 Idaho 850, 243 P.3d 666 (2010).

Applicability.

Subsection (b)(4) was inapplicable and irrelevant to the discovery of information acquired by an expert as a treating physician, and it provided no justification for plaintiff’s failure to respond to defendants’ interrogatories seeking disclosure of all of the physician’s opinions that plaintiff wished to present at trial; plaintiff had a duty to answer defendants’ interrogatories asking for the facts and opinions to which his expert witnesses would testify. *Clark v. Raty*, 137 Idaho 343, 48 P.3d 672 (Ct. App. 2002).

Identity of Witness.

Court erred by permitting a doctor's expert to testify where he had not disclosed the identity of the witness, nor the substance of the witness's testimony before trial, even though the plaintiffs had filed the proper request. *Clark v. Klein*, 137 Idaho 154, 45 P.3d 810 (2002).

In a medical negligence case, defendant

doctor did not properly disclose his expert witness as required by paragraph (b)(4); thus, the district court did not err by barring him from calling the expert during his case in chief. *Aguilar v. Coonrod*, — Idaho —, 262 P.3d 671 (2011).

Cited in: *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985).

RESEARCH REFERENCES

A.L.R. Pretrial deposition-discovery of opinions of opponent's expert witnesses. 33 A.L.R.Fed. 403.

Pretrial discovery of facts known and opin-

ions held by opponent's experts under Rule 20(b)(4) of Federal Rules of Civil Procedure. 33 A.L.R. Fed. 403.

Rule 26(b)(4)(B). Experts not expected as witnesses.

A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except as provided in Rule 35(b) or except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

JUDICIAL DECISIONS**Expert Called by Opposing Party.**

In a property sale dispute, the trial court did not err in barring the testimony of the sellers' expert witness in the buyer's case in chief since I.R.C.P. 26(b)(4)(B) did not allow

an expert to be called by an opposing party during trial without a proper showing of exceptional circumstances. *White v. Mock*, 140 Idaho 882, 104 P.3d 356 (2004).

Rule 26(b)(4)(C). Fees of expert — Apportionment.

Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule, and, in the event discovery is obtained by deposition under (b)(4)(A)(i) of this rule, the party seeking discovery shall pay the expert a reasonable fee for time spent testifying at said deposition; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. (Amended April 4, 2008, effective July 1, 2008.)

Rule 26(b)(5)(A). Privileged information withheld.

When a party withholds information otherwise discoverable under these rules by claiming it is privileged or subject to protection as trial preparation

material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. (Adopted March 17, 2006, effective July 1, 2006.)

Rule 26(b)(5)(B). Privileged information produced.

When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court. (Adopted March 17, 2006, effective July 1, 2006.)

Rule 26(c). Protective orders.

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matter relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.
Showing of Need.

Discretion of Court.

Given the permissive language of this rule, a court's decision to grant a protective order

was discretionary and not subject to being overturned absent an abuse of that discretion. *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 996 P.2d 798 (2000).

Showing of Need.

Where all materials generated in federal multi-district litigation involving defendant

were available to plaintiffs for a reasonable charge, the trial court in state action was well within its authority to limit plaintiffs' discovery efforts by precluding the taking of depositions of various employees, officers, past employees and past officers of the defendant

because plaintiffs made no showing of a need for information that was not already contained in the federal multi-district litigation. *Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 788 P.2d 1293 (1990).

RESEARCH REFERENCES

A.L.R. Use of evidence excludible under dead man's statute to defeat or support summary judgment. 67 A.L.R.3d 970.

Construction and application of provisions of Federal Rule of Civil Procedure 26(c) pro-

viding for the filing of secret or confidential documents or information enclosed in sealed envelopes to be opened only as directed by the court. 19 A.L.R. Fed. 970.

Rule 26(d). Sequence and timing of discovery.

Unless the court upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Rule 26(e). Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) If a party fails to seasonably supplement the responses as required in this Rule 26(e), the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party. (Amended March 30, 1988, effective July 1, 1988.)

JUDICIAL DECISIONS

ANALYSIS

Application.
 Discretion of Court.
 Exclusion of Expert Testimony.
 New Trial.
 No Abuse of Discretion.
 Substitute Witness.
 Supplementation of Responses.

Application.

Where an action to admit an alleged will to probate was commenced on August 5, 1974, this rule, which became effective January 1, 1975, was not applicable, so that the trial court did not err in admitting the testimony of contestant's witness who had not been listed as a potential witness in answer to proponent's interrogatory. In re Estate of Webber, 97 Idaho 703, 551 P.2d 1339 (1976).

Discretion of Court.

The imposition of the sanction of exclusion of testimony for failure to timely supplement a discovery response rests in the sound discretion of the trial court. Viehweg v. Thompson, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).

When the identity of a witness is tardily disclosed, the trial judge should request an explanation of the late disclosure, weigh the importance of the testimony in question, determine the time needed for preparation to meet the testimony, and consider the possibility of a continuance. Viehweg v. Thompson, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982); Wiseman v. Schaffer, 115 Idaho 537, 768 P.2d 800 (Ct. App. 1989).

In medical malpractice action, summary judgment was improperly granted to doctor where trial court improperly disregarded plaintiff's expert's supplemental affidavit regarding his familiarity with the local standard of care even though affidavit possibly conflicted with his earlier deposition testimony. Mains v. Cach, 143 Idaho 221, 141 P.3d 1090 (2006).

Exclusion of Expert Testimony.

The trial court made an intensive inquiry into what tests were conducted by expert witness pre- and post-deposition and entertained the argument of counsel on the tests and related evidentiary issues. The trial court acted within its discretion, applied the correct legal standards and clearly reached its decision by exercise of reason; under the circumstances, the trial court did not abuse its discretion in refusing to exclude the expert testimony in this case. Hopkins v. Duo-Fast Corp., 123 Idaho 205, 846 P.2d 207 (1993).

In a medical malpractice action, the trial court did not abuse its discretion in precluding plaintiffs' medical expert from testifying regarding a delegation of services agreement on the ground that the expert's opinion had not been disclosed to defendants. Plaintiffs' failure to disclose the expert's opinions regarding the delegation of services agreement was due as much to their own neglect as that of defendants. Schmechel v. Dille, M.D., 148 Idaho 176, 219 P.3d 1192 (2009).

In a workers' compensation case, an employee was not entitled to strike an IME doctor's medical opinions in a post-hearing deposition under Idaho R. Civ. P. 26(b)(4) and (e) because no new opinions were expressed; the doctor merely expounded upon those previously offered. Watson v. Joslin Millwork, Inc., 149 Idaho 850, 243 P.3d 666 (2010).

New Trial.

The ability of the defendants in a personal injury action to present their case was substantially prejudiced by the failure of the injured party to supplement and/or clarify his answers to the interrogatories concerning the expected testimony of his expert witness and the introduction of the medical reports of the previous attending and treating physicians; therefore, the cause was remanded for a new trial on the damage issue. Zolber v. Winters, 109 Idaho 824, 712 P.2d 525 (1985).

No Abuse of Discretion.

In a suit by pickup truck owners against a tow truck operator for trespass or conversion and negligence in towing their pickup, without authorization, to a location where it was subsequently stolen, the magistrate did not abuse his discretion by admitting testimony of tow truck operator's witnesses whose testimony touched only upon the negligence theory of the action, even though the identity of the witnesses was not disclosed until three days prior to the trial. Wiseman v. Schaffer, 115 Idaho 537, 768 P.2d 800 (Ct. App. 1989).

Where defendant convicted of rape contended that several letters written between his attorneys in Cassia and Idaho Counties demonstrated that confusion existed over his plea negotiations, the district judge did not err in refusing to admit the letters at defendant's post-conviction relief hearing because defendant had failed to provide the letters to the Cassia County prosecutor pursuant to a prehearing discovery request. Gee v. State, 117 Idaho 107, 785 P.2d 671 (Ct. App. 1990).

The trial court did not abuse its discretion in excluding videotape and testimony where the tenor and results of pretrial hearings

should have put the defendant on notice that sanctions were probable if either party violated discovery orders, but where the defendant gambled on the possibility that it could show a videotape as impeachment evidence and then failed to show good cause for not producing the evidence during the mandated disclosure period. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Substitute Witness.

The trial court did not abuse its discretion by refusing to exclude the testimony of a physician in place of the testimony of plaintiff's treating physician who was unavailable at trial since the testimony was substantially similar to that which the defendant was notified of and supposedly was prepared to cross examine. *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 726 P.2d 648 (1985).

Supplementation of Responses.

In an action between a mortgagee and property owner who had deeded property to mortgagor, wherein the mortgagee sought to foreclose on the mortgage to recover for loans the mortgagor had failed to repay, the mortgagee was under no duty to supplement his responses to interrogatories by informing the property owner of recovery by the mortgagee in a different state where the out-of-state action dealt with an attempt to recover on the same loans which were the subject of the foreclosure action. *Artiach Trucking, Inc. v. Wolters*, 118 Idaho 656, 798 P.2d 938 (Ct. App. 1990).

Cited in: *Sirius LC v. Erickson*, 150 Idaho 80, 244 P.3d 224 (2010).

Rule 26(f). Signing of discovery requests, responses, and objections.

(1) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(2) If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney's fees. (Adopted March 20, 1985, effective July 1, 1985.)

Rule 27(a)(1). Depositions before action — Petition.

A person who desires to perpetuate testimony or that of another person regarding any matter that may be cognizable in any court of the state of Idaho may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the state of Idaho but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

STATUTORY NOTES

Cross References. Notice and service, Rule 27 (a)(2).

Order and examination, Rule 27(a)(3).

Pending appeal, Rule 27(b).

Persons before whom taken in foreign countries, Rule 28(b).

Persons before whom taken within the United States, Rule 28(a).

Use of deposition, Rule 27(a)(4).

RESEARCH REFERENCES

A.L.R. Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence. 12 A.L.R.5th 577, 60 A.L.R. Fed. 924.

Construction and Application of Fed. R. Civ. P. 27. 37 A.L.R. Fed. 2d 573.

Rule 27(a)(2). Notice and service.

The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the county or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

STATUTORY NOTES

Cross References. Infants or incompetent persons, representative acting for, Rule 17(c).
Process, issuance, Rules 4(a)-4(h).

Summons, personal service, Rule 4(d).
Time computation, Rule 6(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

Order of Admission.
Where the evidence of a witness is taken by deposition after the notice given as provided by statute, and the adverse party neglects to appear and cross-examine the witness, and thereafter gives notice in conformity with law of the taking of a deposition of the same witness, and in pursuance of such notice

takes deposition of such witness and in so doing cross-examines the witnesses on the deposition previously given by him, it is erroneous procedure to admit the later deposition as a part of plaintiff's case before the defendant has opened his side of the case. *Vaughn v. Johnson*, 20 Idaho 669, 119 P. 879 (1911).

Rule 27(a)(3). Order and examination.

If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

STATUTORY NOTES

Cross References. Discovery and production of documents and things, Rule 34.
Persons before whom taken in foreign countries, Rule 28(b).

Persons before whom taken within the United States, Rule 28(a).
Physical and mental examinations, Rule 35(a).

Rule 27(a)(4). Use of deposition.

If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in district court, in accordance with the provisions of Rule 32(a).

STATUTORY NOTES

Cross References. Depositions before action or pending appeal, Rule 27(a)(1).

Depositions to be used in other states, Rule 28(e).

Rule 27(b). Depositions pending appeal.

If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court

in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

STATUTORY NOTES

Cross References. Discovery and production of documents and things, Rule 34. Physical and mental examinations, Rule 35(a).

Rule 27(c). Perpetuation by action.

This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 28(a). Persons before whom depositions may be taken — Within the United States.

Within the state of Idaho, depositions shall be taken before a person authorized by the laws of this state to administer oaths; without the state, but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this state, by the United States, or of the place where the examination is held; within or without the state of Idaho, depositions may also be taken before a person appointed by the court in which the action is pending, which persons so appointed shall have the power to administer oaths and take testimony.

STATUTORY NOTES

Cross References. Affidavits, persons sworn before, Rule 11(c).	Disqualification of officer, waived when, Rule 32(d).
Certification and filing by officer, Rule 30(f)(1).	Officer to prepare record after taking responses, Rule 31(b).
Depositions to be used in other states, Rule 28(e).	Persons in foreign countries, who may take, Rule 28(b).
Disqualification for interest, Rule 28(d).	Record of examination, Rule 30(c).

Rule 28(b). Taking in foreign countries.

In a foreign state or country depositions shall be taken (1) before a secretary of embassy or legation, consul, vice consul, or consular agent of the United States, or any officer authorized to administer oaths under the laws of this state, or of the United States or (2) before a person appointed by the court. The officer or person is empowered to administer oaths and take testimony. A commission shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title.

Rule 28(c). Members of the armed forces.

The deposition of a person in any of the armed forces of the United States or of the state of Idaho or of their spouses and children or any other person subject to military or naval law or their spouses and dependents, may be taken before any officer of any component of any branch of such armed forces of the United States or the state of Idaho. Recital in the certificate of such officer that the officer holds the office stated in the certificate and that affiant is a member of such armed forces or subject to military or naval law or is a spouse or child of such member, shall be prima facie evidence of such facts. (Amended December 19, 1975, effective January 1, 1976.)

STATUTORY NOTES

Cross References. Taking of depositions by armed forces officers, § 55-705.

Rule 28(d). Disqualification for interest.

No deposition shall be taken before a person who is a relative, employee or attorney or counsel of any party, or is a relative or employee of such attorney or counsel, or is financially interested in the action; provided that such disqualification shall not apply to an attorney acting as a notary public for the acknowledgment of a document, or the verification of an affidavit or pleading in an action.

Rule 28(e). Depositions to be used in other states. [Repealed.]**STATUTORY NOTES**

Compiler's Notes. Former Rule 28(e) was repealed by a court order dated March 19, 2009, effective July 1, 2009.

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules

for other methods of discovery. (Amended January 8, 1976, effective March 1, 1976.)

STATUTORY NOTES

Cross References. Objections to admissibility, Rule 32(b).

Rule 30(a). Depositions upon oral examination — When depositions may be taken.

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of a court on such terms as the court prescribes.

STATUTORY NOTES

Cross References. Before whom taken, Rules 28(a), 28(b).

Certification and filing by officer, copies, notice of filing, Rule 30(f)(1).

Copies furnished upon payment of charge, Rule 30(f)(2).

Discovery and production of documents and things, Rule 34.

Effect of errors, Rule 32(d).

Exhibits to depositions, Rule 30(f)(5).

Failure to attend, expenses, Rule 30(g)(1).

Failure to serve subpoena, expenses, Rule 30(g)(2).

Interrogatories to parties, Rule 33(a).

Motion to terminate or limit examination, Rule 30(d).

Notice of filing to be given, Rule 30(f)(3).

Oath, Rule 30(c).

Objections, Rule 30(c).

Objections as to completeness and return, Rule 32(d).

Objections to admissibility, Rule 32(b).

Orders for protection of parties and deponents, Rules 26(c), 31(d).

Publication of depositions, Rule 30(f)(4).

Record of examination, Rule 30(c).

Scope of examination, Rule 26(b)(1).

Stipulations as to, Rule 29.

Submission to witness, changes, signing, Rule 30(e).

Subpoena for taking depositions, Rule 45(d)(1).

Use of, Rule 32(a).

Waiver of objections to form, Rule 32(d).

DECISIONS UNDER PRIOR RULE OR STATUTE

Cross-Examination.

Where the evidence of a witness is taken by deposition after notice given as provided by statute, and the adverse party neglects to appear and cross-examine the witness, and thereafter gives notice in conformity with law of the taking of a deposition of the same witness, and in pursuance of such notice

takes deposition of such witness and in so doing cross-examines the witness on the deposition previously given by him, it is erroneous procedure to admit the later deposition as a part of plaintiff's case before the defendant has opened his side of the case. *Vaughn v. Johnson*, 20 Idaho 669, 119 P. 879 (1911).

Rule 30(b)(1). Notice of examination.

A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

DECISIONS UNDER PRIOR RULE OR STATUTE

Cross-Examination.

Where the evidence of a witness is taken by deposition after notice given as provided by statute, and the adverse party neglects to appear and cross-examine the witness, and thereafter gives notice in conformity with law of the taking of a deposition of the same witness, and in pursuance of such notice

takes deposition of such witness and in so doing cross-examines the witness on the deposition previously given by him, it is erroneous procedure to admit the later deposition as a part of plaintiff's case before the defendant has opened his side of the case. *Vaughn v. Johnson*, 20 Idaho 669, 119 P. 879 (1911).

Rule 30(b)(2). General requirements.

Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out from the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

Rule 30(b)(3). Special notice.

The court may for cause shown enlarge or shorten the time for taking the deposition.

Rule 30(b)(4). Audio-visual deposition.

(A) **Recording.** Any deposition may be recorded by audio-visual means but simultaneously shall be recorded as a stenographic record. Any party may make at the party's own expense a simultaneous stenographic or audio record of the deposition. Upon a party's request and at the party's own

expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.

(B) **Official Record.** The audio-visual recording is an official record of the deposition. A transcript prepared by a reporter is also an official record of the deposition.

(C) **Transcript.** On motion the court, for good cause, may order the party taking, or who took, a deposition by audio-visual recording to furnish, at the party's expense, a transcript of the deposition.

(D) **Use.** An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

(E) **Notice.** The notice for taking an audio-visual deposition and the subpoena for attendance at that deposition must state that the deposition will be recorded by audio-visual means.

(F) **Procedure.** The following procedure must be observed in recording an audio-visual deposition:

(1) **Opening of Deposition.** The deposition must begin with an oral or written statement on camera which includes:

- (i) the operator's name and business address;
- (ii) the name and business address of the operator's employer;
- (iii) the date, time, and place of the deposition;
- (iv) the caption of the case;
- (v) the name of the witness;
- (vi) the party on whose behalf the deposition is being taken; and
- (vii) any stipulations by the parties.

(2) **Counsel.** Counsel shall identify themselves on camera.

(3) **Oath.** The oath must be administered to the witness on camera.

(4) **Multiple Units.** If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit must be announced on camera.

(5) **Closing of Deposition.** At the conclusion of a deposition, a statement must be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters.

(6) **Index.** Depositions must be indexed by a time generator or other method specified by rule.

(7) **Objections.** An objection must be made as in the case of stenographic depositions.

(8) **Editing.** If the court issues an editing order, the original audio-visual recording must not be altered.

(9) **Filing.** Unless otherwise ordered by court, the original audio-visual recording of a deposition, any copy edited pursuant to an order of the court, and exhibits shall be held and preserved by the attorney who noticed the deposition, in the same manner as a transcript of a deposition as provided by Rule 30(f)(1).

(G) **Costs.** The reasonable expense of recording, editing, and using an

audio-visual deposition may be taxed as costs. (Adopted June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988.)

RESEARCH REFERENCES

A.L.R. Use of videotape to take deposition for presentation at civil trial in state court. 66 A.L.R.3d 637.

Recording of testimony at deposition by

other than stenographic means under Rule 30 (b)(4) of Federal Rules of Civil Procedure. 16 A.L.R. Fed. 969.

Rule 30(b)(5). Production of documents and things.

The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

Rule 30(b)(6). Deposition of organization.

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) of this rule does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 30(b)(7). Depositions by conference telephone calls.

The parties may stipulate in writing or the court may upon motion order that a deposition may be taken by telephone. For purposes of this rule and rules 28(a), 37(a)(1), 37(b)(1) and Rule 45(f)(1), a deposition taken by telephone is taken in the state, territory or insular possession and at the place where the deponent is to answer questions propounded to the deponent. (Adopted February 10, 1993, effective July 1, 1993; amended April 4, 2008, effective July 1, 2008.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so

that the former rule was repealed and a new rule enacted.

Rule 30(c). Examination and cross-examination — Record of examination — Oath — Objections.

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b) and the Idaho Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one (1) of the parties, the testimony shall be transcribed at the party's own expense.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition who shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim. (Amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Cross References. Errors and irregularities in depositions, effect, Rule 32(d). Objections to admissibility, Rule 32(b).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Admissibility.
Defects.
Objections to Depositions.
Substantial Compliance.

Admissibility.

Deposition is not rendered inadmissible in evidence because it fails to show that it was read to witness and corrected by him. *Darby v. Heagerty*, 2 Idaho 282, 13 P. 85 (1887).

Defects.

Failure to have deposition sworn to and certified was not a fatal defect where counsel for opposing party examined the witnesses when their depositions were taken and there was no showing of substantial prejudice by reason of failure to follow technical require-

ments. *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P.2d 728 (1938).

Objections to Depositions.

Objection to deposition will not be sustained on appeal when it was introduced in evidence without objection in trial court. *Walling v. Walling*, 36 Idaho 710, 214 P. 218 (1923).

Substantial Compliance.

In a compensation proceeding, depositions taken in accordance with stipulations by the attorneys, by a notary who sealed and certified the depositions, being subscribed and sworn to before the notary, were in substantial compliance with the statutes. *Chambers v. State ex rel. Parsons*, 59 Idaho 200, 81 P.2d 748 (1938).

Rule 30(d). Conduct during depositions; motion to terminate or limit examination.

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Conduct of counsel

or other persons during the deposition shall not impede, delay or frustrate the fair examination of the deponent. If the court finds an impediment, delay or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible appropriate sanctions, including the reasonable costs and attorney's fees incurred by parties as a result thereof, and those listed in Rule 37(b).

(2) Any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or in the district court or magistrates division where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. (Amended March 31, 1998, effective July 1, 1998.)

RESEARCH REFERENCES

A.L.R. Pretrial deposition-discovery of opinions of opponent's expert witness. 33 A.L.R. Fed. 403.

Rule 30(e). Submission to witness — Changes — Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

STATUTORY NOTES

Cross References. Errors and irregularities in completion and return of deposition, Rule 32(d).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Admissibility.
Corrected Testimony.
Objection to Changes.
Substantial Compliance.
Use of Unsigned Deposition.

Admissibility.

Deposition is not rendered inadmissible in evidence because it fails to show that it was read to witness and corrected by him. *Darby v. Heagerty*, 2 Idaho 282, 13 P. 85 (1887).

Corrected Testimony.

Where buyer corrected his prior deposition testimony in which he had stated that he could not recall certain facts about representations made by seller, later statements contained in the corrected deposition testimony were not inconsistent with buyer's affidavits. *Tolmie Farms, Inc. v. J.R. Simplot Co.*, 124 Idaho 607, 862 P.2d 299 (1993).

Objection to Changes.

Failure of the deposition to show the reasons for changes made is waived unless pre-

sented in a motion to suppress. *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966).

Substantial Compliance.

In a compensation proceeding, depositions taken in accordance with stipulations by the attorneys by a notary who sealed and certified the depositions, being subscribed and sworn to before the notary, were in substantial compliance with the statutes. *Chambers v. State ex rel. Parsons*, 59 Idaho 200, 81 P.2d 748 (1938).

Use of Unsigned Deposition.

In an action to foreclose mortgage, where court reporter who took defendant's deposition was instructed by defendant to send the transcribed deposition to defendant's attorney, and where the deposition was in the possession of defendant's attorney for seven months but returned unsigned to the court, the trial court did not abuse its discretion in overruling objection to publication of the deposition and in allowing it to be used as though it had been signed. *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 548 P.2d 72 (1976).

Rule 30(f)(1). Certification by officer and non-filing — Exhibits.

(A) The officer shall certify on the transcript of the deposition that the witness was duly sworn by the officer and that the transcript is a true record of the testimony given by the witness. The officer shall then securely seal the transcript in an envelope or package indorsed with the title of the action and marked "Deposition of (here insert the name of witness)" and shall then promptly transmit it to the attorney for the party who noticed the deposition and for whom the deposition was taken. This attorney shall store the transcript under conditions that will protect it against loss, destruction, or tampering.

(B) The transcript of a deposition shall not be filed with the court. The attorney to whom the transcript of a deposition is transmitted shall retain custody of it until one (1) year after final disposition of the action. At that time, the transcript may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the transcript or record be preserved for a longer period.

(C) Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be

inspected and copied by any party, except that (i) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials request their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case. (Amended March 30, 1988, effective July 1, 1988; amended March 20, 1991, effective July 1, 1991.)

STATUTORY NOTES

Compiler's Notes. The words in parentheses so appeared in the rule as adopted.

Rule 30(f)(2). Copies.

Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

Rule 30(f)(3). Notice of preparation of transcript and filing notice of mailing.

Upon completion of the transcript of the deposition and the mailing thereof to the attorney at whose request the deposition was taken, the officer who prepared the transcript shall promptly notify all parties or their attorneys that the transcript has been completed and has been mailed or otherwise delivered to said attorney. The officer who prepared the transcript shall also file with the court notice stating when the original transcript was completed and mailed, the name and address of the attorney receiving the original transcript, and the name(s) and address(es) of all person(s) receiving copies thereof. (Adopted March 30, 1988, effective July 1, 1988.)

Rule 30(f)(4). Use of deposition.

(A) The attorney having custody of the original transcript shall make it available for inspection by the parties, unless otherwise ordered by the court.

(B) If a deposition, or portions thereof, are to be used at trial, or are to be used either in support of, or in opposition to, a pretrial or post-trial motion, only those portions to be used shall be submitted to the court at the outset of the trial or at the filing of the motion or response thereto, insofar as their use can be reasonably anticipated by the party seeking to introduce such evidence. For purposes of this Rule, and unless a genuine issue of authenticity is raised, a moving party need not produce the original transcript, but may rely on the submission of relevant excerpts from copies of the original transcript.

(C) Depositions, or portions thereof, which have been submitted to the court pursuant to this Rule shall be returned to appropriate counsel after

final disposition of the case. (Adopted March 30, 1988, effective July 1, 1988.)

JUDICIAL DECISIONS

Filing of Entire Deposition Not Required.

With the 1988 amendment to this rule depositions are no longer physically filed with the clerk and the trial court is not required to review the entire deposition on a motion for

summary judgment; only those portions of the deposition that are applicable to the existence or nonexistence of a genuine issue of material fact need be submitted to the court. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 801 P.2d 37 (1990).

Rule 30(f)(5). Exhibits to depositions.

Documentary evidence before the officer or exhibits proved or identified by the witness, may be annexed to and returned with the deposition; or the officer shall, if requested by the party producing the documentary evidence or exhibits, mark it as an exhibit in the case, and return it to the party offering the same, and the same shall be received in evidence as if annexed to and returned with the deposition.

DECISIONS UNDER PRIOR RULE OR STATUTE

Exhibits.

Exhibits referred to in testimony given by deposition are not required to be attached to

or enclosed with the deposition. *Fidelity Acceptance Corp. v. Erickson*, 62 Idaho 152, 108 P.2d 1031 (1941).

Rule 30(g)(1). Failure to attend.

If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by a party and that party's attorney in attending, including reasonable attorney's fees. (Amended March 30, 1994, effective July 1, 1994.)

Rule 30(g)(2). Expenses.

If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

STATUTORY NOTES

Cross References. Motion to terminate or limit examination, Rule 30(d).

DECISIONS UNDER PRIOR RULE OR STATUTE

Erroneous Allowance.

Where the evidence of a witness is taken by deposition after notices are given as provided by law, and the adverse party neglects to appear and cross-examine the witness and thereafter gives notice in conformity with the law of the taking of a deposition of the same witness, and in pursuance of such notice

takes the deposition of the witness and in so doing cross-examines him on his evidence previously given by deposition, it is erroneous to allow the cost and expense of taking such subsequent deposition to the party taking it. *Vaughn v. Johnson*, 20 Idaho 669, 119 P. 879 (1911).

Rule 31(a). Depositions upon written questions — Serving questions — Notice.

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 10 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 5 days after being served with cross questions a party may serve redirect questions upon all other parties. Within 3 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

STATUTORY NOTES

Cross References. Interrogatories to parties, Rule 33.
Notice of filing, Rule 31(c).
Officer to take, Rule 31(b).

Orders for the protection of parties and deponents, Rule 31(d).
Time computation, Rule 6(a).

JUDICIAL DECISIONS

Cited in: *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979).

DECISIONS UNDER PRIOR RULE OR STATUTE

Failure of Service.

Where interrogatories proposed by plaintiff under former Rule 33 submitted by plaintiff and answered by defendant were not served

on defendant as required by this rule, and it appeared that there was a failure to actively pursue the attendance of the witnesses, the trial court properly refused to admit such

interrogatories. *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 511 P.2d 828 (1973).

RESEARCH REFERENCES

A.L.R. Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness. 23 A.L.R.3d 389.

Rule 31(b). Officer to take responses and prepare record.

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and mail the deposition, attaching thereto the copy of the notice and the questions received by the officer. (Amended March 30, 1988, effective July 1, 1988.)

STATUTORY NOTES

Cross References. Certification and filing by officer, Rules 30(f)(1)-30(f)(5).
Record of examination, Rule 30(c).

Submission to witness for changes and signing, Rule 30(e).

Rule 31(c). Notice of preparation of transcript and filing notice of mailing.

In all respects the procedure for notice of preparation of transcript and copies thereof and filing notice of mailing under this Rule shall be in accordance with the provisions of Rule 30(f)(3). (Adopted March 30, 1988, effective July 1, 1988.)

Rule 31(d). Orders for the protection of parties and deponents.

After the service of written questions and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination. (Amended December 19, 1975, effective January 1, 1976.)

RESEARCH REFERENCES

A.L.R. Pre-trial deposition-discovery of opinions of opponent's expert witness. 33 A.L.R. Fed. 403.

Rule 32(a). Use of depositions.

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying,

may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Idaho Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state of Idaho, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor. A deposition previously taken also may be used as permitted by the Idaho Rules of Evidence. (Amended December 19, 1975, effective January 1, 1976; amended March 20, 1985, effective July 1, 1985; amended March 27, 1989, effective July 1, 1989.)

JUDICIAL DECISIONS

ANALYSIS

Construction with Other Rules.
Inadmissible Deposition Testimony.
Part of Deposition Introduced.
Substantially Similar Issues.
Use in Evidence.

Construction with Other Rules.

Depositions by nurses were ruled admissible as statements from party agents who are not corporate designees, not as depositions by persons who were testifying on behalf of a corporation. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Inadmissible Deposition Testimony.

In a medical negligence case, defendant doctor did not properly disclose his expert witness as required by Idaho R. Civ. P. 26(b)(4); thus, the district court did not err by barring him from calling the expert during his case in chief. Because the expert was present and did testify, the doctor could not read portions of the expert's deposition testimony into the record under subsection (a) of this rule. *Aguilar v. Coonrod*, — Idaho —, 262 P.3d 671 (2011).

Part of Deposition Introduced.

If only part of a deposition is offered in evidence by a party, those portions of the deposition which "in fairness" should or should not be admitted under subdivision (4) of this rule lie within the discretion of the trial court. *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984).

Although only part of the coconspirator's deposition was introduced into evidence, the trial court did not err in excluding certain other portions of the deposition since there was no showing that the matters contained in the other portions would have either prejudiced or aided the defendant's case. *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984).

Trial court did not err in admitting portions of the deposition testimony of an expert witness after plaintiff had introduced other por-

tions of the deposition testimony. *Slack v. Kelleher*, 140 Idaho 916, 104 P.3d 958 (2004).

Substantially Similar Issues.

The subject matter requirement of the last paragraph of this rule does not demand precisely the same subject matter but only that the issues be substantially identical. *Eliassen v. Fitzgerald (In re Estate of Eliassen)*, 105 Idaho 234, 668 P.2d 110 (1983).

Where decedent's deposition was taken for his pending divorce action, but he died before that action came to trial and where the issue involved in the divorce case and in the probate proceedings was the characterization and ultimate distribution of the property, and the parties were the same, being the personal representative for the decedent and the widow herself, decedent's deposition was properly admitted in probate proceedings. *Eliassen v. Fitzgerald (In re Estate of Eliassen)*, 105 Idaho 234, 668 P.2d 110 (1983).

Use in Evidence.

A plaintiff bailor was entitled to use the deposition of a witness in its damage action against defendant bailee after showing that the witness lived in Virginia and was beyond the subpoena power of the court. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982).

Cited in: *State v. Phillips*, 99 Idaho 354, 581 P.2d 1173 (1978); *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Failure to Procure Attendance.
Sickness or Infirmary of Deponent.
Time of Objection to Questions.
Use by Adverse Party.
Use in Evidence.
Use of Unsigned Deposition.
Waiver of Objections.
Who May Use.

Failure to Procure Attendance.

Where interrogatories proposed by plaintiff under former Rule 33 submitted by plaintiff and answered by defendant were not served on defendant as required by former Rule 31(a), and it appeared that there was a failure to actively pursue the attendance of the witnesses, the trial court properly refused to admit such interrogatories. *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 511 P.2d 828 (1973).

Sickness or Infirmary of Deponent.

Upon testimony by a deponent's physician that the deponent's physical condition was

such that appearance at the trial would be detrimental to his health, the deposition was qualified for admission under former similar rule even though counsel for plaintiff testified to seeing the deponent a few days before the trial transacting business in a bank and testimony of said counsel that he saw the witness a month after the trial and deemed him able to appear personally was not sufficient to require the court to reopen the trial because of his absence. *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966).

Time of Objection to Questions.

Where a defense attorney wrote to the court requesting that a scheduled pre-trial conference be vacated and the judge did not receive the request before leaving the place to which it was mailed to journey to the county of the scheduled conference, it was error for the court to overrule objections to admission of answers to interrogatories at the trial on the ground that they had already been ruled admissible at the pre-trial conference in the absence of the defense attorney. *Theesen v.*

Continental Life & Accident Co., 90 Idaho 58, 408 P.2d 177 (1965).

Use by Adverse Party.

Where one party instituted deposition proceedings, former similar rule authorized its introduction by the adverse party even though he had made no request for taking the depositions of the witnesses as cross-examination under former Rule 43(b) or § 9-1206 (repealed). *Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 382 P.2d 906 (1963).

Under former Rule 26(d)(2) there was no requirement of a showing of unavailability before an adverse party's deposition could be admitted as substantive evidence; therefore the trial court did not abuse its discretion in admitting defendant's deposition where the parties offering the deposition were defendant's judgment creditors whose claims were adverse to defendant. *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 548 P.2d 72 (1976).

Use in Evidence.

Former similar rule and former Rules 26(a), (b), (e), (f), 32(c)(1), 33, and 43(a) presupposed the admission in evidence of a deposition or part thereof desired to be used, or upon which some aspect of the trial might be predicated, by an adverse party, but with the objection thereto saved, particularly by former Rules 26(f) and 43(a), should answers to interrogatories be self-serving. *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

A deposition containing an admission of a party opponent is admissible, even if the party opponent is present in the court room, if the in-court statement is not likely to be as

accurate as the testimony recorded in the deposition. *Blankenship v. Myers*, 97 Idaho 356, 544 P.2d 314 (1975).

Use of Unsigned Deposition.

In an action to foreclose mortgage, where court reporter who took defendant's deposition was instructed by defendant to send the transcribed deposition to defendant's attorney, and where the deposition was in the possession of defendant's attorney for seven months but returned unsigned to the court, the trial court did not abuse its discretion in overruling objection to publication of the deposition and in allowing it to be used as though it had been signed. *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 548 P.2d 72 (1976).

Waiver of Objections.

The failure to make a motion to correct or supplement a deposition waives any objection to its use for any purpose except for use for purposes of impeachment or contradiction. *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966).

Who May Use.

In an action against a cattle owner and a railroad for damages resulting from collision on the highway with a cow which had escaped through a cattle guard left down by the railroad, a deposition taken by the plaintiff of a railroad official could be used by the cattle owner, who was an adverse party to the plaintiff and also to the railroad by virtue of a cross-claim which he asserted against it. *Whitt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966).

RESEARCH REFERENCES

A.L.R. Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent. 13 A.L.R.3d 1312.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness. 23 A.L.R.3d 389.

Rule 32(b). Objections to admissibility.

Subject to the provisions of subdivision (d) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Failure to Object.
Unsubstantiated Statements.

Failure to Object.

Objections to deposition will not be sustained on appeal when it was introduced in evidence without objection in trial court. *Walling v. Walling*, 36 Idaho 710, 214 P. 218 (1923).

Unsubstantiated Statements.

In an action to foreclose mortgage, defen-

dant's statements in his deposition that he possessed documentary proof of his claims of ownership of resort property and proof of amounts he had invested in the property were properly excluded by the trial court where none of the documents were produced at the deposition nor were they introduced at trial. *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 548 P.2d 72 (1976).

Rule 32(c). Effect of taking or using depositions. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1, 1975) was rescinded by order of the Supreme Court, of March 20, 1985, effective July 1, 1985.

Rule 32(d). Effect of errors and irregularities in depositions.

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to taking of deposition.**

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) **As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is

prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

STATUTORY NOTES

Cross References. Depositions of witnesses upon written interrogatories, Rules 31(a)-31(d).

Depositions upon oral examination, Rules 30(a)-30(g)(2).

Rejection required by refusal to sign, Rule 30(e).

JUDICIAL DECISIONS

Taking of Depositions.

In an action to quiet title to land, a party's objection that the opposing counsel was leading his witness on cross examination under a

deposition was waived since the party failed to state his objection at the time of the taking of the deposition. *Collins v. Parkinson*, 98 Idaho 871, 574 P.2d 913 (1978).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Failure of Witness to Sign.
Presumption of Irregularity.
Slight Irregularity.
Timely Objections.

Failure of Witness to Sign.

Failure to make a timely motion to suppress deposition because it was not signed by witness acted as a waiver of the irregularity. *Nab v. Hills*, 92 Idaho 877, 452 P.2d 981 (1969).

In an action to foreclose mortgage, where court reporter who took defendant's deposition was instructed by defendant to send the transcribed deposition to defendant's attorney, and where the deposition was in the possession of defendant's attorney for seven months but returned unsigned to the court, the trial court did not abuse its discretion in overruling objection to publication of the deposition and in allowing it to be used as though it had been signed. *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 548 P.2d 72 (1976).

Presumption of Irregularity.

Irregularity in the taking of a deposition is presumed on motion to suppress. *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P.2d 728 (1938).

Slight Irregularity.

Slight irregularity in the taking of deposi-

tions will not cause the deposition to be excluded. *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P.2d 728 (1938); *Chambers v. State ex rel. Parsons*, 59 Idaho 200, 81 P.2d 748 (1938).

Timely Objections.

Objection to deposition will not be sustained on appeal when it was introduced in evidence without objection in trial court. *Walling v. Walling*, 36 Idaho 710, 214 P. 218 (1923).

Where, at trial, objections were made to the reading of a number of questions from a deposition on the ground mainly that the questions were leading and suggestive and in some instances improper, foundation was laid as to conversations to which the examination was directed, the trial court erred in sustaining such objections which were made for the first time at the trial and were not advanced at the time the deposition was taken since such objections could have been obviated had they been properly presented at that time. *Nutterville v. McLam*, 84 Idaho 36, 367 P.2d 576 (1961).

This rule, together with Rule 30(e) contemplates that any objection to the deposition because of changed answers or of the failure of the officer to show both the original and the changed answers and the reasons for the changes should be made by timely motion and not by oral testimony during the trial. *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966).

Rule 33(a). Interrogatories to parties — Availability — Procedures for use.

(1) **Use of Interrogatories.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(2) **Answers to Interrogatories.** Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections may be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve the original of the answers, and objections if any, within 30 days after the service of the interrogatories. The court may allow a shorter or longer time. The answers shall first set forth each interrogatory asked, followed by the answer or response of the party. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer any interrogatory.

(3) **Number of Interrogatories.** No party shall serve upon any other single party to an action more than forty (40) interrogatories, in which sub-parts of interrogatories shall count as separate interrogatories, without first obtaining a stipulation of such party to additional interrogatories or obtaining an order of the court upon a showing of good cause granting leave to serve a specific number of additional interrogatories.

(4) **Not Filed with Court.** The interrogatories and the response thereto shall not be filed with the court. The propounding party shall retain both the original of the interrogatories and the original of the answers with the original proof of service affixed thereto, and the original of the sworn response until one (1) year after final disposition of the action. At that time, both originals may be destroyed, unless the court on motion of any party and for good cause shown orders that the originals be preserved for a longer period.

(5) **Notice of Serving.** The party serving either an interrogatory or a response thereto, shall file with the court a notice of when the interrogatory or response was served and upon whom. (Amended December 27, 1979, effective July 1, 1980; amended March 30, 1988, effective July 1, 1988; amended February 26, 1997, effective July 1, 1997; amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Cross References. Orders for the protection of parties and deponents, Rule 31(d).

Pre-trial procedure, Rule 16(a).
Process or summons, issuance, Rule 4(a).

Scope of examination, Rule 26(b)(1).
Use of depositions, Rule 32(a).

Voluntary appearance of party, Rule 4(i).

JUDICIAL DECISIONS

ANALYSIS

Corporate Nonparty Employee.
Response.

Corporate Nonparty Employee.

Because it is improper to serve interrogatories upon an individual nonparty who is employed by a corporation that is a party, and the language of this rule makes no distinction between corporations and governmental agencies and was applicable, the district court did not abuse its discretion in awarding the Department of Agriculture (DOA) attorney fees for the time spent in opposition to growers' motion to compel discovery for interrogatories mailed to DOA director who was not

named as a party in suit by growers against DOA alleging negligence in warehouse inspections. *Crown v. State*, Dep't of Agric., 127 Idaho 175, 898 P.2d 1086 (1995).

Response.

Subsection (2) of this rule requires a complete response to interrogatories, and answers stating that the questions are "not applicable" are deficient; if in fact interrogatories are beyond the legitimate scope of discovery, the proper procedure is to object to them in a timely manner. *Ashby v. Western Council*, 117 Idaho 684, 791 P.2d 434 (1990).

Cited in: *Lester v. Salvino*, 141 Idaho 937, 120 P.3d 755 (Ct. App. 2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Corporate Parties.
Failure of Service.
Incompetent Testimony.
Purpose of Interrogatories.

Corporate Parties.

Interrogatory to a corporate party is not properly addressed to an employee of the corporation; corporation has the right to select which of its officers or agents shall answer the interrogatory. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972).

Failure of Service.

Where interrogatories proposed by plaintiff under former similar rule submitted by plaintiff and answered by defendant were not served on defendant as required by former Rule 31(a) and it appeared that there was a failure to actively pursue the attendance of the witnesses, the trial court properly refused to admit such interrogatories. *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 511 P.2d 828 (1973).

Incompetent Testimony.

Incompetency of witness to testify under § 9-202 as to any matter of fact occurring

before death of deceased was not waived by executrix's action of taking and filing discovery deposition even though deposition was not introduced in evidence. *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

Purpose of Interrogatories.

The principal purpose of interrogatories provided for under former similar rule was to afford parties information regarding facts involved in the issues in suit to enable the proposing party to prepare for trial and to reduce the possibility of surprise in the trial. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 364 P.2d 146 (1961); *Pence v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Donahue v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Johnson v. Big Lost River Irrigation Dist.*, 83 Idaho 394, 364 P.2d 159 (1961).

The fact that a request for admissions solicits the same information contained in answers to interrogatories is not a proper basis for court's refusal to require response to the request for admissions since the purpose of interrogatories is discovery of facts, while the request for admissions goes to the question of proof of these facts at trial and the elimination of introducing testimony and documents. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972).

RESEARCH REFERENCES

A.L.R. Party's right to use, as evidence in civil trial, his own testimony given upon in-

terrogatories or depositions taken by opponent. 13 A.L.R.3d 1312.

Taking deposition or serving interrogatories in civil case as waiver of incompetency. 23 A.L.R.3d 389.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 A.L.R.3d 1109.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 A.L.R.4th 9.

Pre-trial deposition-discovery of opinions of opponent's expert witness. 33 A.L.R. Fed. 403.

Rule 33(b). Scope — Use of interrogatories at trial or on motions.

(1) Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Idaho Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(2) If interrogatories and responses thereto are to be used at trial or are to be used either in support of, or in opposition to, a pretrial or post-trial motion, only those portions to be used shall be submitted to the court at the outset of the trial or at the filing of the motion or response thereto insofar as their use can be reasonably anticipated by the party seeking to introduce such evidence. For purposes of this rule, and unless a genuine issue of authenticity is raised a moving party need not produce portions of the original interrogatories and responses thereto, but may rely on the submission of copies of the relevant original interrogatories and responses.

(3) Interrogatories and responses thereto which have been submitted to the court pursuant to this Rule shall be returned to appropriate counsel after final disposition of the case. (Amended March 20, 1985, effective July 1, 1985; amended March 30, 1988, effective July 1, 1988.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Construction.

Striking Interrogatories.

Use in Evidence.

—Objection.

Construction.

Former similar rule, by providing that interrogatories may relate to any of the matters inquired into under former Rule 26(b), was co-extensive with the discovery procedure of former Rule 26(a) providing for the taking of a deposition "for the purpose of discovery or for use as evidence or for both." *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

Striking Interrogatories.

It could not be said that the trial judge abused his discretion in ordering certain interrogatories to be stricken in view of the fact

that the interrogatories submitted were general in scope and would require much research and the compilation of a great deal of detailed data since the case had been set for hearing and such interrogatories could not be completed in the time remaining, the court being further convinced that the extensive requests of the interrogatories were neither timely nor necessary. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 364 P.2d 146 (1961); *Pence v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Donahue v. Big Lost River Irrigation Dist.*, 83 Idaho 393, 364 P.2d 158 (1961); *Johnson v. Big Lost River Irrigation Dist.*, 83 Idaho 394, 364 P.2d 159 (1961).

Use in Evidence.

Former similar rule and former Rules 26(a), (b), (d), (e), (f), 32(c)(1) and 43(a) presupposed

the admission in evidence of a deposition or part thereof desired to be used, or upon which some aspect of the trial might be predicated, by an adverse party, but with the objection thereto saved, particularly by former Rules 26(f) and 43(a), should answers to interrogatories be self-serving statements. *Thomas v. Thomas*, 83 Idaho 86, 357 P.2d 935 (1960).

—**Objection.**

Where a defense attorney wrote to the court requesting that a scheduled pre-trial confer-

ence be vacated and the judge did not receive the request before leaving the place to which it was mailed to journey to the county of the scheduled conference, it was error for the court to overrule objections to admission of answers to interrogatories at the trial on the ground that they had already been ruled admissible at the pre-trial conference in the absence of the defense attorney. *Theesen v. Continental Life & Accident Co.*, 90 Idaho 58, 408 P.2d 177 (1965).⁶

Rule 33(c). Option to produce records.

Where the answer to an interrogatory may be derived or ascertained from the business or other records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business or other records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. (Amended March 17, 2006, effective July 1, 2006.)

DECISIONS UNDER PRIOR RULE OR STATUTE

Copies of Documents.

Where plaintiff sought copies of documents prepared in anticipation of litigation, former

similar rule was the proper rule under which to proceed rather than Rule 34. *Sanders v. Aythart*, 89 Idaho 302, 404 P.2d 589 (1965).

Rule 34(a). Production of documents, electronically stored information, things and entry upon land for inspection and other purposes — Scope.

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things including electronic and data storage devices in any medium which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b). (Amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. The words in parentheses so appeared in the rule as adopted.

Cross References. Depositions pending appeal, Rule 27(b).

Documentary evidence, subpoena for production, Rule 45(b).

Failure to comply with order, consequences, Rule 37(b).

Order and examination, Rule 27(a)(3).

Orders for the protection of parties and deponents, Rule 31(d).

Scope of examination, Rule 26(b)(1).

Summary judgment, application refused to permit depositions to be taken, Rule 56(f).

JUDICIAL DECISIONS

Motion to Compel.**—Proper.**

Motion to compel production of records of beer sales was properly granted where the

records might have enabled the jury to make a just determination of damages, and to end the trial. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Copies of Documents.

Indefinite Motion.

Inspection of Check.

Inspection of Corporate Records.

Insufficiency of Affidavit.

Writ of Prohibition.

Copies of Documents.

Where plaintiff sought copies of documents prepared in anticipation of litigation, former Rule 33 rather than former similar rule was the proper rule under which to proceed. *Sanders v. Ayrhart*, 89 Idaho 302, 404 P.2d 589 (1965).

Indefinite Motion.

Motion asking for a general examination of many books and papers which could not be reasonably expected to have any bearing upon the action, or contain evidence relating to the merits, is too sweeping and indefinite, since the movant has no right to a general examination of the books to determine which, if any, might contain evidence. *Wallace Bank & Trust Co. v. First Nat'l Bank*, 40 Idaho 712, 237 P. 284, 50 A.L.R. 316 (1925).

Inspection of Check.

In action involving issue whether deceased executed a check in favor of plaintiff which defendant wrongfully prevented being paid, and to recover difference between the check

and the \$500.00 which defendant had paid to plaintiff, plaintiff was entitled to an order for inspection of the check of the deceased which was in possession of defendant. *Lyon v. Melgard*, 66 Idaho 599, 163 P.2d 1019 (1945).

Inspection of Corporate Records.

Petition for writ of prohibition was denied where it sought to attack action of trial court in granting inspection of corporate records in proceedings wherein trial court had jurisdiction of parties in subject-matter, since error of law if any in granting inspection would be subject to review on appeal from final decree in proceedings. *Allen v. Keane*, 74 Idaho 385, 262 P.2d 998 (1953).

Insufficiency of Affidavit.

An affidavit not disclosing documents desired, nor showing contents nor relevancy thereof, is insufficient. *Hayhurst v. Boyd*, 50 Idaho 752, 300 P. 895 (1931).

Writ of Prohibition.

Petition for writ of prohibition was denied where it sought to attack action of trial court in granting inspection of corporate records in proceedings wherein trial court had jurisdiction of parties and subject matter, since error of law if any in granting inspection would be subject to review on appeal from final decree in proceedings. *Allen v. Keane*, 74 Idaho 385, 262 P.2d 998 (1953).

RESEARCH REFERENCES

A.L.R. Discovery and inspection of articles and premises in civil actions other than for personal injury or death. 4 A.L.R.3d 762.

Compelling party to disclose information in hands of affiliated or subsidiary corporation, or independent contractor, not made party to suit. 19 A.L.R.3d 1134.

Privileges against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another. 37 A.L.R.3d 1373.

Photographs of civil litigant realized by

opponent's surveillance as subject to pretrial discovery. 19 A.L.R.4th 1236.

Insured-Insurer Communications as privileged. 55 A.L.R.4th 336.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons or other evidence. 12 A.L.R.5th 577, 60 A.L.R. Fed. 924; 60 A.L.R. Fed. 924.

Pre-trial deposition-discovery of opinions of opponent's expert witnesses. 33 A.L.R. Fed. 403.

Rule 34(b). Procedure.

(1) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. To obtain discovery of data or information that exists in electronic or data storage devices in any medium, the requesting party must specifically request production of such data and specify the form or manner of delivery in which the requesting party wants it produced.

(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event any reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. As to electronic or data storage devices in any medium, the responding party must produce the data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(3) The request for production, the response thereto, and all or any documents produced pursuant to this Rule shall not be filed with the court. The party demanding an inspection or production shall retain both the original of the inspection or production demand, with the original proof of

service affixed to it, and the original response, until one (1) year after final disposition of the action. At that time, both originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. (Amended December 19, 1975, effective January 1, 1976; amended March 30, 1988, effective July 1, 1988; amended March 17, 2006, effective July 1, 2006.)

Rule 34(c). Persons not parties.

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Rule 34(d). Notice of filing and notice of compliance.

The party serving requests for production of documents shall file with the court a notice stating when and on whom such request was served. The party responding to a request for production of documents may file with the court a notice stating when and on whom the response was served, or otherwise indicating that there has been compliance with the request. (Adopted March 30, 1988, effective July 1, 1988; amended February 26, 1997, effective July 1, 1997.)

Rule 35(a). Physical and mental examination of persons.

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, or a qualified mental health professional as defined in section 6-1901, Idaho Code, excluding nurses, if the mental, emotional, or psychological condition of a party is at issue, or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination, including any tests or procedures to be performed, and the person or persons by whom it is to be performed. Upon giving of reasonable notice to the other parties, the party being examined or the person having custody or legal control of the person being examined, shall have the right to have a representative of his or her choice present. (Amended March 31, 1998, effective July 1, 1998; amended March 17, 2006, effective July 1, 2006; amended April 4, 2008, effective July 1, 2008.)

STATUTORY NOTES

Compiler's Notes. The words in parentheses so appeared in the rule as adopted.

Cross References. Consequences of failure to comply with order, Rule 37(b).

Depositions pending appeal, Rule 27(b).

Order and examination, Rule 27(a)(3).

Report of findings, Rule 35(b).

JUDICIAL DECISIONS

ANALYSIS

Discretion of Trial Court.
Showing of Need for Examination.

Discretion of Trial Court.

In a child custody dispute, after reviewing the parties' mental and physical health records, a trial court concluded that an order for psychological testing was unnecessary. Magistrate in determining that there were sufficient records of each party's mental state before the court. *Navarro v. Yonkers*, 144 Idaho 882, 173 P.3d 1141 (2007).

Showing of Need for Examination.

Where defendant was given a copy of the laboratory report of the physical examination made shortly after the incident, and in this report it was stated that there was no perfor-

ation, lacerations or abrasions of the hymenal ring or of the vagina area, and where defendant was free to use this information to question the veracity of the prosecutrix when she testified that penetration had occurred, any further examination would not have revealed additional information not already available to the appellant; therefore, the trial court did not err in concluding that there was an insufficient showing of need for the examination. *State v. Filson*, 101 Idaho 381, 613 P.2d 938 (1980).

Cited in: *State v. Phillips*, 99 Idaho 354, 581 P.2d 1173 (1978); *Crain v. Crain*, 104 Idaho 666, 662 P.2d 538 (1983); *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000); *State Ins. Fund v. Jarolimek*, 139 Idaho 137, 75 P.3d 191 (2003); *Taylor v. AIA Servs. Corp.*, — Idaho —, 261 P.3d 829 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.
Divorce Action.
Refusal of Party to Submit.

Discretion of Court.

Court abused discretion in ordering plaintiff to submit to physical examination on same day of entry of order and not affording plaintiff opportunity to have her physician present. *Greenhow v. Whitehead's, Inc.*, 67 Idaho 262, 175 P.2d 1007 (1946).

Divorce Action.

In a divorce action in which both parties,

prior to the filing of the action, had sessions with a psychiatrist, the husband could not require the wife's psychiatrist to testify as to his findings concerning her where the wife objected. *Barker v. Barker*, 92 Idaho 204, 440 P.2d 137 (1968).

Refusal of Party to Submit.

Court has power to order physical examination of plaintiff and where plaintiff refuses to submit to same, the court has power to dismiss plaintiff's case. *Greenhow v. Whitehead's, Inc.*, 67 Idaho 262, 175 P.2d 1007 (1946).

RESEARCH REFERENCES

A.L.R. Blood-grouping test. 43 A.L.R.4th 579.

Rule 35(b). Report of examining physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, and provide access to all other writings or recordings created by the examiner or the party including the originals of forms and test score sheets, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously

or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule. (Amended April 4, 2008, effective July 1, 2008.)

Rule 36(a). Requests for admission.

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed under oath by the party or by the party's attorney, unless the court shortens the time. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of

which an admission has been requested represents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it. The answers shall first set forth each request for admission made, followed by the answer or response of the party.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

The genuineness, accuracy or truth of any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit. (Amended December 19, 1975, effective January 1, 1976; amended July 2, 1976, effective October 1, 1976; amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Cross References. Expenses on refusal to admit, Rule 37(c).

Motion and proceedings on summary judgment, Rule 56(c).

Process, issuance, Rule 4(a).

Summons by substituted service, Rule 4(e) (1).

JUDICIAL DECISIONS

ANALYSIS

Correction of Errors.

Court Order.

Failure to Admit Truth of Facts.

Failure to Deny — Effect.

Failure to Sign Responses.

Negligence.

Correction of Errors.

This rule permits correction of clerical errors but not judicial errors. *State v. Phillips*, 99 Idaho 354, 581 P.2d 1173 (1978).

Court Order.

A court order setting aside an earlier ruling and summary judgment as to the amount of damages relieved the defendant from the effect of his prior admissions on the issue of damages. *Transamerica Ins. Co. v. Widmark*, 116 Idaho 7, 773 P.2d 275 (1989).

Failure to Admit Truth of Facts.

The court awarded \$16,000 for attorney fees earned by wife's counsel on her claim to

establish husband's ownership of apartments. The primary basis for this award was to impose sanctions against husband under I.R.C.P. 37(c) for his unreasonable refusal to admit the truth of facts requested under I.R.C.P. Rule 36, and for his other attempts to prevent wife from obtaining evidence of husband's ownership of the apartments. Husband made no cogent argument against the awards. The record and the law fully support the awards of fees as sanctions. Moreover, the awards of fees for this purpose was not dependent upon § 12-121, and thus these awards did not need to await the final outcome of the case. *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

Trial court erred in awarding attorney fees as a sanction for defendant's failure to admit liability in a court-ordered settlement conference where she could reasonably have believed she would have prevailed at trial, she had not received a citation for violating traffic laws, the accident report did not assign her any responsibility, her accident reconstruc-

tion expert would have testified that a third party, with whom plaintiff had settled, had had a greater opportunity to have avoided the collision, and the jury found defendant only 10 percent negligent, a relatively small percentage of the overall fault. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

In subrogation action against Idaho transportation department by company whose employee drove through a stop sign, striking another vehicle and killing its occupants, trial court properly awarded attorneys' fees to company where department denied requests to admit that it had a duty to erect and maintain traffic-control devices at the intersection in question, that the signage at that intersection had been altered after the accident, and that the settlement between Schwan's and the decedents' representatives was reasonable, citing lack of knowledge as the basis for denial. Department could not rely on lack of knowledge where there was no showing that it made any reasonable inquiry into these matters. *Schwan's Sales Enterprises v. Idaho Transp. Dep't*, 142 Idaho 826, 136 P.3d 297 (2006).

In subrogation action against Idaho Transportation Department by company whose employee drove through a stop sign, striking another vehicle and killing its occupants, trial court properly awarded attorneys fees to company where department denied requests to admit that it had a duty to erect and maintain traffic-control devices at the intersection in question, that the signage at that intersection had been altered after the accident, and that the settlement between Schwan's and the decedents' representatives was reasonable, citing lack of knowledge as the basis for denial. Department could not rely on lack of knowledge where there was no showing that it made any reasonable inquiry into these matters. *Schwan's Sales Enterprises v. Idaho Transp. Dep't*, 142 Idaho 826, 136 P.3d 297 (2006).

Failure to Deny — Effect.

In divorce proceedings, the wife admitted,

by virtue of her failure to deny, that all the property values ascribed by the parties to their community property were fair market values. *Jones v. Jones*, 100 Idaho 510, 601 P.2d 1 (1979).

In a suit to recover a deficiency after repossession and sale of certain equipment the failure of a guarantor to respond to a request for an admission that the equipment had been disposed of and proper credits had been applied to the debtor's account disposed of any claim by the guarantor that the losses had not properly mitigated, but not the claim that the lease was unconscionable. *M & H Rentals, Inc. v. Sales*, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985).

Failure to Sign Responses.

The plaintiff's answers, which were served within the time allotted under this rule, although not verified until eight months later, set forth the plaintiff's position which adequately denied the substance of the requests for admissions submitted by the defendant. Thus, the defendant suffered no prejudice as a result of the plaintiff's failure to sign its responses under oath, as required by this rule, until eight months after the responses were filed. *State, Bureau of Child Support v. Knowles*, 128 Idaho 835, 919 P.2d 1036 (Ct. App. 1996).

Negligence.

This rule permits requests involving opinions, conclusions and mixed questions of law and fact; thus, a request to admit one's fault, negligence, or liability is permissible. However, in circumstances where response to a mixed question would be difficult, or would turn primarily on a legal issue to be resolved by the court, an objection to the request may be filed. *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988).

Cited in: *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 726 P.2d 648 (1985); *Evans v. Sayler*, — Idaho —, 254 P.3d 1219 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Instruments in Writing.

- Contracts.
- Deeds.
- Effectiveness of Release.
- Instruments.
- Leases.

General Denial.

Purpose of Requirement.

Instruments in Writing.

— Contracts.

Failure to deny a written instrument contained in the answer as required admits the genuineness and due execution of such instrument, and plaintiff is not precluded from taking any position in avoidance of the contract not inconsistent with the admission of its genuineness and due execution. *Austin v.*

Brown Bros., 30 Idaho 167, 164 P. 95 (1917).

Where copy of contract is attached to answer, failure to deny due execution by affidavit does not admit same when answer and contract construed together do not constitute defense founded upon written instrument, but set up matters proper for cross-complaint. *Citizens Bank & Trust Co. v. Pocatello Milling & Elevator Co.*, 41 Idaho 403, 240 P. 186 (1925).

— Deeds.

Failure to file an affidavit denying the execution of a deed does not preclude evidence of what took place between the parties at the time of the execution and delivery of the deed. *Martin v. Dowd*, 8 Idaho 453, 69 P. 276 (1902).

Failure to deny due execution of a deed does not preclude proof of its defects nor the denial that it conveyed title to the grantee named in it and defendant may question the proceedings leading up to its issuance. *Western Loan & Bldg. Co. v. Bandel*, 57 Idaho 101, 63 P.2d 159 (1936).

— Effectiveness of Release.

Failure to file affidavit does not preclude plaintiff from denying the effectiveness of a release interposed as a defense. *Gold Hunter Mining & Smelting Co. v. Bowden*, 252 F. 388 (9th Cir. 1918).

The failure of the plaintiff in a personal injury action to deny under oath the genuineness and due execution of a release relied on by the defendants as a bar does not preclude the plaintiff from showing that the release was obtained by fraud. *Cox v. Northwestern Stage Co.*, 1 Idaho 376 (1871).

— Instruments.

A failure to file an affidavit denying the

genuineness or due execution of an instrument does not place a party in the position of admitting its validity and he should be allowed to introduce evidence that the instrument, notwithstanding its genuineness and due execution, is invalid. *Pettengill v. Blackman*, 30 Idaho 241, 164 P. 358 (1917).

— Leases.

Where defendants in a quiet title suit appended to their answer a copy of a purported lease executed by plaintiff covering the land in question and annexed an affidavit of a third party, respecting the execution and acknowledgment of the lease, plaintiff's failure to file and serve a statutory denial of the genuineness and due execution of the lease, although an admission of its genuineness and due execution did not preclude plaintiffs from claiming that the lease was invalid, in that one of the plaintiffs, the wife, had not acknowledged the lease as required by law. *Little v. Bergdahl Oil Co.*, 60 Idaho 662, 95 P.2d 833 (1939).

General Denial.

In suit to foreclose a mortgage, an answer of general denial by defendant to plaintiff's complaint which set out *note haec verba* and each mortgage by copy, admitted the genuineness and due execution of the note and mortgages. *Land Dev. Co. v. Cannaday*, 77 Idaho 237, 290 P.2d 1087 (1955).

Purpose of Requirement.

The purpose of requirement for denial is to apprise party pleading written instrument whether his opponent does or does not admit its genuineness and due execution. *Citizens Bank & Trust Co. v. Pocatello Milling & Elevator Co.*, 41 Idaho 403, 240 P. 186 (1925).

RESEARCH REFERENCES

A.L.R. Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to requests for

admission of facts not within his personal knowledge. 20 A.L.R.3d 756.

Rule 36(b). Effect of admission.

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits. Any admission made by a party under this rule is for the purpose

of the pending action only and is not an admission by the party for any other purpose nor may it be used against him in any other proceeding.

JUDICIAL DECISIONS

ANALYSIS

Admission Upheld.

Applicability.

Motion to Discard Request for Admission.

Other Evidence.

Prejudice.

Standard of Review.

Admission Upheld.

Because boat sellers represented to boat buyers, in response to a request for admission, that they represented boat was in good and seaworthy condition, that factual finding by the district court must be upheld. *Pitzer v. Swenson*, 128 Idaho 423, 913 P.2d 1193 (Ct. App. 1996).

Applicability.

The conclusiveness of matters admitted pursuant to this rule applies equally to admissions made affirmatively and those made by default. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

Motion to Discard Request for Admission.

The trial court did not err in granting the motion to discard the requests for admissions where just prior to trial, the plaintiffs made a motion to have the requests for admissions "discarded," and no prejudice occurred to the defendant since plaintiffs' statements in depositions and interrogatories set out plaintiffs' position which adequately denied the substance of the requests for admissions. *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 726 P.2d 648 (1985).

Other Evidence.

An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

Prejudice.

Prejudice is not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

The party who obtained the admission has the burden of proving that withdrawal of the admission would prejudice the party's case. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

Standard of Review.

The correct standard of review to apply to lower court's rulings on motions under this rule is the abuse of discretion standard. Although the court correctly perceived the issue as one of discretion, it did not act consistently with the legal standards applicable to the specific choices available to it. *Sammis v. MagneTek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

Admission Unsupported by Evidence.

The pleadings in a cause are before the court as part of the proceedings, without being introduced in evidence. Admissions

made by a pleading need not be supported by evidence of the opposing party. *Wheeler v. Gilmore & P. R.R.*, 23 Idaho 479, 130 P. 801 (1913).

Rule 36(c). Non-filing of requests for admission and responses thereto.

(1) The requests for admission and the response shall not be filed with the court. The party requesting admission shall retain both the original of the requests for admission, with the original proof of service affixed, and the original of the sworn response until one (1) year after final disposition of the action. At that time, both originals may be destroyed, unless the court, on

motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

(2) The party serving either a request for admission or a response thereto, shall file with the court a notice of when the request or response was served and upon whom. (Adopted March 30, 1988, effective July 1, 1988.)

Rule 36(d). Use of admissions.

In addition to the provisions of Rule 36(b), if admissions are to be used at trial or are to be used either in support of, or in opposition to, a pretrial or post-trial motion, only those portions to be used shall be submitted to the court at the outset of the trial or at the filing of the motion or response thereto insofar as their use can be reasonably anticipated by the party seeking to introduce such admissions. For purposes of this Rule, unless a genuine issue of authenticity is raised, a moving party need not produce portions of the original admission, but may rely on the submission of relevant excerpts from copies of the original request for admission and response thereto. Requests for admission and responses thereto, which have been submitted to the court pursuant to this rule shall be returned to appropriate counsel after final disposition of the case. (Adopted March 30, 1988, effective July 1, 1988.)

JUDICIAL DECISIONS

Attorney Fees.

When the city did not respond to the request for admissions within 15 days as required by rule 36(a), the plaintiffs could have treated the requests as admitted. Nevertheless, plaintiffs decided not to rely on the admissions, and did not submit them to the

trial court as required by this rule. Because the plaintiffs could have treated the requests as admitted facts under this rule, it was not necessary to prove the matters at trial and the trial court appropriately denied their request for attorney fees. *Tomich v. City of Pocatello*, 127 Idaho 394, 901 P.2d 501 (1995).

Rule 37(a). Sanctions for violation of orders — Motion for order compelling discovery.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, taken in connection with litigation pending outside the state, to the district court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an

answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. (Amended March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Cross References. Expenses on refusal to admit, Rule 37(c).

Expenses, payment upon failure to attend, Rule 30(g)(1).

Failure of party to attend or serve answers, Rule 37(d).

Failure to comply with order, contempt, Rule 37(b).

Failure to serve subpoena, expenses, Rule 30(g)(2).

Interrogatories to parties, Rule 33(a).

Motion to terminate or limit examination, Rule 30(d).

Written interrogatories, depositions of witnesses upon, Rule 31(a).

JUDICIAL DECISIONS

ANALYSIS

Actions Preceding Sanctions.

Attorney Fees.

Award of Expenses.

Discovery Order.

Divorce Proceedings.

Motion to Compel.

Sanctions.

Actions Preceding Sanctions.

Some balancing of the equities and some consideration of the efficacy of lesser sanctions must precede a trial court's imposition of a sanction which will significantly impair a party's ability to present its case on the mer-

its at trial. *Roe v. Doe*, 129 Idaho 663, 931 P.2d 657 (Ct. App. 1996).

Attorney Fees.

Because it is improper to serve interrogatories upon an individual nonparty who is employed by a corporation that is a party and the language of Rule 33(a) makes no distinction between corporations and governmental agencies and is applicable, the district court did not abuse its discretion in awarding the Department of Agriculture (DOA) attorney fees for the time spent in opposition to growers' motion to compel discovery for interrogatories mailed to DOA director who was not named as a party in suit by growers against DOA alleging negligence in warehouse inspections. *Crown v. State, Dep't of Agric.*, 127 Idaho 175, 898 P.2d 1086 (1995).

Award of Expenses.

District court did not have authority under this rule to assess costs against special prosecuting attorney who advised deponents not to answer certain questions, where the party seeking discovery had made no motion to compel discovery. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

Discovery Order.

Where special prosecuting attorney petitioned the district court for a protective order to prevent the party seeking discovery from inquiring into certain matters relative to criminal investigation during taking of law enforcement officers' depositions, the court's refusal to grant the protective order did not amount to an order to compel discovery of these matters. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

Divorce Proceedings.

Magistrate did not abuse his discretion in sanctioning husband in a divorce proceeding by striking husband's pleadings, allowing wife to take default judgment and awarding costs and attorney fees to wife; delay caused by the husband's failure to comply with discovery orders was intentional and caused prejudice to the wife. *Nollenberger v. Nollenberger*, 122 Idaho 186, 832 P.2d 757 (1992).

Motion to Compel.

In a product liability case, a trial court did not compel the production of suspension orders regarding the preservation of test data since they were not subject to discovery because they were protected by the attorney-client privilege; the communications were confidential and were made for the purpose of rendering professional legal advice. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 116 P.3d 27 (2005).

Sanctions.

The record did not reflect either a balancing of the equities by the trial court nor consideration of the efficacy of lesser sanctions. If such an analysis had been conducted, the record would not support the sanctions imposed in this case. *Roe v. Doe*, 129 Idaho 663, 931 P.2d 657 (Ct. App. 1996).

Trial court properly excluded plaintiff's expert's testimony where the plaintiffs failed to demonstrate an acceptable reason to extend the discovery deadlines previously imposed by the court. *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006).

Cited in: *Devault v. Steven L. Herndon, P.A.*, 107 Idaho 1, 684 P.2d 978 (1984); *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988); *Day v. CIBA Geigy Corp.*, 115 Idaho 1015, 772 P.2d 222 (1989).

RESEARCH REFERENCES

A.L.R. Taxation of costs and expenses in proceedings for discovery or inspection. 76 A.L.R.2d 953.

Rule 37(b). Failure to comply with discovery order — Sanctions.

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or affirmed or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make

such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. (Amended December 19, 1975, effective January 1, 1976.)

STATUTORY NOTES

Cross References. Refusal to answer, Rule 37(a).

JUDICIAL DECISIONS

ANALYSIS

Award of Expenses.
Discovery Order.
—Noncompliance.
Discretion of Court.
Dismissal with Prejudice.
Divorce Proceedings.
Exclusion of Exhibit.
Exclusion of Witness.
Sanctions.

Award of Expenses.

District court did not have authority under this rule to assess costs against special pros-

ecuting attorney who advised deponents not to answer certain questions, where the court had never issued an order compelling discovery. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

Discovery Order.

Where special prosecuting attorney petitioned the district court for a protective order to prevent the party seeking discovery from inquiring into certain matters relative to criminal investigation during the taking of law enforcement officers' depositions, the court's refusal to grant the protective orders did not amount to an order to compel discov-

ery of these matters. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

—Noncompliance.

Where the trial court was faced with repeated refusal to comply with specific, direct orders of the court instructing plaintiff to produce certain documents and information, which repeated refusal resulted in the trial having to be delayed at least once, and which would have required a second delay had the defendant's motion to dismiss not been granted, and there was no showing of the inability of the plaintiff to comply with these orders, the granting of the motion to dismiss for failing to comply with the discovery orders did not constitute an abuse of discretion. *Devault v. Steven L. Herndon, P.A.*, 107 Idaho 1, 684 P.2d 978 (1984).

The magistrate acted within the permissible bounds of his discretion by striking the husband's answer and counterclaim, enabling his wife to proceed to judgment, where the husband failed to comply with a discovery request. *McPherson v. McPherson*, 112 Idaho 402, 732 P.2d 371 (Ct. App. 1987).

Before ordering the drastic remedy of dismissal of defenses and counterclaim, a trial court must consider lesser sanctions, and if dismissal is nevertheless ordered, appropriate findings of fact must be made. *Southern Idaho Prod. Credit Ass'n v. Astorquia*, 113 Idaho 526, 746 P.2d 985 (1987).

The dismissal of defenses and counterclaim of the defendant pursuant to this rule was proper for failure to comply with discovery, even though the defendants argued that they were never personally informed by their attorneys of the plaintiff's requests for information concerning the counterclaim, the scheduling of hearings on the discovery requests, or the scheduling of their depositions; it is no excuse that the failure to comply with court orders is the fault of a litigant's attorney, and the defendants in this action were not entirely without fault. *Southern Idaho Prod. Credit Ass'n v. Astorquia*, 113 Idaho 526, 746 P.2d 985 (1987).

In action on promissory note where plaintiff failed to comply with court's order to compel discovery in that he never answered interrogatories submitted or provided the documents required, but requested that the court take judicial notice of the same evidence in another case, court properly precluded note from being entered into evidence, and appropriately dismissed the action under this rule and I.R.C.P. 37(d) and (e). *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

The record indicated that the defendant's proffered affidavit may have been part of the business records of defendant, requested by

the plaintiffs and ordered by the court to be produced, which defendants failed to produce; therefore the court acted within its discretion when it precluded the affidavit from being submitted to the jury because it appeared that defendant had not produced the document before trial. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

Discretion of Court.

This rule gives the trial court discretion to impose any of several different sanctions, including dismissal of the action; such a dismissal by the trial court will not be overturned absent a showing of abuse of the trial court's discretion. *Devault v. Steven L. Herndon, P.A.*, 107 Idaho 1, 684 P.2d 978 (1984).

The imposition of sanctions under this rule is committed to the discretion of the trial court, and that ruling will not be overturned on appeal absent a manifest abuse of discretion. *Ashby v. Western Council*, 117 Idaho 684, 791 P.2d 434 (1990).

Dismissal with Prejudice.

There are certain factors which have been explicitly laid out regarding the imposition of the sanction of dismissal with prejudice for failure to comply with procedural rules, and the two primary factors are a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one "aggravating" factor, including: 1) delay resulting from intentional conduct, 2) delay caused by the plaintiff personally, or 3) delay causing prejudice to the defendant. *Ashby v. Western Council*, 117 Idaho 684, 791 P.2d 434 (1990).

Where plaintiffs represented to the District Court that they had no objections to defendants' interrogatories, yet they responded to several questions with the bald assertion that the questions were "not applicable," where defendants' interrogatories requested names, addresses, telephone numbers and employers of certain individuals who might have knowledge of the case, yet plaintiffs responded with names only, making no attempt to claim that the further information was unavailable, where for the most part, defendants' requests for the production of documents were ignored, where photographs were requested and plaintiffs provided indecipherable photocopies, where defendants' request for the summary of expected witness testimony was ignored, and where none of plaintiffs' answers were signed by the parties themselves, but were signed only by the their attorney, these responses fell so short of a good faith attempt at compliance with the District Court's order to comply with discovery that they contributed to the clear

record of delay in this case, and supported the sanction of dismissal with prejudice. *Ashby v. Western Council*, 117 Idaho 684, 791 P.2d 434 (1990).

An award of costs and explicit warnings are among the appropriate preliminary measures which a trial court may take to force compliance with procedural rules before taking the drastic measure of dismissal with prejudice. *Ashby v. Western Council*, 117 Idaho 684, 791 P.2d 434 (1990).

Where plaintiff's delay of matter had caused the magistrate to award attorney fees against him to encourage compliance with discovery, all to no avail; where the delay was caused by the plaintiff's intentional and deliberate failure to produce certain answers and documents requested; and where no adequate excuse was ever given to any court, explaining the reason for the delay, the dismissal of the plaintiff's complaint and the striking of his response to the counterclaim were proper. *Blaser v. Riceci*, 119 Idaho 834, 810 P.2d 1120 (1991).

Where plaintiff failed to comply with the district court's prior order requiring plaintiff to pay costs associated with a prior missed independent medical exam, and plaintiff failed to participate in a later independent medical exam, sanction of dismissal with prejudice was not an abuse of discretion. *Kleine v. Fred Meyer, Inc.*, 124 Idaho 44, 855 P.2d 881 (Ct. App. 1992).

Dismissal of an action in favor of the driver involving a vehicular accident was improper where the district judge failed to articulate what specific prejudice the driver would have suffered as a result of the other driver's absence. *State Ins. Fund v. Jarolimek*, 139 Idaho 137, 75 P.3d 191 (2003).

Divorce Proceedings.

Magistrate did not abuse his discretion in sanctioning husband in a divorce proceeding by striking husband's pleadings, allowing wife to take default judgment and awarding costs and attorney fees to wife; delay caused by the husband's failure to comply with discovery orders was intentional and caused prejudice to the wife. *Nollenberger v. Nollenberger*, 122 Idaho 186, 832 P.2d 757 (1992).

Exclusion of Exhibit.

Under Idaho R. Civ. P. 16(i) and paragraph (2)(B) of this rule, the trial court has authority to exclude an exhibit, as a procedural matter, irrespective of evidentiary considerations, once the trial court finds that a party failed to comply with a scheduling order. *Harris, Inc. v. Foxhollow Constr. & Trucking*, — Idaho —, 264 P.3d 400 (2011).

Exclusion of Witness.

In personal injury action, trial court did not abuse its discretion in refusing to allow testimony from a witness disclosed by plaintiff after the deadline imposed in the scheduling order. Plaintiff had failed to exercise due diligence to discover the witness earlier, allowing witness would impose additional costs on defendant, and the importance of the witness to plaintiff's case was questionable. *McKim v. Horner*, 143 Idaho 568, 149 P.3d 843 (2006).

Sanctions.

Where defendant reporters and defendant newspaper refused to divulge sources used in writing investigative articles concerning plaintiff insurance company, it was error for trial court to strike all of defendant's pleadings and enter default judgment against defendants based on the sanction provisions of this rule after defendants had raised the defense of truth, since plaintiff failed to establish that its inability to discover the confidential sources obstructed its ability to prove the falsity of the articles or that the revelations of the sources would have been instrumental in establishing that the articles were in fact false. *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980).

When the trial court sanctions a party by striking pleadings and entering judgment against that party, the court must make specific findings that less severe sanctions would be inadequate and in this case the court did not make any findings regarding the inadequacy of any lesser sanctions. *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991).

The district court did not abuse its discretion in precluding testimony from plaintiff's accident reconstruction expert as a sanction for noncompliance with the pretrial discovery order, where plaintiff did not disclose any of her expert witnesses, even her treating physicians, until the same date that she disclosed the accident reconstructionist, which was more than two months after the court-ordered deadline. *Priest v. Landon*, 135 Idaho 898, 26 P.3d 1235 (Ct. App. 2001).

From a contractor's suit to recover payment on a contract, the trial court did not err by imposing a discovery sanction dismissing the homeowners' breach of contract counterclaim as their conduct caused delay in repeatedly refusing to allow the contractor to participate in the inspection of their property under any circumstances. *Lee v. Nickerson*, 146 Idaho 5, 189 P.3d 467 (2008).

Cited in: *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987);

State ex rel. Dep't of Labor & Indus. Servs. v. Hill, 118 Idaho 278, 796 P.2d 155 (Ct. App.

1990); Gunter v. Murphy's Lounge, L.L.C., 141 Idaho 16, 105 P.3d 676 (2005).

RESEARCH REFERENCES

A.L.R. Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another. 37 A.L.R.3d 1373.

Who has possession, custody, or control of corporate books or records for purposes of order to produce. 47 A.L.R.3d 676.

Dismissal of action for plaintiff's failure or refusal to obey court order in aid of discovery or inspection. 56 A.L.R.3d 1109; 27 A.L.R.4th 61; 32 A.L.R.4th 212; 3 A.L.R.5th 237.

Sanctions for failure to make discovery under Federal Civil Procedure Rule 37 as affected by defaulting party's good faith attempts to comply. 2 A.L.R. Fed. 811.

Rule 37(c). Expenses on failure to admit.

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

JUDICIAL DECISIONS

ANALYSIS

Attorneys' Fees.

Mandatory Award.

Reasonable Belief in Prevailing.

Attorneys' Fees.

The court awarded \$16,000 for attorney fees earned by wife's counsel on her claim to establish husband's ownership of apartments. The primary basis for this award was to impose sanctions against husband under this rule for his unreasonable refusal to admit the truth of facts requested under Rule 36 and for his other attempts to prevent wife from obtaining evidence of husband's ownership of the apartments. Husband made no cogent argument against the awards. The record and the law fully support the awards of fees as sanctions. Moreover, the awards of fees for this purpose were not dependent upon § 12-121, and thus these awards did not need to await the final outcome of the case. *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

When the city did not respond to the request for admissions within 15 days as required by rule 36(a), the plaintiffs could have

treated the requests as admitted. Nevertheless, plaintiffs decided not to rely on the admissions, and did not submit them to the trial court as required by rule 36(d). Because the plaintiffs could have treated the requests as admitted facts under rule 36(d), it was not necessary to prove the matters at trial and the trial court appropriately denied their request for attorney fees. *Tomich v. City of Pocatello*, 127 Idaho 394, 901 P.2d 501 (1995).

By its plain terms, Idaho R. Civ. P. Rule 37(c) authorizes sanctions only in favor of a party who, after a request for admission is denied, thereafter proves the truth of the matter. *Payne v. Wallace*, 136 Idaho 303, 32 P.3d 695 (Ct. App. 2001).

In subrogation action against Idaho transportation department by company whose employee drove through a stop sign, striking another vehicle and killing its occupants, trial court properly awarded attorneys' fees to company where department denied requests to admit that it had a duty to erect and maintain traffic-control devices at the intersection in question, that the signage at that intersection had been altered after the accident, and that the settlement between

Schwan's and the decedents' representatives was reasonable, citing lack of knowledge as the basis for denial. Department could not rely on lack of knowledge where there was no showing that it made any reasonable inquiry into these matters. *Schwan's Sales Enterprises v. Idaho Transp. Dep't*, 142 Idaho 826, 136 P.3d 297 (2006).

In subrogation action against Idaho Transportation Department by company whose employee drove through a stop sign, striking another vehicle and killing its occupants, trial court properly awarded attorneys fees to company where department denied requests to admit that it had a duty to erect and maintain traffic-control devices at the intersection in question, that the signage at that intersection had been altered after the accident, and that the settlement between Schwan's and the decedents' representatives was reasonable, citing lack of knowledge as the basis for denial. Department could not rely on lack of knowledge where there was no showing that it made any reasonable inquiry into these matters. *Schwan's Sales Enterprises v. Idaho Transp. Dep't*, 142 Idaho 826, 136 P.3d 297 (2006).

Mandatory Award.

The judge may not refuse to make an award for failure to admit solely because the expenses of proving the matter contained in the requests for admission might also have been incurred with respect to another issue. *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988).

Where one party fails to admit the truth of a matter as requested, and the opposing party

subsequently proves the truth of the matter, the court must award "the reasonable expenses" incurred, subject only to the four exceptions set forth in this rule itself. *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988).

Reasonable Belief in Prevailing.

Where, in a personal injury action, the defendant refused to admit that his negligence proximately caused the plaintiff's injuries, and the jury subsequently found the defendant 100 percent at fault in the accident, whether the failure to admit was based upon a reasonable belief in prevailing on the issue or other good reasons were issues for the trial court's exercise of sound discretion; therefore, the action was remanded for reconsideration under this rule. *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988).

Trial court erred in awarding attorney fees as a sanction for defendant's failure to admit liability in a court-ordered settlement conference where she could reasonably have believed she would have prevailed at trial, she had not received a citation for violating traffic laws, the accident report did not assign her any responsibility, her accident reconstruction expert would have testified that a third party, with whom plaintiff had settled, had had a greater opportunity to have avoided the collision, and the jury found defendant only 10 percent negligent, a relatively small percentage of the overall fault. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

Cited in: *W.L. Scott, Inc. v. Madras Aero-tech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982); *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009).

Rule 37(d). Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that

the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

JUDICIAL DECISIONS

ANALYSIS

Award of Expenses.
Discretion of Court.
Dismissal of Action.

Award of Expenses.

The sanctions provided for in this rule were limited to instances of failure to appear, so that the district court did not have authority to assess discovery costs against special prosecuting attorney who advised deponents not to answer certain questions, where the deponents appeared and were sworn but refused to answer some questions. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

Discretion of Court.

The imposition of sanctions for noncompli-

ance with discovery orders, if warranted, is best left to the trial court's discretion as guided by this section. *Cummings v. Cummings*, 115 Idaho 186, 765 P.2d 697 (Ct. App. 1988).

Dismissal of Action.

In action on promissory note where plaintiff failed to comply with court's order to compel discovery, in that he never answered interrogatories submitted or provided the documents required but requested that the court take judicial notice of the same evidence in another case, court properly precluded note from being entered into evidence, and appropriately dismissed the action under this rule and I.R.C.P. 37(b) and (e). *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Late Motion.
Summary Judgment.

Late Motion.

The trial court did not abuse its discretion in denying a motion under former similar rule as not timely where plaintiffs did not make the motion until after they rested their case,

which was more than three years after the documents were first sought. *H.M. Chase Corp. v. Idaho Potato Processors, Inc.*, 96 Idaho 398, 529 P.2d 1270 (1974).

Summary Judgment.

A summary judgment will not be set aside for failure to answer irrelevant interrogatories. *Hemingway v. Fritz*, 96 Idaho 364, 529 P.2d 264 (1974).

Rule 37(e). General sanctions — Failure to comply with any order.

In addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, or assess attorney's fees, costs or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules.

JUDICIAL DECISIONS

ANALYSIS

Award of Expenses.
Dismissal of Action.

Award of Expenses.

Where district court judge denied special prosecuting attorney's petition for a protec-

tive order to prevent the party seeking discovery from inquiring into certain matters relative to criminal investigation during the taking of law enforcement officers' depositions, the district judge did not have authority under this rule to assess costs against special prosecuting attorney who was not ordered to

do anything with respect to the depositions, even though the attorney advised deponents not to answer certain questions. *Frost v. Hofmeister*, 97 Idaho 757, 554 P.2d 935 (1976).

Dismissal of Action.

In action on promissory note where plaintiff failed to comply with court's order to compel discovery in that he never answered interrogatories submitted or provided the documents required but requested that the court take judicial notice of the same evidence in another case, court properly precluded note from being entered into evidence, and appropriately dismissed the action under this rule

and I.R.C.P. 37(b) and (d). *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

Where plaintiff failed to comply with the district court's prior order requiring plaintiff to pay costs associated with a prior missed independent medical exam, and plaintiff failed to participate in a later independent medical exam, sanction of dismissal with prejudice was not an abuse of discretion. *Kleine v. Fred Meyer, Inc.*, 124 Idaho 44, 855 P.2d 881 (Ct. App. 1992).

Cited in: *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987); *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995).

Rule 37(f). Expenses against state of Idaho.

Expenses and attorney's fees may be awarded against the state of Idaho under this rule.

Rule 38(a). Jury trial of right — Right preserved.

The right of trial by jury as declared by the Constitution or as given by a statute of the state of Idaho shall be preserved to the parties inviolate except in the small claims department.

STATUTORY NOTES

Cross References. Advisory jury, Rule 39(c).

Demand, Rule 38(b).

Demand, specification of issues, Rule 38(c).

Jury trial, right to where declaratory judgment sought, Rule 57.

Jury trials, small claims, § 1-2315.

Motion for directed verdict not a waiver of jury trial, Rule 50(a).

Trial by jury, Rule 39(a).

Waiver, Rule 38(d).

JUDICIAL DECISIONS

ANALYSIS

Equity Actions.

Party.

Right to Jury Trial.

Equity Actions.

This section does not extend the right of trial by jury to actions solely involving equity issues such as the accounting and winding up of a partnership — a matter traditionally the province of the courts of equity. *Thomas v. Schmelzer*, 118 Idaho 353, 796 P.2d 1026 (Ct. App. 1990).

Party.

Although the trial court found that tenant had acted as landowner's agent in construction of relocated ditch which was the subject of the lawsuit, this did not affect tenant's status as a "party" and thus, landowner's oral

waiver of right to a jury trial did not waive tenant's right to a jury trial. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Right to Jury Trial.

Since the right to a trial by jury is inviolate under the Constitution of the State of Idaho, a party to an equity action has a right to a jury trial on the legal causes of action raised pursuant to his compulsory counterclaim, unless there is a clear showing of imperative circumstances which would cause the equity claimant irreparable harm while affording a jury trial in the legal cause. *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

Cited in: *Parrott v. Wallace*, 127 Idaho 306, 900 P.2d 214 (Ct. App. 1995).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Attorney Fees.
 Damages for Use of Land.
 Issues Submitted to Jury.
 Right to Jury Trial.
 Waiver.

Attorney Fees.

When attorney seeking to recover legal fees for services to drainage district abandons proceeding to have amount of such fees determined by court and brings action therefor, he is entitled to jury trial in his action. *Neal v. Drainage Dist. No. 2*, 42 Idaho 624, 248 P. 22 (1926).

Damages for Use of Land.

Under cross-complaint claiming damages for use of land in controversy, parties are entitled to jury trial as matter of right. *Shull v. Lawrence*, 37 Idaho 401, 217 P. 267 (1923).

Issues Submitted to Jury.

In an interpleader proceeding by insurance company which joined several adverse claimants where the insurance company thereafter filed two affirmative defenses to counterclaim asserted by one of the claimants, the insurer

was entitled to a decision by the jury on both issues raised, hence the district court committed reversible error where it submitted only one of the issues to the jury. *Gem State Mut. Life Ass'n v. Gray*, 77 Idaho 157, 290 P.2d 217 (1955).

Right to Jury Trial.

An appeal from an order of board of county commissioners allowing a cut claim is within the provisions of the law that an issue should be submitted to a jury. *Fisher v. Board of County Comm'rs*, 4 Idaho 381, 39 P. 552 (1895).

The right to a jury trial cannot be denied because it is necessary to show a deed absolute in form of a mortgage, when determination of this issue is only incidental to the main object of the action, which is the recovery of money. *Johansen v. Looney*, 30 Idaho 123, 163 P. 303 (1917).

Waiver.

Right to a civil trial by jury is waived by failure to demand a jury trial within ten days after service of the last pleading directed to an issue. *Meyer v. Whipple*, 94 Idaho 260, 486 P.2d 271 (1971).

RESEARCH REFERENCES

A.L.R. How to obtain jury trial in eminent domain: waiver. 12 A.L.R.3d 7.

Right in equity suit to jury trial of counterclaim involving legal issue. 17 A.L.R.3d 1321.

Statute reducing number of jurors as violative of right to trial by jury. 47 A.L.R.3d 895.

Right to a jury trial on motion to vacate judgment. 75 A.L.R.3d 894.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury. 68 A.L.R.4th 343.

Contractual jury trial waivers in state civil cases. 42 A.L.R.5th 53.

Rule 38(b). Demand.

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than fourteen (14) days after the service of the last pleading directed to such issue. Provided, in appeals for a trial de novo in small claims to an attorney magistrate, such demand must be served upon the opposing party not later than fourteen (14) days after service of the notice of appeal upon the respondent. Such demand may be indorsed upon a pleading of the party. Any party demanding a jury trial in district court should state in such demand whether or not said party will stipulate to a six person jury or a jury consisting of any other number of persons less than twelve. (Amended effective July 1, 1977; amended March 30, 1994, effective July 1, 1994.)

JUDICIAL DECISIONS

ANALYSIS

Authority to Establish Procedure.
New Issues.
Party.
Unexplained Delay.
Untimely Demand.
Waiver.

Authority to Establish Procedure.

The adoption of this rule was a proper exercise of the inherent rule-making power of the Supreme Court, and merely establishes the orderly procedure to be employed in determining whether a party has waived the right to trial by jury. *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984).

New Issues.

An amended or supplemental pleading which raises a new issue revives the right to demand a jury trial as to that new issue. *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984).

Where no new issues were raised by second answer or subsequent pleadings, the right to demand jury trial expired ten days after first answer and was not thereafter revived. *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984).

Party.

Although the trial court found that tenant had acted as landowner's agent in construction of relocated ditch which was the subject of the lawsuit, this did not affect tenant's status as a "party" and thus, landowner's oral waiver of right to a jury trial did not waive tenant's right to a jury trial. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Unexplained Delay.

Where party furnished no reason for delaying her request for a jury trial, there was no abuse of discretion in denying the late request. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984).

Untimely Demand.

Where defendant waited 62 days after serving his answer to demand a jury trial, he waived trial by jury, as a matter of right, and

the district court did not abuse its discretion by denying motion therefor. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).

Answer to summons and complaint which contained denial of the right of city to condemn the land and also raised defenses based on the United States Constitution constituted a pleading directed to an issue within the intent of this rule, and a request for jury trial made two years after such answer was ineffective as being untimely under this rule. *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984).

Trial court properly denied as untimely workers' compensation policyholders' motions for a jury trial under this rule or I.R.C.P. 39(b) in their action against the State Insurance Fund; the policyholders' waiver of a jury trial was not revoked by the state's intervention in the proceeding or by an amendment of a pleading, and the policyholders gave no reason for their failure to make a timely demand. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005), overruled on other grounds, *Farber v. Idaho State Ins. Fund*, — Idaho —, 272 P.3d 467 (Idaho 2012).

Waiver.

In a civil case, the right to trial by jury must be timely asserted or it will be deemed waived. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984).

Failure to make a timely demand for jury trial constitutes waiver of the right. *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984).

Where the defendants did not demand a jury trial until they filed their first amended counterclaim, ten months after the last pleading, their right to demand a jury trial was waived; the fact that the demand was appended to an amended counterclaim did no more than assert additional claims arising out of the transaction set forth in the original pleading. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

Cited in: *Jones v. EG & G Idaho, Inc.*, 111 Idaho 591, 726 P.2d 703 (1986); *Sutheimer v. Stoltenberg*, 127 Idaho 81, 896 P.2d 989 (Ct. App. 1995).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Construction.
Damages for Use of Land.
New Issues.

Time for Filing Demand.
Waiver.

Construction.

Former Rule 86, providing date rules shall

take effect and govern further proceedings in pending actions, makes this rule pertaining to right to demand jury trial applicable to further proceedings in pending cases, except where application of rule would not be feasible or would work injustice. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Where the last pleading directed to a jury issue was filed months before the effective date of rule of civil procedure which required demand for jury trial be filed within ten days after service of last pleading directed to such issue, the long delay was chargeable to both court and counsel, and continued insistence upon jury trial by defendant's counsel indicated reliance on prior procedure, trial court's denial of jury trial required reversal of judgment. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

Damages for Use of Land.

Under cross-complaint claiming damages for use of land in controversy parties are entitled to jury trial as matter of right. *Shull v. Lawrence*, 37 Idaho 401, 217 P. 267 (1923).

New Issues.

Where the pretrial conference order stated that respondent was contending that appellant was guilty of contributory negligence and also stated that such order superseded all pleadings in the case, a new issue was intro-

duced into the action, such order in effect constituting an amendment raising a new issue, and a written demand for a trial by jury upon the issue of contributory negligence could be made within ten days after the service of such order. *Lehman v. Bair*, 85 Idaho 59, 375 P.2d 714 (1962).

Time for Filing Demand.

A request for a jury trial filed more than ten days after the filing of defendants' answer and counterclaim, but concurrently with the filing of a reply, was filed within ten days after the service of the last pleading within the meaning of former identical rule. *State ex rel. Symms v. Thirteenth Judicial Dist.*, 91 Idaho 237, 419 P.2d 679 (1966).

Waiver.

Waiver of jury trial will not be implied in doubtful cases. *Neal v. Drainage Dist. No. 2*, 42 Idaho 624, 248 P. 22 (1926).

Former identical rule did not violate the right to trial by jury, but established the procedure to be employed in determining whether a party had waived the right to trial by jury. *R.E.W. Constr. Co. v. District Court*, 88 Idaho 426, 400 P.2d 390 (1965).

Right to a civil trial by jury is waived by failure to demand a jury trial within ten days after service of the last pleading directed to an issue. *Meyer v. Whipple*, 94 Idaho 260, 486 P.2d 271 (1971).

Rule 38(c). Demand — Specification of issues.

In a demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within ten (10) days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

DECISIONS UNDER PRIOR RULE OR STATUTE

Pretrial Order.

A pretrial order declaring that the contested issues of law were the proximate cause of an accident, whether it was attributable to the negligence of the defendant employee or the contributory negligence of defendant, and whether the defendant employee, at the time of the accident, was the agent, servant, and

employee of the defendant employer engaged in some purpose or duty in furtherance of his employment did not withdraw those issues from the jury or constitute a waiver by the parties of their right to trial by jury on such issues. *Van Vranken v. Fence-Craft*, 91 Idaho 742, 430 P.2d 488 (1967).

Rule 38(d). Waiver.

The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading

asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

STATUTORY NOTES

Cross References. Filing of papers after complaint, Rule 5(d).

JUDICIAL DECISIONS

ANALYSIS

Failure to Appear.
Untimely Demand.

Failure to Appear.

Where defendants demanded a jury and did not consent to withdrawal of that demand, they did not waive their right to a jury, by failing to appear. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Untimely Demand.

Where defendant waited 62 days after serving his answer to demand a jury trial, he waived trial by jury, as a matter of right, and the district court did not abuse its discretion by denying motion therefor. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appointment of Referee.
Effect of Further Pleading.
Failure to Request.
Manner of Making.
Statutory Rule Superseded.
Waiver.

Appointment of Referee.

Where the parties stipulate and agree to the appointment of a referee to take testimony and report same to court without making any demand for a jury, they will be deemed to have waived a jury even if the case was one in which they would otherwise be entitled to a jury trial. *Lindstrom v. Hope Lumber Co.*, 12 Idaho 714, 88 P. 92 (1906).

Effect of Further Pleading.

Where a defendant pled that the debt sued upon was that of a corporation of which he was an officer and, after expiration of the time within which to demand a jury trial as of right, filed an additional paragraph of answer alleging that the corporation in question was a de facto corporation and that plaintiff was estopped to deny that it was a corporation, such additional defense did not differ from the original defense sufficiently to constitute a revocation of waiver under former identical rule. *Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 402 P.2d 394 (1965).

The filing of a reply by plaintiff more than

ten days after the filing of defendants' answer and counterclaim and within time extended by the court accompanied by a request for jury trial is a filing of such request within ten days after the service of the last pleading in the case and not attempt to revoke a waiver of jury trial previously made. *State ex rel. Symms v. Thirteenth Judicial Dist.*, 91 Idaho 237, 419 P.2d 679 (1966).

Failure to Request.

When no jury was requested and no objection filed in trial court, Supreme Court, in absence of showing in record, will presume that consent was filed. *Snapp v. Bean*, 48 Idaho 236, 281 P. 374 (1929).

Right to a civil trial by jury is waived by failure to demand a jury trial within ten days after service of the last pleading directed to an issue. *Meyer v. Whipple*, 94 Idaho 260, 486 P.2d 271 (1971).

Manner of Making.

Waiver cannot be made or enforced except in manner provided by statute. *Neal v. Drainage Dist. No. 2*, 42 Idaho 624, 248 P. 22 (1926).

Statutory Rule Superseded.

Former identical rule effectively superseded and abrogated what was formerly I.C. § 10-301 in accordance with law as enacted by the legislature in §§ 1-212 — 1-215 (§ 1-215 repealed in 1975). *Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 403 P.2d 859 (1965).

Waiver.

Waiver of jury trial will not be implied in doubtful cases. *Neal v. Drainage Dist.* No. 2, 42 Idaho 624, 248 P. 22 (1926).

There was no waiver of right of trial by jury where defendant requested a jury in writing

prior to trial though minutes of court disclosed that case was set down for trial by the court, since the minutes did not contain any statement that defendant consented to trial by the court. *Farmer v. Loofbourrow*, 75 Idaho 88, 267 P.2d 113, 41 A.L.R.2d 774 (1954).

RESEARCH REFERENCES

A.L.R. How to obtain jury trial in eminent domain: waiver. 12 A.L.R.3d 7.

Withdrawal of waiver of jury trial. 9 A.L.R.4th 1041; 48 A.L.R.4th 747.

Contractual jury trial waivers in state civil cases. 42 A.L.R.5th 53.

Discretion of District Court under Rule 39

(b) of Federal Rules of Court Procedure, authorizing it to order jury trial notwithstanding party's failure to make seasonable demand for jury. 6 A.L.R. Fed. 217.

Waived right to jury trial as revived by amended or supplemental pleadings. 18 A.L.R. Fed. 754.

Rule 39(a). Trial by jury or by the court — By jury.

When trial by jury has been demanded as provided in Rule 38, the actions shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

STATUTORY NOTES

Cross References. Advisory jury, Rule 39(c).

Enlargement of time, Rule 6(b).

Jury trial, demand for, Rule 38(b).

Trial by consent, Rule 39(c).

Trial by court, Rule 39(b).

JUDICIAL DECISIONS**ANALYSIS**

Failure to Appear.

In General.

Nonparty Waiver.

Telephone Stipulation.

Failure to Appear.

Where defendants demanded a jury and did not consent to withdrawal of that demand, they did not waive their right to a jury by failing to appear. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

In General.

The judge must identify each ground for ordering a new trial, although he is not required to state specific reasons for deeming each ground applicable; when proper grounds are identified, the grant of a new trial is discretionary. The judge's order will not be disturbed on appeal unless discretion has

been abused. *Murphy v. Etchegaray*, 108 Idaho 814, 702 P.2d 852 (Ct. App. 1985).

Nonparty Waiver.

Although the trial court found that tenant had acted as landowner's agent in construction of relocated ditch which was the subject of the lawsuit, this did not affect tenant's status as a "party" and thus, landowner's oral waiver of right to a jury trial did not waive tenant's right to a jury trial. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Telephone Stipulation.

An alleged stipulation by telephone conference did not constitute a valid waiver of the right to a jury trial by the parties because it was not entered into the record. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Cited in: Thriftway Lumber Co. v. Tisherman, 105 Idaho 668, 672 P.2d 236 (1983).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal from Board of County Commissioners.
Attorney Fees.

Determination of Right to Jury Trial.

Quo Warranto Proceedings.

Receipt of Letter.

Use of Land.

Waiver.

Appeal from Board of County Commissioners.

An appeal from an order of board of county commissioners allowing a claim is within provisions of the law and the issue should be submitted to a jury. *Fisher v. Board of County Comm'rs*, 4 Idaho 381, 39 P. 552 (1895).

Attorney Fees.

When attorney seeking to recover legal fees for services to drainage district abandons proceeding to have amount of such fees determined in court and brings action therefor, he is entitled to jury trial in his action. *Neal v. Drainage Dist. No. 2*, 42 Idaho 624, 248 P. 22 (1926).

Determination of Right to Jury Trial.

Right to a jury trial cannot be denied because it is necessary to show that a deed absolute is in form of a mortgage, when determination of this issue is only incidental to the main object of the action, such as the recovery of money. *Johansen v. Looney*, 30 Idaho 123, 163 P. 303 (1917).

Where it appeared from the record that the trial court was conscientious in considering the motion for jury trial under former similar rule, the refusal of the court to grant a trial by jury was not an abuse of its discretion. *Meyer v. Whipple*, 94 Idaho 260, 486 P.2d 271 (1971).

Quo Warranto Proceedings.

Actions in nature of quo warranto proceedings to test authority of office do not contemplate jury trial. *People ex rel. Brown v. Burnham*, 35 Idaho 522, 207 P. 589 (1922).

Receipt of Letter.

A question as to whether a letter intended for a corporation whose full name was "American Surety Co. of New York," which had an office in a certain office building in Salt Lake City, but addressed merely "American Surety Co., Salt Lake City, Utah," was received by the addressee, is for the jury, where, though the addressee denies having received it, there was testimony that the sender's address was on the envelope, and that the letter was never returned. *American Sur. Co. v. Blake*, 54 Idaho 1, 27 P.2d 972, 91 A.L.R. 153 (1933).

Use of Land.

Upon cross-complaint claiming damages for use of land in controversy parties are entitled to jury trial as matter of right. *Shull v. Lawrence*, 37 Idaho 401, 217 P. 267 (1923).

Waiver.

A pretrial order declaring that the contested issues of law were the proximate cause of an accident, whether it was attributable to the negligence of the defendant employee or the contributory negligence of defendant, and whether the defendant employee, at the time of the accident, was the agent, servant, and employee of the defendant employer engaged in some purpose or duty in furtherance of his employment did not withdraw those issues from the jury or constitute a waiver by the parties of their right to trial by jury on such issues. *Van Vranken v. Fence-Craft*, 91 Idaho 742, 430 P.2d 488 (1967).

RESEARCH REFERENCES

A.L.R. Existence of actionable defect in street or highway proper as question for court or for jury. 1 A.L.R.3d 496.

Issues in garnishment as triable to court or to jury. 19 A.L.R.3d 1391.

Dentist's negligence as question for jury. 11 A.L.R.4th 748.

Modern trends as to contributory negligence of children. 32 A.L.R.4th 56.

Automobile, question for jury as to duty of

driver of, whose view is obstructed by dust, smoke, or atmospheric conditions. 32 A.L.R.4th 933.

Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction. 42 A.L.R.4th 12.

Publication, question for jury as to whether accidental communication, not intended by defendants, constitutes. 62 A.L.R.4th 616.

Rule 39(b). Trial by the court.

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

STATUTORY NOTES

Cross References. Failure to demand a waiver, Rule 38(d).

Findings by the court, effect, Rule 52(a).

Master's report in nonjury actions, Rule 53(e)(2).

Trial by jury, Rule 39(a).

JUDICIAL DECISIONS**ANALYSIS**

Demand for Jury Trial.
Procedure.

Demand for Jury Trial.

Where party furnished no reason for delaying her request for a jury trial, there was no abuse of discretion in denying the late request. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984).

In the absence of proof of abuse of discretion, appellate court ordinarily will not intervene in the trial court decision as to whether to order jury trial; thus, where the appellants gave no reason for their failure to make a timely demand for jury trial and moreover, the demand purportedly made occurred on the eve of the trial, there was no abuse of discretion in denying the request. *City of Pocatello v. Anderton*, 106 Idaho 370, 679 P.2d 647 (1984).

Where the defendants did not demand a jury trial until they filed their first amended counterclaim, ten months after the last pleading, their right to demand a jury trial was

waived; the fact that the demand was appended to an amended counterclaim did no more than assert additional claims arising out of the transaction set forth in the original pleading. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

Procedure.

Trial court properly denied as untimely workers' compensation policyholders' motions for a jury trial under this rule or I.R.C.P. 38(b) in their action against the State Insurance Fund; the policyholders' waiver of a jury trial was not revoked by the state's intervention in the proceeding or by an amendment of a pleading, and the policyholders gave no reason for their failure to make a timely demand. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005), overruled on other grounds, *Farber v. Idaho State Ins. Fund*, — Idaho —, 272 P.3d 467 (Idaho 2012).

Cited in: *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982); *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Plea in Abatement.
Procedure.
Quo Warranto Proceedings.

Plea in Abatement.

There was no abuse of discretion in overruling motion that plea in abatement be heard by the court without a jury. *Collard v. Universal Auto. Ins. Co.*, 55 Idaho 560, 45 P.2d 288 (1935).

Procedure.

Where a party desires a trial after time to

demand a jury trial as of right has expired, a motion to the court under former identical rule, rather than service of a demand under former Rule 38(b) was the proper course. *R.E.W. Constr. Co. v. District Court*, 88 Idaho 426, 400 P.2d 390 (1965).

Quo Warranto Proceedings.

Actions in nature of quo warranto proceedings to test the authority of office do not contemplate jury trial. *People ex rel. Brown v. Burnham*, 35 Idaho 522, 207 P. 589 (1922).

RESEARCH REFERENCES

A.L.R. Discretion of District Court under Rule 39(b) of Federal Rules of Civil Procedure, authorizing it to order jury trial not-

withstanding party's failure to make seasonable demand for jury. 6 A.L.R. Fed. 217.

Rule 39(c). Advisory jury and trial by consent.

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

JUDICIAL DECISIONS

Cited in: Hoppe v. McDonald, 103 Idaho 33, 644 P.2d 355 (1982).

DECISIONS UNDER PRIOR RULE OR STATUTE**Equitable Claims.**

Where complaint was framed in terms of an unidentified trust relationship, an accounting and claim that conveyance was in fact a mortgage and requesting that mortgage be foreclosed and sold, such claims were cogni-

zable as equitable and trial court did not err in treating special findings of jury as advisory only and in disregarding certain special verdicts of the jury as advisory only. Rowe v. Burrup, 95 Idaho 747, 518 P.2d 1386 (1974).

Rule 40(a). Court calendars or calendar review. [Rescinded effective November 1, 1987.]**STATUTORY NOTES**

Compiler's Notes. This rule (adopted effective January 1, 1975; amended March 24, 1982, effective July 1, 1982) was rescinded by

Supreme Court order of June 15, 1987, effective November 1, 1987.

Rule 40(b). Request for trial setting.

In any action which is at issue, either party may request the court at any time to set the same for a pre-trial hearing or for trial, or the court on its own initiative may set such action for trial or pre-trial hearing. Such request shall be in such form and contain such information as prescribed by the administrative judge of the judicial district but shall include statements as to the nature of the case, whether a jury trial has been demanded, whether mediation would be beneficial to the resolution of the dispute, an estimate of the time required for the trial, the name of the attorney who will appear at trial, and the dates on which the attorney would not be available for trial of the action. The request shall be served upon all parties to the action. Within five (5) days after service of such request, the attorneys of record of all other parties to a pending action shall file written responses containing all of the information required in the request for trial setting and serve copies thereof upon all other parties to the action. Upon receipt of the request and the

responses thereto, or upon a failure to file the response as required by this rule, the court may set the action for pre-trial hearing or trial without waiting for the next calendar call date. (Amended March 24, 1982, effective July 1, 1982; amended June 12, 1996, effective July 1, 1996.)

JUDICIAL DECISIONS

Notice of Pending Dismissal.

Patient in a medical malpractice suit fulfilled the requirement of the trial court's notice of pending dismissal to take affirmative action when she submitted interrogatories to

the doctor and requested a trial be set. *Sato v. Schossberger*, 117 Idaho 771, 792 P.2d 336 (1990).

Cited in: *Kalange v. Rencher*, 136 Idaho 192, 30 P.3d 970 (2001).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Notice.

Setting in Absence of Defense.

Notice.

In absence of statutory provision or rule requiring that parties be expressly notified by setting of cause, no such notice need be given, but it may be set for trial at regular term and

it is incumbent upon party's counsel to keep informed. *Peters v. Walker*, 37 Idaho 195, 215 P. 845 (1923).

Setting in Absence of Defense.

Plaintiff may bring case for trial in absence of defense unless court for good cause directs otherwise. *Storer v. Heitfeld*, 17 Idaho 113, 105 P. 55 (1909).

Rule 40(c). Dismissal of inactive cases.

In the absence of a showing of good cause for retention, any action, appeal or proceeding, except for guardianships, conservatorships, and probate proceedings, in which no action has been taken or in which the summons has not been issued and served, for a period of six (6) months shall be dismissed. Dismissal pursuant to this rule in the case of appeals shall be with prejudice and as to all other matters such dismissal shall be without prejudice. At least 14 days prior to such dismissal, the clerk shall give notification of the pending dismissal to all attorneys of record, and to any party appearing on that party's own behalf, in the action or proceeding subject to dismissal under this rule. (Amended effective March 1, 1976; amended effective July 1, 1977; amended March 24, 1982, effective July 1, 1982; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Appellate Review.

Bond Requirement.

Condemnation Action.

Construction with Other Rules.

Notice of Dismissal.

Reinstatement.

Appellate Review.

On appellate review, a dismissal under this rule is treated as a discretionary decision, which will be upheld unless it is found that

the lower court abused its discretion. *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988).

Where appellant filed a pro se petition for post-conviction relief alleging the ineffective assistance of counsel, but after years of neglect by his appointed attorneys, his petition for post-conviction relief was dismissed for inactivity pursuant to Idaho R. Civ. P. 40(c). The Supreme Court of Idaho held that a dismissal under Idaho R. Civ. P. 40(c) was in effect a final judgment for purposes of relief under Idaho R. Civ. P. 60(b); appellant was

permitted to seek relief from the judgment of dismissal under Idaho R. Civ. P. 60(b), given the complete absence of meaningful representation in the only available proceeding for him to advance constitutional challenges to his conviction. *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010).

Bond Requirement.

Since there is no authorization for a trial court to require the posting of a security for costs as a condition to maintaining an action as an alternative to dismissal under this rule, the district court erred by imposing an improper condition — a bond as security for costs — in order to retain the case on the court's calendar. *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988).

Condemnation Action.

The trial court abused its discretion in dismissing a private condemnation action with prejudice *sua sponte*, where neither party took any affirmative action in the case for a period of 21 months. *Kirkham v. 4.60 Acres of Land*, 100 Idaho 781, 605 P.2d 959 (1980).

Construction with Other Rules.

A finding of good cause under this rule justifying retention of a case on the court's calendar is wholly irrelevant to a determination of whether good cause has been shown for failing to serve a defendant with a copy of a

state complaint under I.R.C.P. 4(a)(2). *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999).

Notice of Dismissal.

Where plaintiff claimed that he had never received notice of dismissal for lack of prosecution but failed to allege that he had notified the clerk's office of his change of address or that, had the notice been delivered to his former address, he would have received it, there was insufficient proof that the required notice was unsent. *Hendrickson v. Sun Valley Corp.*, 98 Idaho 133, 559 P.2d 749 (1977).

Although the preamendment version of this rule only required notice of dismissal to "attorneys of record," this language should be liberally construed to include parties who are acting as their own attorney. *Hendrickson v. Sun Valley Corp.*, 98 Idaho 133, 559 P.2d 749 (1977).

Reinstatement.

District court did not have authority to reinstate a case in response to a motion to reinstate filed 77 days after the case was dismissed for inaction. *Castle v. Hays*, 131 Idaho 373, 957 P.2d 351 (1998).

Cited in: *Heacock v. Madsen*, 108 Idaho 65, 696 P.2d 916 (Ct. App. 1985); *Child v. Blaser*, 111 Idaho 702, 727 P.2d 893 (Ct. App. 1986); *Nagel v. Wagers*, 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986); *Madsen v. Nuxoll*, 120 Idaho 530, 817 P.2d 196 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Liberal Construction.
Mortgage Foreclosure.

Liberal Construction.

Former district court rule requiring dismissal of suits for want of prosecution should be construed so as to promote decisions on merit rather than on strict formal procedure. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

Mortgage Foreclosure.

Action by trustees of bond issue commenced March 17, 1924, to foreclose mortgage was improperly dismissed for want of prosecution on April 25, 1930, where there were negotiations and dealings transpiring during period and defendant had made no objection on ground of delay. *Nielsen v. Old Charles Dickens Mining Co.*, 51 Idaho 40, 1 P.2d 193 (1931).

Rule 40(d)(1). Disqualification without cause.

In all civil actions and petitions for judicial review, the parties shall each have the right to one (1) disqualification of the judge without cause, except as herein provided, under the following conditions and procedures:

(A) **Motion to Disqualify.** In any action in the district court or the magistrate's division thereof, any party may disqualify one (1) judge by filing a motion for disqualification, which shall not require the stating of any grounds therefor, and such motion for disqualification, if timely, shall be granted.

(B) **Time for Filing.** A motion for disqualification without cause must be filed not later than seven (7) days after service of a written notice or order setting the action for status conference, pretrial conference, trial or for hearing on the first contested motion, or not later than twenty-one (21) days after service or receipt of a complaint, summons, order or other pleading indicating or specifying who the presiding judge to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pretrial conference, a contested proceeding or trial before the judge sought to be disqualified.

(C) **Multiple Parties.** If there are multiple parties plaintiff, defendant or otherwise, the trial court shall determine whether such co-parties have sufficient interest in common in the action so as to be required to join in a disqualification without cause, or whether such parties have an adverse interest in the action such that each adverse co-party is entitled to file one (1) motion for disqualification without cause.

(D) **New Parties.** If a new party is joined in an action after the time for disqualification without cause of the presiding judge has passed, the new party shall have the right to file a motion for disqualification without cause within fourteen (14) days of the filing date of that party's first appearance or from the date when that party's first responsive pleading is due, whichever occurs first.

(E) **New Judge.** If at any time during the course of the proceedings, except under circumstances involving alternate judges as set forth below in subparagraph (G), a new judge is assigned to preside over the case, each party shall have the right to file one (1) motion for disqualification without cause as to the new judge, within the time limits set forth in subparagraph (B) of this Rule. Provided, if a party has previously exercised a disqualification under this Rule 40(d)(1), that party shall have no right of disqualification without cause of a new judge under this subparagraph.

(F) **Disqualification on New Trial.** After a trial has been held, if a new trial has been ordered by the trial court or by an appellate court, each party may file a motion for disqualification without cause of the presiding judge, within the time limits set forth in subparagraph (B) of this Rule.

(G) **Alternate Judges.** If the presiding judge intends to have a panel of judges as alternates to preside at trial or at any other hearing or proceeding in the case, a notice or amended notice of trial setting shall include a list of judges who may alternatively be assigned to so preside if the presiding judge is unavailable. Upon service of the notice as to the panel, each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of written notice listing the alternate judges. Provided, if a party has previously exercised the right to disqualification without cause under this Rule 40(d)(1), that party shall have no right to disqualify an alternate judge under this subparagraph.

(H) **Service on Judge.** A party moving to disqualify a judge under this Rule 40(d)(1) shall mail a copy of the motion for disqualification to the presiding judge or magistrate at the judge's resident chambers.

(I) **Exceptions.** Notwithstanding the above provisions, the right to disqualification without cause shall not apply to:

(i) A judge when acting in an appellate capacity from another court, unless the appeal is a trial de novo;

(ii) A judge in a post-conviction proceeding, when that proceeding has been assigned to the judge who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding.

(iii) A judge who has been appointed by the Supreme Court to preside over a specific civil action.

(iv) A judge hearing petitions to modify child custody orders or child support orders entered by that same judge in an earlier proceeding.

(J) **Misuse of disqualification without cause.** A motion for disqualification without cause shall not be made under this Rule to hinder, delay or obstruct the administration of justice. If it appears that an attorney or law firm is using disqualifications without cause for such purposes, or with such frequency as to impede the administration of justice, the Trial Court Administrator shall notify the Administrative Director of the Courts requesting a review of the possible misuse of disqualifications without cause. The Administrative Director shall review the possible misuse of this Rule and may take remedial measures. The Administrative Director, before or after taking such remedial measures, may refer the matter to the Chief Justice, who, upon determining that there has been misuse of disqualifications without cause, may take appropriate action to address the misuse, which may include an order providing that the attorney or firm that has engaged in such misuse is prohibited from using disqualifications without cause for such period of time as is set forth in the order or until further order of the Chief Justice. (Adopted June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended March 20, 1991, effective July 1, 1991; amended May 3, 1991, effective July 1, 1991; amended March 26, 1992, effective July 1, 1992; amended January 30, 2001, effective July 1, 2001; amended March 22, 2002, effective July 1, 2002; amended June 3, 2003, effective July 1, 2003; amended September 10, 2010, effective October 1, 2010; amended February 9, 2012, effective July 1, 2012.)

JUDICIAL DECISIONS

ANALYSIS

Consolidated Cases.
Disqualification Inappropriate.
Exceptions for Certain Judges.
General Right to Disqualify.
Grounds.
Name of Judge.
Post-Conviction Relief.
Purpose.
Remand for Additional Findings.

Review of Agency Decisions.
Timeliness.

Consolidated Cases.

Where consolidated divorce cases originally filed in separate counties are absolutely identical, and are in fact the same action, a failed motion to disqualify the judge in one case will serve as the only bite of the apple of disqualification without cause and movant cannot subsequently attempt to disqualify the same

judge in the same case filed in another county. *Jones v. Jones*, 117 Idaho 621, 790 P.2d 914 (1990).

Disqualification Inappropriate.

Although it has been held that a right to disqualification without cause may exist after a remand if the case is set for trial peremptorily, before the parties and their counsel have enjoyed an opportunity to make meaningful decisions on whether to accept or reject the judge likely to hear the case, *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987), disqualification without cause under this rule was not appropriate where numerous contested matters already had been submitted to the judge for his determination, and where on remand, the parties had agreed to submit the merits of this case without further evidence but upon additional briefing. *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 979, 812 P.2d 286 (1989), modified on other grounds, 119 Idaho 946, 812 P.2d 253 (1991).

Even though no proper record of proceedings involving a trial judge in his previous representation of a city was provided to an appellate court, a motion to disqualify was nevertheless properly denied because the prior representation did not involve the same matter. *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006).

Exceptions for Certain Judges.

The role and scope of authority of a judge conducting a judicial review under the Administrative Procedures Act is more analogous to that of an appellate court judge than that of a trial court judge. Consequently, it is logical and consistent to treat a district judge in a judicial review action like an appellate judge for purposes of application of subsection (I)(i) of this rule. *Arthur v. Shoshone County*, 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000).

Court properly denied a debtor's Idaho R. Civ. P. 40(d)(1) disqualification motion in creditors' quiet title action because senior judges appointed under Idaho Code § 1-2005 were excepted from Rule 40(d)(1) motions to disqualify without cause, and a nunc pro tunc order retroactively and properly assigned the judge to the case in accordance with § 1-2005. *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004).

General Right to Disqualify.

The general right to disqualify one judge or magistrate without cause does not apply in a post-conviction proceeding where the judge or magistrate assigned to hear that case also entered the judgment of conviction or sentence being challenged in the post-conviction action. *Wilbanks v. State*, 126 Idaho 341, 882 P.2d 996 (Ct. App. 1994).

Grounds.

Under this rule the movant does not have to state any grounds for the disqualification of the judge. If the movant is concerned that the judge may be biased or unfair for some real or imagined reason, all that is required is a timely-filed motion under this rule. *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987).

Name of Judge.

Plaintiffs were entitled to know who the judge was who would hear their case before they exercised their right under this rule. *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987).

Where all the nonmoving parties have stipulated to a continuance of the trial because pleading and discovery could not be completed by the first trial date set and because of the 14-month time span between trial dates, the plaintiffs could not reasonably ascertain who the judge would be that would hear the case, since plaintiffs' motion was timely filed after the second trial date was set, the district judge was automatically disqualified and without authority to hear the matter. *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987).

Post-Conviction Relief.

Where petitioner for post-conviction relief was never actually served with notice of a hearing — as is expressly contemplated by the rules — until after his motion for change of judge was filed, his in-custody, uncounseled appearance before the court was not a proper substitute for the service required by the rules; therefore, it was not proper for the court to deny his motion for a change of judge on the ground that he failed to comply with the time limits set forth in this rule. *State v. Bearshield*, 104 Idaho 676, 662 P.2d 548 (1983), modified on other ground, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

An application for post-conviction relief is a special proceeding, civil in nature and is an entirely new proceeding, distinct from the criminal action which led to conviction. *State v. Bearshield*, 104 Idaho 676, 662 P.2d 548 (1983), modified on other ground, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

Where judge's stated reason for not honoring motion for disqualification, that he had been in the case from its inception, could only be understood as founded upon his view that the post-conviction proceeding was a continuation of the criminal action at which he had presided, he erred in continuing to preside in the post-conviction relief action. *State v.*

Bearshield, 104 Idaho 676, 662 P.2d 548 (1983), modified on other ground, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

Subdivision (A) of this rule does not disqualify a judge in a post-conviction proceeding when the assigned judge is the one who presided over the underlying criminal case. *Smith v. State*, 126 Idaho 106, 878 P.2d 805 (Ct. App. 1994).

Purpose.

The purpose of this rule is to insure a fair tribunal by allowing a party to disqualify a judge thought to be unfair or biased. *Jahnke v. Moore*, 112 Idaho 944, 737 P.2d 465 (Ct. App. 1987).

Remand for Additional Findings.

In a case that was remanded for the limited purpose of having the magistrate make additional written findings on particular issues of fact which had already been tried before him, subdivision (F) of this rule did not apply to grant applicant an automatic right to disqualify the magistrate without cause. *Jones v. State*, 125 Idaho 294, 870 P.2d 1 (Ct. App.

1994), cert. denied, 513 U.S. 838, 115 S. Ct. 121, 130 L. Ed. 2d 66 (1994).

Review of Agency Decisions.

Subsection (I)(i) of this rule, precluding the disqualification without cause of a judge sitting in an appellate capacity, is applicable to district judges conducting judicial review of state or local agency actions under the Administrative Procedures Act. *Arthur v. Shoshone County*, 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000).

Timeliness.

Where, on appeal, defendant abandoned his argument made to the trial court that paragraph (d)(1)(F) governed his motion for disqualification of the judge, and instead argued that the motion should have been granted under paragraph (d)(1)(A), the motion was not timely and was denied. *Farr West Invs. v. Topaz Mktg. L.P.*, 220 P.3d 1091 (2009).

Cited in: *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987); *Stedtfeld v. State*, 114 Idaho 273, 755 P.2d 1311 (Ct. App. 1988); *Freeman v. State*, 114 Idaho 521, 757 P.2d 1240 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Actual Prejudice.

Conditional Disqualification.

Dismissal as to One Defendant.

Motion by State.

Name of Judge.

Successive Disqualifications Not Permitted.

Actual Prejudice.

Although former § 1-1801 provided a defendant with only one unquestioned disqualification, this provision was supplemental to Idaho Const., art. 1, § 18, which authorizes a change of judge whenever actual prejudice against a defendant is established. *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).

Conditional Disqualification.

Where defendants told the court that it was permitted to either order the transfer of stock in exchange for dismissal, or order that the defendants keep the stock, but if the court failed to comply with their demands, the judge so ruling was disqualified, such a conditional disqualification found no precedential approval nor could it be sanctioned by public policy. To permit a party to disqualify a judge after that party finds how the judge will rule on a matter before him would permit forum shopping of the worst kind. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Dismissal as to One Defendant.

When disqualification of trial judge, under the affidavit, exists as to only one of the defendants, and the suit is dismissed as to him, the disqualification is completely removed. *Nielson v. Garrett*, 55 Idaho 240, 43 P.2d 380 (1935).

Motion by State.

While the defendant's motion to disqualify the magistrate, filed at the preliminary hearing itself, was clearly untimely, the state's motion, at the District Court level, was timely because a Saturday and a Sunday intervened in the time between the setting of trial and the filing of the motion; therefore, the defendant was not prejudiced by grant of the state's motion. *State v. Powers*, 100 Idaho 614, 603 P.2d 569 (1979).

Defendant was not prejudiced by the granting of the state's motion to disqualify the first trial judge assigned to hear the case, while the defendant's motion to disqualify the magistrate was denied as untimely filed. *State v. Powers*, 100 Idaho 614, 603 P.2d 569 (1979).

Name of Judge.

To construe this rule to allow disqualification solely for delay would be contrary to the spirit of the rules; hence, to disqualify a judge under this rule, the judge who is to be disqualified must be named. Disqualification

could not be made prior to assignment of a judge to the case. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Successive Disqualifications Not Permitted.

New trial was not a new action or proceed-

ing, but was a continuation of the original action, and the appellant having disqualified a judge was not entitled to disqualify the judge assigned to hear the new trial. *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).

RESEARCH REFERENCES

A.L.R. Laws governing judicial recusal or disqualification in state proceeding as violat- ing federal or state constitution. 91 A.L.R.5th 437.

Rule 40(d)(2). Disqualification for cause.

(A) **Grounds.** Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:

1. That the judge or magistrate is a party, or is interested, in the action or proceeding.
2. That the judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.
3. That the judge or magistrate has been attorney or counsel for any party in the action or proceeding.
4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.

(B) **Motion for Disqualification.** Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions. (Adopted June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Appellate Review.
Attorney or Counsel for Party.
Bias or Prejudice.
Contested Matter.
Denial of Motion to Disqualify.
Discretion of Court.
Disqualification Not Reviewable.
Effect of Filing of Affidavit.
Extrajudicial Source of Bias and Prejudice.
Failure to File Written Motion.
Hearing and Notice.
Insufficient Allegations.
Interest in Corporation.

Nature of Disqualifying Interest.
Previous Role as Attorney.
Self-Disqualification.
Successive Disqualifications Not Permitted.

Appellate Review.

Appellate court will utilize an abuse of discretion standard to review the respective denials of motions to disqualify for cause a magistrate and district judge. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

Attorney or Counsel for Party.

Judge acknowledged that he once represented brother of husband concerning the estate of husband's mother, but he explained

that no conflict or prejudice resulted. Brother was not a party in this action, nor was he shown to have any interest in the outcome. Judge had not acted as counsel on behalf of either husband or wife and thus judge did not abuse his discretion in deciding to remain on the case. *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

Bias or Prejudice.

In divorce action where magistrate informed counsel of plaintiff husband that his affidavit for attorney fees should have included the specific time allotted to each delineated item, such request was an effort to reach a just result on the issue of attorney fees, and did not amount to coaching in favor of defendant counsel or bias against plaintiff. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

Adverse rulings alone do not support the existence of a disqualifying prejudice. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992).

In divorce action, statements of magistrate did not support the existence of a finding of bias where plaintiff who moved to disqualify magistrate cited in his affidavit opening comment of magistrate at one of the hearings that he was calling the "Bell case" and that he had indicated to the parties that the case would be called first, stating that because he and his attorney did not know that their case would be called first, the magistrate's statements indicated that defendant's counsel and the magistrate had reached a secret agreement. *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004).

Contested Matter.

Disqualification of a judge was properly denied where defendant sought to disqualify more than one judge and the affidavit was filed after the ruling on demurrer to the original complaint. *Aker v. Coleman*, 60 Idaho 118, 88 P.2d 869 (1939).

Filing of affidavits of prejudice of the judge was not timely where judge had passed on demurrers and motions to strike. *Cooper v. Wesco Bldrs., Inc.*, 76 Idaho 278, 281 P.2d 669 (1955).

Where the judge granted defendant's motion for a mistrial, the case reverted to the status it had prior to the commencement of the trial, and, where the court had not ruled upon any contested matter involving the discretion of the court except during the proceeding declared to be a mistrial, defendant was entitled to file an affidavit of prejudice and the court erred in holding that the right to file such affidavit was not available to defendant.

State v. Bitz, 89 Idaho 181, 404 P.2d 628 (1965).

Appellant was not precluded from filing an affidavit of prejudice merely because the judge presided over a prior habeas corpus hearing which involved none of the issues before the court in the trial of the case. *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).

Defendant's refusal to plead, and trial court's entry of plea of not guilty on his behalf, did not constitute the submission of "a contested matter for decision" so as to preclude the filing of an affidavit of prejudice. *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

Under former § 1-1801 the supreme court held that where the district court had denied the state's motion to dismiss or for summary judgment before the affidavit of prejudice was filed, the trial judge properly refused to disqualify himself since a contested matter had been submitted to the court prior to the filing of the affidavit. *Goodrick v. State*, 98 Idaho 124, 559 P.2d 303 (1977).

Denial of Motion to Disqualify.

Where a review of the record revealed no pattern or indication of bias by the magistrate for or against either party, appellant failed to show an abuse of discretion and magistrate's denial of a motion to disqualify himself for cause was proper. *Liebelt v. Liebelt*, 125 Idaho 302, 870 P.2d 9 (1994).

Where defendant made a motion under subdivision (A)(4) of this rule to disqualify the district judge appointed to defendant's post-conviction relief proceeding under § 19-4907(a), grounds asserted by defendant, bias and appearance of impropriety, were without merit and judge's denial of defendant's motion was proper. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

Motion to disqualify based on the assertion that the magistrate was prejudiced against a party because it had presided over a prior termination proceeding of the party was not appropriate under subdivision (A)(4) of this rule because the alleged prejudice did not stem from an extra-judicial source. *State v. Doe*, 133 Idaho 826, 992 P.2d 1226 (Ct. App. 1999).

Discretion of Court.

Where the court was subjected to repeated, unvarying arguments filled with suggestions of a far-reaching conspiracy against husband that pervaded and controlled an earlier divorce action and the present action, touching everyone involved in either case, and the judge exhibited infinite patience with these arguments, and the record showed that while judge put time restraints on arguments, and conducted even-handed hearings allowing all

parties the opportunity to be heard, he did not abuse his discretion in deciding to remain on the case. *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

The denial of a motion to disqualify a judge for cause is a matter within the sound discretion of the trial judge. *Pizzuto v. State*, 127 Idaho 469, 903 P.2d 58 (1995).

Disqualification Not Reviewable.

Judge's finding that he is disqualified is not reviewable. *Newman v. District Court*, 32 Idaho 607, 186 P. 922 (1920).

Effect of Filing of Affidavit.

The truth of the filed affidavit charging bias or prejudice on the part of the judge is not what disqualifies the judge, but the affidavit itself. *Price v. Featherstone*, 64 Idaho 312, 130 P.2d 853 (1942); *Davis v. Irwin*, 65 Idaho 77, 139 P.2d 474 (1943); *Anderson v. Winstead*, 65 Idaho 161, 140 P.2d 233 (1943).

The filing of an affidavit charging bias or prejudice of the judge is sufficient to disqualify him without any hearing as to whether the affidavit is true, and regardless of whether he is in fact prejudiced or not; the filing deprives the judge of all jurisdiction except to make a proper order of the removal of the cause or to call another judge. *Davis v. Irwin*, 65 Idaho 77, 139 P.2d 474 (1943).

Upon the filing of an affidavit under the former section, the presiding judge was automatically disqualified without any hearing on the truth or falsity of the affidavit and regardless of whether the judge was actually prejudiced as a matter of law. *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

Extrajudicial Source of Bias and Prejudice.

When reviewing a judge's ruling on a disqualification motion, the alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *DesFosses v. DesFosses*, 120 Idaho 27, 813 P.2d 366 (Ct. App. 1991), *aff'd*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

Failure to File Written Motion.

Where rule in effect at the time of the defendant's hearing required that a motion for disqualification of the trial judge be made within five days after service of notice setting the action for trial, and the facts showing cause for disqualification was not known until the hearing itself when the district judge made his comments concerning the previous pleas, the failure of the defendant to file a written motion was not fatal to the presenta-

tion of his issue. *Freeman v. State*, 114 Idaho 521, 757 P.2d 1240 (Ct. App. 1988).

Hearing and Notice.

Denial of motion to disqualify judge for cause from presiding over inmates claim for post-conviction relief was proper even though no hearing was held. There was no request for a hearing, and no requirement that a hearing be conducted. No notice was required as there was no oral argument scheduled. *Lamm v. State*, 143 Idaho 763, 152 P.3d 634 (Ct. App. 2006).

Insufficient Allegations.

A defendant's vague and factually unsubstantiated allegations are insufficient to merit disqualification of the district court. *Hays v. Craven*, 131 Idaho 761, 963 P.2d 1198 (Ct. App. 1998).

Interest in Corporation.

Being stockholder in corporation interested in litigation disqualifies judge from sitting in case. *Hultner-Wallner v. Featherstone*, 48 Idaho 507, 283 P. 42 (1929).

Judge was disqualified to preside in mandamus action to determine proper officers of corporation, where there was another suit pending between such corporation and another corporation involving substantial rights and the principal assets of such corporation and the judge was a director and large stockholder in the other corporation. *Bentley v. Lucky Friday Extension Mining Co.*, 70 Idaho 511, 223 P.2d 947 (1950).

Nature of Disqualifying Interest.

Interest which disqualifies judge in trying case is personal or property interest; that is, interest in event of suit or in judgment which may be rendered therein. *Hultner-Wallner v. Featherstone*, 48 Idaho 507, 283 P. 42 (1929).

Previous Role as Attorney.

A judge is not disqualified from presiding over the trial of an action on a judgment, to revive it, because he previously acted as attorney for a party in the suit in which the judgment was rendered, for the reason that the only issues in such action are the regularity of the entry of the judgment and the payment thereof, which issues were not involved in the original case, and on which the judge as attorney had not advised or appeared for either party. *Stevens v. Hall*, 8 Idaho 549, 69 P. 282 (1902).

Self-Disqualification.

A judge's participation in prior legal proceedings involving related parties or issues does not provide grounds for the judge to recuse himself. *Roselle v. Heirs & Devises of*

Grover, 117 Idaho 530, 789 P.2d 526 (Ct. App. 1990).

Successive Disqualifications Not Permitted.

It was not the intent of the legislature to make it possible for a litigant to disqualify, one by one, every judge in the state by alleging the conclusion of bias and prejudice without stating the facts from which it is drawn. *Home Owner's Loan Corp. v. Stookey*, 59 Idaho 267, 81 P.2d 1096 (1938).

Affidavit for disqualification of judge cannot be filed after case has been submitted to judge for determination. *Ex Parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

Affidavit filed by defendant for implied bias or prejudice, one day prior to hearing date on demurrer to complaint where defendant had more than five days' notice of hearing date, was not timely and trial court properly struck

the affidavit. *Stevens v. McQuade*, 78 Idaho 162, 299 P.2d 95 (1956).

Although the affidavit for disqualification was not filed at least five days before the time originally designated for the hearing of respondent's motion for preliminary injunction, it was not untimely, where the hearing at which the affidavit was directed was held more than five days after the filing of the affidavit, the presiding judge having had ample notice and time to transfer the cause to another court or judge. *Lewiston Lime Co. v. Barney*, 87 Idaho 462, 394 P.2d 323 (1964).

Affidavit filed one day after the receipt of notice of hearing on demurrer to a criminal information was sufficient although not filed at least five days prior to hearing. *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

Cited in: *State v. Sivak*, 127 Idaho 387, 901 P.2d 494 (1995); *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 233 P.3d 38 (2009).

RESEARCH REFERENCES

A.L.R. Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant — state cases. 85 A.L.R.5th 547.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution. 91 A.L.R.5th 437.

Disqualification of judge under 28 U.S.C.A. § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 163 A.L.R. Fed. 575.

Rule 40(d)(3). Motion for disqualification. [Rescinded effective November 1, 1987.]

STATUTORY NOTES

Compiler's Notes. Former Rule 40(d)(3) (adopted effective January 1, 1975; amended December 19, 1975, effective January 1, 1976)

was rescinded by Supreme Court order of June 15, 1987, effective November 1, 1987.

Rule 40(d)(4). Voluntary disqualification.

This rule shall not prevent any presiding judge in an action from making a voluntary disqualification without stating any reason therefore. (Amended December 19, 1975, effective January 1, 1976.)

Rule 40(d)(5). Disqualification and assignment of new judge.

Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification. Upon disqualification of a judge for any reason, the administrative judge of the judicial district, or designee, shall appoint any other qualified judge in the judicial district to act or preside in the action. In lieu of such direct appointment procedure, the administrative district judge, or designee, may make application to the Supreme Court for

appointment of a new judge from outside of the judicial district to act or preside in the action.

STATUTORY NOTES

Cross References. Request by district judge for replacement, § 1-704.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Effect of Disqualification.
Judge Acting After Affidavit Filed.

Effect of Disqualification.

Disqualified judge may not act upon preliminary motion calling for exercise of judicial discretion. *Gordon v. Conon*, 5 Idaho 673, 51 P. 747 (1897), *aff'd*, *Clough v. Curtis*, 134 U.S. 361, 10 S. Ct. 945, 33 L. Ed. 945 (1890).

Judge Acting After Affidavit Filed.

Prohibition is proper remedy to prevent a judge, against whom a disqualifying affidavit has been filed under § 1-1801 (repealed), from acting. *Poff v. Scales*, 36 Idaho 762, 213 P. 1019 (1923); *Davis v. Irwin*, 65 Idaho 77, 139 P.2d 474 (1943); *Anderson v. Winstead*, 65 Idaho 161, 140 P.2d 233 (1943).

After the filing of affidavit of prejudice the judge is without authority to proceed further except as to certain matters; but by acting after the affidavit was filed, the judge acts in excess of, but not without, jurisdiction. Under such circumstances the judge is not liable in civil damages. *Waters v. Barclay*, 57 Idaho 376, 64 P.2d 1079 (1937).

After an affidavit of bias or prejudice is filed, any order made other than one calling in another judge or transferring the cause is void, and this includes an order for attorney's fees in a divorce proceeding. *Price v. Featherstone*, 64 Idaho 312, 130 P.2d 853 (1942).

All proceedings, findings, conclusions and orders, after affidavit of prejudice was timely filed, were improper, void and of no effect. *Lewiston Lime Co. v. Barney*, 87 Idaho 462, 394 P.2d 323 (1964).

RESEARCH REFERENCES

A.L.R. Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution. 91 A.L.R.5th 437.

Rule 40(e). Change of venue.

(1) Judge or magistrate may grant a change of venue or change the place of trial to another county in any civil action as provided by statute, and the judge or magistrate must, on motion pursuant to Rule 12(b), change the venue of a trial when it appears by affidavit or other satisfactory proof:

(A) That the county designated in the complaint is not the proper county, which motion must be made no later than fourteen (14) days after the party files a responsive pleading, or

(B) That there is reason to believe that an impartial trial cannot be had therein, or

(C) That the convenience of witnesses and the ends of justice would be promoted by the change.

(2) In the event a trial judge grants a change of venue pursuant to this Rule to a court of proper venue within the same judicial district, the trial judge granting the change of venue shall order the case transferred to a specific court of proper venue within the judicial district and shall continue the assignment over the case, unless the administrative district judge shall reassign the case to another judge of the judicial district. In the event a trial

judge desires to transfer a case to a court of proper venue outside of the judicial district in which the action is filed and desires to continue the assignment over the case, the trial judge may enter an order granting the change of venue and indicate therein a suggested court of proper venue in another judicial district and the trial judge's desire to preside over the case, and then refer the case to the administrative director of the courts for assignment by the Supreme Court to a court of proper venue in another judicial district and assignment of a specific judge to preside in the proceeding. In the event a trial judge desires to transfer a case to a county outside of the judicial district in which the action is filed upon the grounds that the county designated in the complaint is not the proper county, the trial judge shall enter an order transferring the case to the proper county and a trial judge of the receiving judicial district shall be assigned to preside over the case under the assignment procedures of that judicial district. In the event a trial judge desires to transfer a case to a court of proper venue outside of the judicial district in which the action is filed upon the grounds set forth in sub-paragraphs (1)(B) or (1)(C) of this rule, and the trial judge does not desire to continue the assignment over the case, the trial judge shall enter an order granting the change of venue, and then refer the case to the administrative director of the courts for assignment by the Supreme Court to a court of proper venue in another judicial district and assignment of a specific judge to preside in the proceeding.

(3) In the event that a judge is disqualified from further handling of a proceeding in which a change of venue has been granted to a court of proper venue within the same judicial district, the administrative district judge shall reassign the case to another judge of the judicial district. In the event that a judge is disqualified from further handling of a proceeding in which a change of venue has been granted from an originating court outside of the judicial district, the administrative district judge of the judicial district to which venue has been removed shall refer the case to the administrative director of the courts for assignment by the Supreme Court to a court of proper venue and assignment of a specific judge to preside in the proceeding.

(4) In ruling upon a motion for change of venue under subsection (1)(A) above, the court may consider an objection thereto based upon subsections (1)(B) or (1)(C), and the court may deny an otherwise proper motion for change of venue under section (1)(A) if it finds that the convenience of witnesses and the ends of justice would be promoted by retaining jurisdiction in the county where the action is filed.

(5) When a judge or magistrate grants a motion for change of venue, if the court finds that the action was filed in the county of improper venue without good cause, the court may, in its discretion, assess sanctions against the party, or the party's attorney, who filed the action. (Amended effective January 8, 1976; amended December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 30, 1984, effective July 1, 1984; amended April 22, 2004, effective July 1, 2004.)

JUDICIAL DECISIONS

ANALYSIS

Denial Proper.
Effect of Summary Judgment.
Insufficient Grounds.

Denial Proper.

Where there was evidence upon which the district court could properly find that a contract was created and breached in the county in which the complaint was filed, that the ensuing damages occurred there, and that an unjust enrichment claim and false labor lien claim arose in the same county, the district court properly exercised its discretion when it denied a motion for change of venue. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 986 P.2d 1019 (Ct. App. 1999).

Effect of Summary Judgment.

Upon appeal of a grant of summary judgment, the matter of whether or not a motion for change of venue should be granted was not

yet ripe for appellate review since the granting of the motion for summary judgment rendered that issue moot. *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 775 P.2d 640 (1989).

Insufficient Grounds.

Allegation that defendant could not receive an impartial hearing before a certain magistrate was not a ground for change of venue under this rule. *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983).

Cited in: *Long v. Hendricks*, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985); *Priest Lake Coalition, Inc. v. State ex rel. Evans*, 111 Idaho 354, 723 P.2d 898 (1986); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *Burton v. Atomic Workers Fed. Credit Union*, 119 Idaho 17, 803 P.2d 518 (1990); *Gilbert v. State*, 119 Idaho 684, 809 P.2d 1163 (Ct. App. 1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Convenience of Parties.
Convenience of Witnesses.
Discretion of Court.
Divorce Suits.
Joint Tort-Feasors.
Mortgage Foreclosure.
Popular Prejudice.
Proper County.
Refusal to Pay Cost of Transcript.
Resident Defendant Out of Case.
Stipulation of Parties.

Convenience of Parties.

In motion for change of venue for convenience of moving party's witnesses, convenience of parties themselves normally is not to be considered. *Stephan v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963).

Convenience of Witnesses.

When an application for change of venue on the ground of convenience of a witness shows that the witness resides in another state, the application should at least allege that the witness had promised to attend the trial if the change should be ordered; it is insufficient to allege that he thinks that he will do so. *Shirley v. Nodine*, 1 Idaho 696 (1878).

Convenience of witnesses is not alone sufficient to warrant change of venue. It must also appear that "the ends of justice would be promoted by the change." *Brown v. Tamarack & Custer Consol. Mining Co.*, 37 Idaho 650, 218 P. 363 (1923).

Where a cause of action for personal injuries arose in different county from that of the plaintiff's residence, and the majority of witnesses resided there, plaintiff could have case transferred there. *Spaulding v. Hoops*, 49 Idaho 289, 287 P. 947 (1930).

The sole convenience of the moving party's witnesses is generally not considered sufficient reason for court to grant motion for change of venue where opposing party brings into issue the convenience of his own witnesses; the entire situation should be examined and consideration given the witnesses of all parties. *Stephan v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963).

On a motion for change of venue for convenience of witnesses, for the convenience of a particular witness to be considered, testimony of such witness must be shown to be necessary, not merely cumulative. *Stephan v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963).

Mere preponderance in the number of witnesses which either party expects to produce, while generally recognized as an element to be considered, does not necessarily determine the merits of a motion for change of venue for convenience of witnesses; consideration should be given all other factors which may outweigh the factor of numbers alone. *Stephan v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963).

Convenience of witnesses who are members of the immediate family of a party, and witnesses who are employees of one of the parties

normally are not given the same consideration as given to witnesses not occupying such relationship, in determining change of venue for convenience of witnesses. *Stephan v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963).

It was not error to deny defendant's motion to change the venue of a cause back to the county from which venue had been changed when several witnesses, including plaintiff, resided in the county where the action was pending. *Robinson v. White*, 90 Idaho 548, 414 P.2d 666 (1966).

Discretion of Court.

Application for change of venue is addressed to the sound discretion of the trial court, and the decision reached by the trial court will not be reversed on appeal unless the showing made is such as to convince the appellate court that the trial court abused such discretion. *Gibbert v. Washington Water Power Co.*, 19 Idaho 637, 115 P. 924 (1911); *Lessman v. Anschustigui*, 37 Idaho 127, 215 P. 460 (1923); *Ondes v. Bunker Hill & Sullivan Concentrating Co.*, 40 Idaho 186, 232 P. 578 (1924); *Hay v. Hay*, 40 Idaho 627, 235 P. 900 (1925); *Spaulding v. Hoops*, 49 Idaho 289, 287 P. 947 (1930); *Callahan v. Callahan*, 30 Idaho 431, 165 P. 1122 (1917); *Sweeney v. American Nat'l Bank*, 64 Idaho 695, 136 P.2d 973 (1943).

Where a motion for change of the place of a trial is made upon the ground that "the convenience of witnesses and the ends of justice would be promoted by the change," but no affidavits accompany the motion in support thereof, and it does not appear from the complaint or answer that the convenience of witnesses or the ends of justice would be promoted by such change, it is no abuse of discretion to deny the motion. *Young v. Extension Ditch Co.*, 28 Idaho 775, 156 P. 917 (1916).

When an issue is presented by affidavits or otherwise in opposition to the motion for change of venue, the granting or refusal of a change of venue is addressed to the sound discretion of the trial court and an order changing the place of trial or refusing to change it, will not be disturbed in the absence of a manifest abuse of that discretion. *Anderson v. Lee*, 86 Idaho 300, 386 P.2d 54 (1963); *Stephan v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963).

Divorce Suits.

Wife who has changed her residence, in seeking change of venue to new domicile in divorce suit, must name her witnesses and show their competency to testify to transactions occurring at county of matrimonial domicile. *Finnell v. Finnell*, 59 Idaho 148, 81 P.2d 401 (1938).

A failure to retain jurisdiction of wife's divorce action in the county, which was not that of the husband's residence, was not an abuse of discretion where the wife merely stated that it would be inconvenient for her to prosecute the action in the county of the husband's residence, but did not name her witnesses, or if there were witnesses in the county where the action was brought, did not state whether they would testify as to transactions in the county of the husband's residence where the alleged cruelty and failure to support occurred. *Finnell v. Finnell*, 59 Idaho 148, 81 P.2d 401 (1938).

Joint Tort-Feasors.

In action against joint tort-feasors, defendant seeking change of venue on ground that he is only party in interest must make showing sufficient to convince court of that fact, and it is within discretion of court to decide whether resident defendant was joined for ulterior purpose. *Big Springs Land & Live Stock Co. v. Beck*, 45 Idaho 509, 263 P. 477 (1928).

Mortgage Foreclosure.

Where a cross-complaint seeks to have a mortgage on real estate foreclosed in an action brought to contest foreclosure of a chattel mortgage, motion for change of venue on the ground that the mortgaged real estate is in another county may be denied. *Murphy v. Russell*, 8 Idaho 151, 67 P. 427 (1901).

Popular Prejudice.

Where a motion for change of venue is based on the ground of popular prejudice, supported by affidavit of the applicant and denied by the counter affidavit of the adverse party, supported by the affidavits of one hundred citizens showing that each of them is competent to sit as a juror in the case, it is error to grant the motion, although the applicant alleges without contradiction that two juries had failed to agree in the case. *Sommercamp v. Catlow*, 1 Idaho 716 (1878).

An application for change of venue on the grounds of popular prejudice ought to be supported by the affidavits of persons who have either been over the county generally or through large communities thereof, and have heard the citizens generally express themselves in regard to the matter at issue, or by residents of different portions of the county who know of the sentiment prevailing in their respective communities. *Gibbert v. Washington Water Power Co.*, 19 Idaho 637, 115 P. 924 (1911).

Proper County.

When county designated in complaint is not proper county, court, on proper demand there-

for, “must change the place of trial.” *McCarty v. Herrick*, 41 Idaho 529, 240 P. 192 (1925).

Refusal to Pay Cost of Transcript.

Where defendant refuses to pay costs of a transcript on being granted change of venue, it is the duty of the justice (now judge) to proceed and try case. *Presley v. Dean*, 10 Idaho 375, 79 P. 71 (1904).

Resident Defendant Out of Case.

Where, at the time of the filing of the original action in Bonneville County, the individual defendants resided in Lemhi County and the principal place of business of a defendant bank was in Bonneville County where plaintiff also resided, but as a result of the first appeal, defendant bank ceased to have

any interest in the subject-matter and Lemhi County was the place where the building contract involved was made and was performed, and the property concerning which the litigation arose was located in that county, the granting of a change of venue to Lemhi County on the ground of convenience of witnesses and the ends of justice was not an abuse of discretion. *Sweeney v. American Nat'l Bank*, 64 Idaho 695, 136 P.2d 973 (1943).

Stipulation of Parties.

Stipulation that action to enforce payment of note may be brought in a county other than that of defendant's residence is not binding. *McCarty v. Herrick*, 41 Idaho 529, 240 P. 192 (1925).

Rule 41(a)(1). Dismissal of actions — Voluntary dismissal — Effect thereof — By plaintiff — By stipulation.

Subject to the provisions of Rule 23(e), of Rule 73, and of any statute of the state of Idaho an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state, of the United States, or of any state an action based on or including the same claim. (Amended March 26, 1992, effective July 1, 1992.)

STATUTORY NOTES

Cross References. Class action, dismissal only upon approval of court, Rule 23(c).

Costs of previously dismissed action, Rule 41(d).

Counterclaim, cross-claim, or third-party claim, dismissal of, Rule 41(c).

Court ordering dismissal of action, Rule 41(a)(2).

Failure to state a claim upon which relief can be granted, Rule 12(b).

Involuntary dismissal, effect thereof, Rule 41(b).

Jurisdiction, lack of, Rule 12(b).

Motion for directed verdict, Rule 50(a).

Receivers, Rule 73.

Venue, lack of, Rule 12(b).

JUDICIAL DECISIONS

Stipulation.

In a case involving the dismissal of an action relating to the sale of a duplex, there was no waiver of the right to claim costs and fees by signing a stipulation of dismissal because there was no language in the document pertaining to such. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

Cited in: *World Wide Lease, Inc. v. Wood-*

worth, 111 Idaho 880, 728 P.2d 769 (Ct. App. 1986); *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986); *Idaho State Tax Comm'n v. Beacom*, 131 Idaho 569, 961 P.2d 660 (Ct. App. 1998); *State Dep't of Health & Welfare v. Roe (In the Interest of Doe)*, 139 Idaho 18, 72 P.3d 858 (2003); *Idaho Schs. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 97 P.3d 453 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Affirmative Relief.
 Conclusiveness of Dismissal.
 Eminent Domain Proceedings.
 Right of Dismissal.
 Time of Dismissal.

Affirmative Relief.

Plea of the statute of limitations does not constitute affirmative relief such as to destroy plaintiff's right to voluntarily dismiss action. *Boyd v. Steele*, 6 Idaho 625, 59 P. 21 (1899).

Conclusiveness of Dismissal.

Where plaintiff pays the costs and dismisses the action before trial, the fact that the clerk fails to enter a formal judgment of dismissal, if such judgment is required, does not affect the conclusiveness of the dismissal. *Stover v. Stover*, 7 Idaho 185, 61 P. 462 (1900).

Writ of prohibition will issue to prevent further proceedings, when plaintiff has dismissed. *Ramsey v. District Court*, 33 Idaho 296, 193 P. 733 (1920).

Eminent Domain Proceedings.

Former similar provision was applicable to actions and proceedings in eminent domain and authorized plaintiff to dismiss an action in condemnation after the filing of a report by commissioners appointed to award damages or at any time before trial. *Chicago, M. & St. P. Ry. v. Trueman*, 18 Idaho 687, 112 P. 210 (1910).

Right of Dismissal.

Plaintiff has absolute right to dismiss action, provided counterclaim has not been filed or affirmative relief sought by cross-complaint or answer. *Ramsey v. District Court*, 33 Idaho 296, 193 P. 733 (1920); *Spencer v. Ensign*, 33 Idaho 577, 196 P. 668 (1921).

In an action for divorce, where no cross-complaint or counterclaim stating a cause of action and seeking affirmative relief was filed, plaintiff had the right, as a matter of course, to dismiss the action. *Stover v. Stover*, 7 Idaho 185, 61 P. 462 (1900). This applies even though plaintiff's counsel has stipulated for confession of motion for change of venue. *Spencer v. Ensign*, 33 Idaho 577, 196 P. 668 (1921).

Time of Dismissal.

Plaintiff may dismiss his action at any time before a counterclaim has been interposed or affirmative relief has been sought by cross-complaint or answer. *Elliott v. Collins*, 6 Idaho 266, 55 P. 301 (1898).

It was permissible for court to disregard defendant corporation's principal place of business when it denied a change of venue motion since the corporation had been voluntarily dismissed as a party to the lawsuit by plaintiff; although defendant was dismissed subsequent to the motion for change of venue, the dismissal occurred before any of the defendants had filed either an answer or a motion for summary judgment. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

RESEARCH REFERENCES

A.L.R. Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts," or the like. 1 A.L.R.3d 711.

Right of one spouse, over objection, to voluntarily dismiss claim for divorce, annulment, or similar marital relief. 16 A.L.R.3d 283.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property. 24 A.L.R.3d 768.

What amounts to "final submission" or "retirement of jury" within statute permitting plaintiff to take voluntary dismissal or non-

suit without prejudice before submission or retirement of jury. 31 A.L.R.3d 449.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict. 36 A.L.R.3d 1113.

Construction, as to terms and conditions, of rule or statute providing for voluntary dismissal without prejudice upon such terms and conditions as court deems proper. 34 A.L.R.4th 778.

Propriety of dismissal under Federal Civil Procedure Rule 41 (a) of action against less than all of several defendants. 3 A.L.R. Fed. 569.

Rule 41(a)(2). Dismissal by order of court.

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

STATUTORY NOTES

Cross References. Findings by court, Voluntary dismissal of action, Rule 41(a)(1). Rules 52(a), 52(b).

JUDICIAL DECISIONS

ANALYSIS

Construction.

Costs and Attorney's Fees.

Dismissal.

—Without Prejudice.

Error to Dismiss Responsive Pleading.

Prevailing Party Analysis.

Construction.

In determining whether a trial court abused its discretion in ordering dismissal without awarding costs and attorney fees, the focus should be on the words: "upon such terms and conditions as the court deems proper." *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

Costs and Attorney's Fees.

Magistrate did not abuse his discretion by not awarding attorney fees as a condition of a voluntary dismissal of a father's petition to modify a divorce decree; the litigation was not entirely terminated by the dismissal and the dismissal did not in any way prejudice the mother. *Rohr v. Rohr*, 118 Idaho 689, 800 P.2d 85 (1990).

The award of costs and attorney fees, or either, is not a prerequisite to an order granting voluntary dismissal pursuant to this rule. *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

The trial court reached its decision by an exercise of reason and not by mere fiat, therefore, the exercise of the trial court's discretion in denying costs and attorney fees was accepted. *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

Dismissal.

Trial court abused its discretion by granting a lessee's motion to voluntarily dismiss a case against its lessor because the lessor was not given 14 days' notice of the motion and there was no indication of whether the lessee sought oral argument or to file a brief in support of its motion. The lessor suffered prejudiced as it was deprived of the opportunity to argue in favor of an award of attorney fees. *Parkside Sch., Inc. v. Bronco Elite Arts & Ath., LLC*, 145 Idaho 176, 177 P.3d 390 (2008).

—Without Prejudice.

Because the order of dismissal did not specify otherwise, the dismissal was without prejudice, therefore, defendant was not entitled to costs under IRCP 68, even though plaintiff had earlier rejected defendant's settlement offer. *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

Error to Dismiss Responsive Pleading.

Magistrate did not abuse his discretion in granting a voluntary dismissal of a father's petition to modify a divorce decree but it was error to also dismiss mother's pending responsive pleading, seeking affirmative relief without first addressing its merits. *Rohr v. Rohr*, 118 Idaho 689, 800 P.2d 85 (1990).

Prevailing Party Analysis.

The discretion given to the trial court in this rule is not circumscribed by the prevailing party analysis that is mandated by § 12-120 and IRCP 54(d)(1)(B). *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Counterclaim.
Entry of Cross-Complaint.
Failure to Seek Affirmative Relief.
Inherent Dismissal Power.
Want of Prosecution.

Counterclaim.

Granting of a motion by plaintiff to dismiss an action as to defendants who, by their answer, have sought affirmative relief, is error. *Northwestern & Pac. Hypotheek Bank v. Rauch*, 5 Idaho 752, 51 P. 764 (1898).

The amount of \$200.00 sought by defendant in his counterclaim arose out of the original transaction wherein he traded in the truck and purchased the harvester-thresher and, being affirmative relief, brings the counterclaim within the prohibitory scope of this section denying dismissal of complaint when a counterclaim has been made. *John Hoene Implement, Inc. v. Peters*, 80 Idaho 160, 327 P.2d 362 (1958).

Entry of Cross-Complaint.

Trial court has no power or right to dismiss an action over objection of a defendant who has filed an answer and cross-complaint seeking affirmative relief, but is required to enter judgment upon the merits of the issue presented by the cross-complaint. *Frost v. Idaho Irrigation Co.*, 19 Idaho 372, 114 P. 38 (1911).

Failure to Seek Affirmative Relief.

Under the provisions of former similar section requiring there be affirmative relief sought by the answer before a defendant has standing to resist a plaintiff's motion to dismiss his complaint, where the answer of defendant did not seek affirmative relief, defendant could not urge error for dismissal of the complaint based upon his answer. *John Hoene Implement, Inc. v. Peters*, 80 Idaho 160, 327 P.2d 362 (1958).

Inherent Dismissal Power.

Trial court has inherent power to dismiss case for want of prosecution. It may do so of its own motion, if plaintiff fails or refuses to prosecute suit with reasonable diligence. *McAllister v. Erickson*, 45 Idaho 211, 261 P. 242 (1927).

Want of Prosecution.

District court rule requiring dismissal of suits for want of prosecution should be construed so as to promote decisions on merit rather than on strict formal procedure. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

Rule of district court requiring dismissal of actions for want of prosecution is not a rule of limitations, since the latter applies only to commencement of action. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

RESEARCH REFERENCES

A.L.R. Power of court sitting as trier of fact to dismiss at close of plaintiff's evidence, notwithstanding plaintiff has made out prima facie case. 55 A.L.R.3d 272.

Propriety of dismissal under Federal Civil Procedure Rule 41(a) of action against less than all of several defendants. 3 A.L.R. Fed. 569.

Rule 41(b). Involuntary dismissal — Effect thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this

subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (Amended effective July 1, 2004.)

JUDICIAL DECISIONS

ANALYSIS

Amount of Damages Uncertain.
Application.
Breach of Contract.
Costs and Fees.
Discretion of Court.
Dismissal Improper.
Dismissal in Jury Trial.
Dismissal Proper.
Dismissal With or Without Prejudice.
Duty of Plaintiff.
Evaluation of Plaintiff's Case.
Findings of Fact.
In General.
Inherent Authority of Court.
Insufficiency of Evidence.
Nonjury Trial.
Order of Court.
Plaintiff Not Prepared to Proceed.
Prima Facie Case.
Proper Plaintiff.
Role of the Court.
Standard of Review.
Statute of Limitations.

Amount of Damages Uncertain.

A plaintiff's inability to accurately assess the extent of damages prior to trial in a personal injury case does not relieve the plaintiff from his duty of diligently prosecuting his case; thus, even though a plaintiff encounters difficulty in arriving at the exact amount of damages, he is not entitled to delay in prosecuting the case. *Bartlett v. Peak*, 107 Idaho 284, 688 P.2d 1189 (1984).

Application.

This rule is expressly limited to instances where the defendant has moved for dismissal because of the plaintiffs' failure to prosecute. *Kirkham v. 4.60 Acres of Land*, 100 Idaho 781, 605 P.2d 959 (1980).

Breach of Contract.

In suit involving contract dispute which arose from a remodeling project where plaintiff presented evidence that it was the parties intent to enter into a contractual relationship, and that based on this conduct plaintiff performed the work agreed upon and also presented testimonial and documentary evidence that the work was performed and that defendants refused to pay plaintiff for that work,

substantial evidence existed to support court's determination that plaintiff had established its case for a breach of implied-in-fact contract. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

Costs and Fees.

Because plaintiff's quiet title action was involuntarily dismissed, he was clearly a non-prevailing party. The district court awarded costs and attorney fees incurred by the defendant landowners to the extent the costs and attorney fees were incurred in preparing a defense against plaintiff's claim of prescriptive easement. The district court reached its conclusion through the exercise of reason and did not abuse its discretion in awarding costs and attorney fees to the defendant landowners. *Bonaparte v. Neff*, 122 Idaho 714, 838 P.2d 317 (Ct. App. 1992).

Discretion of Court.

There is no reason why the exercise of discretion under this rule, to decline to render any judgment until the close of all the evidence, should narrow the scope of the court's concurrent discretion to reopen a case, as the object of each type of discretion is to do justice, and it would be illogical for one form of discretion to diminish the other. *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982).

The power to decline to render judgment at the close of the plaintiff's case is within the discretion of the trial court; absent a clear abuse of that discretion, the decision of the trial court will not be overturned. *Miller Constr. Co. v. Stresstek*, 108 Idaho 187, 697 P.2d 1201 (Ct. App. 1985).

A judge should consider the length of delay occasioned by the failure to prosecute, the justification, if any, for such delay and the resultant prejudice. This balancing decision is a discretionary function and the judge's decision will not be overturned on appeal absent an abuse of discretion. *Rudy-Mai Farms v. Peterson*, 109 Idaho 116, 705 P.2d 1071 (Ct. App. 1985).

Dismissal Improper.

Although the interval between the filing of the complaint and the service of process was 19 months, dismissal was not necessary to

protect the court's processes and the defendants from abuse, where the assertions of counsel regarding the presence or absence of prejudice caused by delay were inconclusive, and when the defendants filed their renewed motion for dismissal, the case had been active for several months. *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987).

It is an abuse of discretion to use the power of dismissal to punish a period of delay which no longer exists if the defendant has not established prejudice resulting from the delay; this rule places key emphasis upon demonstrated prejudice to the defendant's ability to present a defense rather than upon the length of the period of delay per se. *Systems Assocs. v. Motorola Communications & Elecs., Inc.*, 116 Idaho 615, 778 P.2d 737 (1989).

Regardless of whether current inactivity, or a prior period of inactivity, has prompted the moving party to request the court to dismiss a case, it is an abuse of discretion "to punish a period of delay" where the defendant has not established prejudice stemming from that delay. Prejudice must consist of more than general concerns about the passage of time and its effect on the memories of witnesses and the ability to prepare a case. There must be actual, demonstrated prejudice to the moving party. *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992).

To justify a dismissal the movant must demonstrate prejudice by actual instances of his or her inability to adequately and effectively prepare the case, occasioned by the non-movant's lack of prosecution. Because no such prejudice was demonstrated the Supreme Court reversed the district court's I.R.C.P. 41(b) dismissal of the cause of action and remanded the cause with directions that it be reinstated on the court's trial calendar. *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992).

The trial court did not abuse its discretion by granting the defendants' motion to dismiss the case for failure to prosecute; the record contained specific evidence of prejudice in the record where key witnesses had disappeared and the books of the corporation were no longer available. *Jackson v. Omnibus Group, Ltd.*, 122 Idaho 347, 834 P.2d 864 (1992).

Dismissal in Jury Trial.

Ordinarily, a motion for dismissal in a jury trial admits the truth of the adversary's evidence and every inference of fact which may be legitimately drawn therefrom. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

Dismissal Proper.

Where under real estate purchase agree-

ment plaintiff unreasonably withheld his consent to request for assignment of agreement where he had no objection to assignee's credit or reputation, or towards assignee personally, refusal was not given in good faith and was totally unreasonable; thus, order of the district court dismissing plaintiff's claims pursuant to this rule was proper. *Cheney v. Jemmett*, 107 Idaho 829, 693 P.2d 1031 (1984).

Dismissal of plaintiffs' action with prejudice was not an abuse of discretion, where the case had been pending approximately six years when it was dismissed, where the only justification offered for such delay was a controverted averment by plaintiffs' attorney that settlement negotiations were pending, and where prejudice was demonstrated by unrefuted statements in the defendants' affidavits that witnesses had become difficult to locate and that the witnesses were unable to recall pertinent facts. *Rudy-Mai Farms v. Peterson*, 109 Idaho 116, 705 P.2d 1071 (Ct. App. 1985).

Where at the time of dismissal action had been pending for six years, and up to the date of the dismissal plaintiff had failed to diligently prosecute the case, to initiate any discovery, or to comply with the discovery efforts of defendant, the trial court did not abuse its discretion in dismissing the case. *Ellis v. Twin Falls Canal Co.*, 109 Idaho 910, 712 P.2d 611 (1985).

The dormant period of 19 months was sufficient to invoke this rule, where the delay was not satisfactorily explained by the plaintiff or her attorneys, the record disclosed no significant activity during the 19-month period, and the plaintiff did not undertake to rebut the presumption of prejudice. *Nagel v. Wagers*, 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986).

Where judge specifically stated that he found an unexplained period of no activity of one year and four months, and where trial court made a specific finding that during the passage of six and one-half years, defendant had suffered significant prejudice in its ability to present a defense due, in part, to the unavailability of several key defense witnesses, the district court did not abuse its discretion by ordering the plaintiff's action dismissed for lack of prosecution. *Day v. CIBA Geigy Corp.*, 115 Idaho 1015, 772 P.2d 222 (1989).

There was no abuse of discretion by the court in dismissing a suit for lack of prosecution, where, in four and one-half years during which the case was pending, the plaintiff's actions were limited to defensive responses to the defendants' efforts to either dismiss the case or be removed as parties; the plaintiff

has the burden of taking affirmative action to move a case forward. *Roberts v. Verner*, 116 Idaho 575, 777 P.2d 1248 (Ct. App. 1989).

Because in arbitration proceedings on a written contract for rebar work performed by subcontractor, subcontractor chose to frame its claim as one arising under a separate structural steel contract for which it had received full payment, rather than as a claim under the rebar contract from which the contractor had withheld funds because of claimed deficiencies in the structural work, contractor's obligation to subcontractor had been discharged and magistrate's dismissal of the claim and award of attorney fees were upheld. *Record Steel & Constr., Inc. v. Martel Constr., Inc.*, 129 Idaho 288, 923 P.2d 995 (Ct. App. 1996).

There was no error in the dismissal of a motion to dismiss where the defendants made no showing of prejudice caused by the delay in the case except for general concerns about the passage of time. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

Dismissal With or Without Prejudice.

Where an order dismissing a declaratory judgment action failed to specify whether the dismissal was with or without prejudice, the dismissal was technically, under this rule, with prejudice, and since the dismissal was based on a pending tort action which would litigate the issues sought to be litigated in the declaratory judgment action, the dismissal order must be modified to be without prejudice since the district court intended the issue to be litigated in the pending tort action. *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 627 P.2d 326 (1981).

Duty of Plaintiff.

This rule imposes upon plaintiffs an affirmative duty to seek prompt adjudication of their claims. *Nagel v. Wagers*, 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986).

Evaluation of Plaintiff's Case.

In rendering a judgment pursuant to the defendants' motion for dismissal under this rule, the trial court is not as limited in its evaluation of the plaintiff's case as it would be in a motion for directed verdict; the court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case, instead, it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies. *Keenan v. Brooks*, 100 Idaho 823, 606 P.2d 473 (1980).

When a defendant moves for an involuntary dismissal at the close of the plaintiff's presen-

tation in a nonjury case, the court sits as a trier of fact and is not required to construe all evidence and inferences to be drawn therefrom in the light most favorable to the plaintiff. *Keenan v. Brooks*, 100 Idaho 823, 606 P.2d 473 (1980).

On a motion for involuntary dismissal, the judge, as sole trier of the facts, is not required to construe evidence favorably to the plaintiff but rather, he may evaluate the evidence and choose the inferences to be drawn; the court must determine whether the evidence, as so evaluated, is sufficient to show a right to the relief sought and an appellate court will not disturb that determination unless it is shown to be clearly erroneous. *Allen v. Burggraf Constr. Co.*, 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984).

When a defendant moves for an involuntary dismissal at the close of the plaintiff's presentation in a non-jury case, the court sits as a trier of fact and is not required to construe all evidence and inferences to be drawn therefrom in the light most favorable to the plaintiff. Thus, in rendering a judgment pursuant to defendants' motion for dismissal under Idaho R. Civ. P. 41(b), the trial court is not as limited in its evaluation of the plaintiff's case as it would be in a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead, it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies. *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 40 P.3d 119 (2002).

Findings of Fact.

Findings of fact are not necessary to support decisions of summary judgment motions under I.R.C.P., Rule 56, or to support a decision relating to any other motion except with respect to motions for involuntary dismissal under I.R.C.P., Rule 41(b). *Bank of Idaho v. Nesselth*, 104 Idaho 842, 664 P.2d 270 (1983).

Where the trial court's findings of fact and conclusions of law in deciding a motion to dismiss were embodied in a single paragraph, such cursory treatment did not satisfy the requirements of I.R.C.P. 52(a) and this rule, and made appellate review virtually impossible. *Powers v. Tiegs*, 108 Idaho 4, 696 P.2d 855 (1985).

Although adjudicative discretion—discretion which determines or directly affects the outcome of litigation — demands a reasoned explanation, failure to state reasons for a dismissal is not fatal if those reasons are obvious from the record itself. *Rudy-Mai Farms v. Peterson*, 109 Idaho 116, 705 P.2d 1071 (Ct. App. 1985).

In General.

Where a tenant's late payment of rent did not work a statutory forfeiture and the lease contained no forfeiture clause, it was error for the trial court to grant a Rule 41(b) motion in the tenant's action seeking a declaration of his rights under the lease. *Schlegel v. Hansen*, 98 Idaho 614, 570 P.2d 292 (1977).

In applying this rule, a judge should consider the length of delay occasioned by the failure to prosecute, the justification, if any, for such delay, and the resultant prejudice. *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987).

Inherent Authority of Court.

The trial court's power to dismiss a case because of failure to prosecute with due diligence is inherent and independent of any statute or rule of court. *Bartlett v. Peak*, 107 Idaho 284, 688 P.2d 1189 (1984).

Insufficiency of Evidence.

In a personal injury action brought against a school bus driver and her employer the trial court properly granted the defendant school district's motion for involuntary dismissal as regards the issue of active negligence on its part where no evidence was presented at trial sufficient to support plaintiff's contention that the school district was actively negligent and moreover, the jury was advised that any negligence on the part of the driver would be imputed to the school district because of the employee-employer relationship. *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981).

Where there was conflicting evidence concerning the adequacy of water supply and the court might have inferred that the water shortage resulted from construction defects in new ditch, but also could have inferred that the shortage was attributable to such other causes as lack of maintenance for which the defendant contractor was not responsible, the court's determination, on the defendant's motion for involuntary dismissal, that the plaintiff landowners failed to prove a right to damages resulting from alteration of an irrigation ditch by a highway construction contractor, was proper. *Allen v. Burggraf Constr. Co.*, 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984).

Nonjury Trial.

When a defendant moves for involuntary dismissal in a nonjury case, the court sits as a trier of facts which is not required to construe the evidence favorably to the plaintiff, and, if the motion is granted, the judgment is a judgment on the merits necessitating findings of fact and conclusions of law as required by

Rule 52(a). *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977), overruled, *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981).

Order of Court.

Where the wording of the trial court's memorandum decision was not couched in the language of an order, but merely requested that counsel for the plaintiffs prepare and submit proposed findings, conclusions and a form of judgment to the court, the failure of the plaintiffs' counsel to file such documents would not support the trial court's dismissal of the action for failure to comply with an "order" of the court. *Trunnell v. Gentry*, 102 Idaho 848, 642 P.2d 563 (Ct. App. 1982).

Plaintiff Not Prepared to Proceed.

Where both parties appeared on scheduled trial date but plaintiff indicated that he was not prepared to proceed with proof, it was not error for court to grant defendant's motion to dismiss plaintiff's complaint involuntarily under this rule. *Jensen v. Doherty*, 101 Idaho 910, 623 P.2d 1287 (1981).

Prima Facie Case.

The rule that a plaintiff need only make out a prima facie case to avoid being nonsuited is not applicable to nonjury trials. *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977), overruled, *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981).

Proper Plaintiff.

Where the trial court, in dismissing a prior action brought by a teachers' association against the school district's board of trustees, specifically ruled that the association could not bring an action on behalf of the teachers, the trial court's holding that the association was not a proper plaintiff was sufficient to take the case out of this rule's provision that unless the dismissal order otherwise specifies, a dismissal operates as an adjudication on the merits; therefore, the dismissal order did not operate as a decision on the merits, and consequently a subsequent class action suit by teachers against the board was not barred by the principles of res judicata. *Gilbert v. Nampa Sch. Dist. No. 131*, 104 Idaho 137, 657 P.2d 1 (1983).

Role of the Court.

There is no requirement under this rule that the court view all testimony and reasonable inferences arising therefrom in the light most favorable to the plaintiff when considering a motion for involuntary dismissal, since the role of the court is to weigh the evidence, resolve any conflicts in it and decide for itself where the preponderance lies. *Morris v. Frandsen*, 101 Idaho 778, 621 P.2d 394 (1980).

Standard of Review.

The standard of review for the district court's determination to dismiss is "manifest abuse of discretion." *Bartlett v. Peak*, 107 Idaho 284, 688 P.2d 1189 (1984).

The trial court's ultimate denial of the motion to dismiss is reviewable; the standard of review on appeal from the judgment requires the reviewing court to view all of the plaintiff's evidence as being true and to afford every inference favorable to the plaintiff that may legitimately be drawn from such evidence. *Miller Constr. Co. v. Stresstek*, 108 Idaho 187, 697 P.2d 1201 (Ct. App. 1985).

An appellate court will uphold factual findings made by the district court in granting the motion for involuntary dismissal, so long as the findings are not "clearly erroneous"; however, it will review freely any statements of law. *Staggie v. Idaho Falls Consol. Hosps.*, 110 Idaho 349, 715 P.2d 1019 (Ct. App. 1986).

When asked to dismiss an action for lack of prosecution under this rule, a judge must consider the length of delay occasioned by the failure to prosecute; the justification, if any, for such delay; and the resultant prejudice, balancing these factors is a discretionary function, and the judge's ruling will not be overturned on appeal unless discretion has been abused. *Nagel v. Wagers*, 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986).

Statute of Limitations.

The applicability of the statute of limitations is irrelevant to an I.R.C.P. 41(b) dismissal. *Jackson v. Omnibus Group, Ltd.*, 122 Idaho 347, 834 P.2d 864 (1992).

Cited in: *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977); *Barnett v. Aetna Life Ins. Co.*, 99 Idaho 246, 580 P.2d 849 (1978); *Lomas & Nettleton Co. v. Tiger Enters., Inc.*, 99 Idaho 539, 585 P.2d 949 (1978); *Aztec Ltd. v. Creekside Inv. Co.*, 100 Idaho 566, 602 P.2d 64 (1979); *Fouser v. Paige*, 101 Idaho 294, 612 P.2d 137 (1980); *Lisher v. City of Potlatch*, 101 Idaho 343, 612 P.2d 1190 (1980); *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982); *Gyurkey v. Babler*, 103 Idaho 663, 651 P.2d 928 (1982); *Knee v. School Dist. No. 139*, 106 Idaho 152, 676 P.2d 727 (Ct. App. 1984); *Pincok v. Pocatello Gold & Copper Mining Co.*, 107 Idaho 683, 691 P.2d 1298 (Ct. App. 1984); *Cheney v. Jemmett*, 107 Idaho 829, 693 P.2d 1031 (1984); *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985); *Hall v. Strawn*, 108 Idaho 111, 697 P.2d 451 (Ct. App. 1985); *Price v. Aztec Ltd.*, 108 Idaho 674, 701 P.2d 294 (Ct. App. 1985); *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985); *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987); *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988); *State ex rel. Dep't of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990); *Weaver v. Millard*, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991); *State, Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992); *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Costs.

Court to Act Cautiously.

Dismissal As to Principal, Not As to Agent.

Dismissal at Conclusion of Trial.

Dismissal on Opening Statement.

Effect of Affirmative Defense.

In General.

Insufficiency of Complaint.

Insufficiency of Evidence.

Jury Trial.

Lateness in Filing Briefs.

Motion for Nonsuit.

Nonjury Trial.

Prima Facie Case.

Res Judicata.

Submission of Evidence.

Substantial Evidence Rule.

Venue.

Waiver of Errors in Denial.

Want of Prosecution.

Costs.

Costs of dismissal only need to be paid at the time; other costs follow as a matter of law. *Chicago, M. & St. P. Ry. v. Trueman*, 18 Idaho 687, 112 P. 210 (1910).

Court to Act Cautiously.

The court should act cautiously and carefully scrutinize all the evidence before granting a motion for nonsuit. *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 186 P.2d 498 (1947).

Dismissal As to Principal, Not As to Agent.

In an action by a vendor for the purchase price of an irrigation pump sold upon representation by a tenant-farmer that he had authority from the landlord to purchase the pump, which authority the landlord denied and of which there was no evidence except the tenant's statement to the vendor, a motion for

involuntary dismissal was properly sustained as to the landlord, but improperly as to the tenant. *Killinger v. Iest*, 91 Idaho 571, 428 P.2d 490 (1967).

Dismissal at Conclusion of Trial.

Judgment dismissing action on merits at conclusion of trial cannot be treated as granting of nonsuit. *Bentley v. Kasiska*, 49 Idaho 416, 288 P. 897 (1930).

Dismissal on Opening Statement.

There is no authority in the court to dismiss an action on the opening statement of counsel or to grant a directed verdict thereon where the counsel for the plaintiff in such opening statement failed to state facts sufficient to entitle plaintiff to recover. *Wheeler v. Oregon R.R. & Nav. Co.*, 16 Idaho 375, 102 P. 347 (1909).

Effect of Affirmative Defense.

In action for conversion of hogs where defendant set up affirmative defense that hogs had damaged his property and they had been sold to satisfy such damage as fixed by arbitration, court erred in granting defendant's motion for nonsuit at close of plaintiff's evidence since defendant should have been required to prove his defense. *Southeast Sec. Co. v. Christensen*, 66 Idaho 233, 158 P.2d 315 (1945).

In General.

In an action for rescission of contract on grounds of fraud, where trial court found as matter of fact and law that no fraud was shown, dismissal under former similar rule was proper. *Thomson v. Marks*, 86 Idaho 166, 384 P.2d 69 (1963).

It was error for the trial court to dismiss the plaintiff's complaint without making any findings of fact and conclusions of law and, on appeal, the cause was remanded with instructions to the court to make such findings and conclusions. *Paullus v. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968).

Upon a motion for dismissal in a jury case after plaintiff has completed presentation of his evidence, the trial court is required to view the evidence and all inferences arising therefrom in the light most favorable to the plaintiff, but may not weigh the evidence or resolve conflicts therein. *Highbarger v. Thornock*, 94 Idaho 829, 498 P.2d 1302 (1972).

Where the record in an action to enforce a lease of property against a subsequent buyer from the lessor contained the lease agreement, the bill of sale and proof of consideration for lease agreement, as well as the unimpeached testimony of the three plaintiffs, the court erred in dismissing the action.

Krasselt v. Koester, 99 Idaho 124, 578 P.2d 240 (1978).

Where all the evidence of lost profits was based on conjecture and speculation, preventing their estimate to a reasonable certainty, there was no accurate figure for the trial court to use to compute damages; therefore, the court was correct in granting a motion to dismiss. *B & F, Inc. v. Intermountain Gas Co.*, 99 Idaho 730, 588 P.2d 458 (1978).

Insufficiency of Complaint.

Insufficiency of the complaint is not ground for nonsuit. *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 P. 910 (1910); *Ludwig v. Ellis*, 22 Idaho 475, 126 P. 769 (1912); *Mole v. Payne*, 39 Idaho 247, 227 P. 23 (1924); *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 227 P. 29 (1924); *Carver v. Ketchum*, 53 Idaho 595, 26 P.2d 139 (1933); *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 186 P.2d 498 (1947).

Court did not err in dismissing action brought by employee against employer for injuries after sustaining demurrer where the complaint showed on its face that its fatal defect could not be cured by amendment. *French v. J.A. Terteling & Sons*, 75 Idaho 480, 274 P.2d 990 (1954).

Insufficiency of Evidence.

Where the evidence of plaintiff is such that the trial court, in the event of a verdict, would feel compelled to set same aside, it is its duty to take the case from the jury by granting a nonsuit. *Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 3 Idaho 126, 28 P. 396 (1891); *Blackwell v. Kercheval*, 29 Idaho 473, 160 P. 741 (1916).

Where plaintiff stands on a challenge which he has interposed to the jury panel and refuses to introduce any testimony, and defendant has pleaded a cross-complaint but introduces no evidence in support thereof, court should order a dismissal or judgment of nonsuit, and should not direct verdict for defendant. *Simmons v. Cunningham*, 4 Idaho 426, 39 P. 1109 (1895).

In an action where the complaint alleges a joint liability of three defendants upon a certain contract, and the evidence shows that the contract was made with but one of the defendants, but that plaintiff was led to believe by the acts of all the defendants that they were jointly liable, a nonsuit will not be granted. *Hewitt v. Maize*, 5 Idaho 633, 51 P. 607 (1897).

A nonsuit should not be granted until plaintiff has put in or offered all of his evidence and rests his case. *Rauh v. Oliver*, 10 Idaho 3, 77 P. 20 (1904); *Wheeler v. Oregon R.R. & Nav. Co.*, 16 Idaho 375, 102 P. 347 (1909).

Motion should be denied, unless admitting

all facts that may be gathered from every reasonable view of the evidence, no recovery can be had. *Later v. Haywood*, 12 Idaho 78, 85 P. 494 (1906); *Stricker v. Hillis*, 17 Idaho 646, 106 P. 1128 (1910).

Where plaintiff's evidence shows that his demand for damages should have been litigated in a former action between same parties, a motion for nonsuit should be sustained. *Shields v. Johnson*, 12 Idaho 329, 85 P. 972 (1906).

When insufficiency of evidence is relied upon, motion must specify wherein evidence is insufficient. *Mole v. Payne*, 39 Idaho 247, 227 P. 23 (1924); *Magee v. Hargrove Motor Co.*, 50 Idaho 442, 296 P. 774 (1931).

Where there is no substantial evidence from which jury might draw legitimate inference of delivery and change of possession in sale of personal property, court is justified in granting nonsuit. *Sweetland v. Oakley State Bank*, 40 Idaho 726, 236 P. 538 (1925).

A plaintiff should not be nonsuited unless it appears that the evidence in his behalf, upon the most favorable construction the jury would be at liberty to give it, would not warrant a verdict for him. *Miller v. Gooding Hwy. Dist.*, 55 Idaho 258, 41 P.2d 625 (1935); *Hill v. Bice*, 65 Idaho 167, 139 P.2d 1010 (1943); *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 186 P.2d 498 (1947).

A motion for nonsuit on the ground of insufficiency of evidence must specify the particulars in which the evidence is insufficient. *Southeast Sec. Co. v. Christensen*, 66 Idaho 233, 158 P.2d 315 (1945).

A motion for nonsuit should be denied when reasonable minds might well differ concerning the evidence introduced. *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 186 P.2d 498 (1947).

Motion for nonsuit which did not set out in what particulars the evidence is insufficient could not be sustained. *Koser v. Hornback*, 75 Idaho 24, 265 P.2d 988 (1954).

An involuntary dismissal should not be granted where the evidence is such that, when considered in the light most favorable to plaintiff, the jury might reasonably find for plaintiff. *Callahan v. Wolfe*, 88 Idaho 444, 400 P.2d 938 (1965).

It is not error to grant a motion for involuntary dismissal without a statement of finding of facts and conclusions of law, as such a motion is as a motion for directed verdict. *Whitney v. Continental Life & Accident Co.*, 89 Idaho 96, 403 P.2d 573 (1965).

In ruling on a motion for involuntary dismissal the court decided the case on its merits and, therefore, may weigh the evidence. *Grieser v. Haynes*, 89 Idaho 198, 404 P.2d 333 (1965).

There was no error in dismissal of a malpractice suit under former similar rule where the plaintiff failed to present evidence sufficient to sustain a verdict of the jury in his favor. *Schofield v. Idaho Falls Latter Day Saints Hosp.*, 90 Idaho 186, 409 P.2d 107 (1965).

In an action by the purchaser of a farm to restrain the tenant of the former owner from trespassing and interfering with the purchaser's possession of the farm, a motion for involuntary dismissal made at the close of plaintiff's evidence, which showed plaintiff's ownership, his preparations for farming without objection by defendant until planting had started, and the defendant's sale of equipment, household furniture, and dairy cattle pursuant to an advertisement announcing "we are leaving the farm," was properly denied. *Iest v. Gartin*, 90 Idaho 246, 409 P.2d 490 (1965).

In an action against a railroad for damages resulting from plaintiff's collision on the highway with a cow which had escaped from an adjacent pasture, it was error to grant an involuntary dismissal with testimony from a railroad official that the railroad had removed the cattle guard in order to remove snow from the tracks and from the cattle owner that the guard was still down after the collision. *Whitt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966).

In an action against the owner of cattle for damages resulting from plaintiff's collision with one of defendant's cows on the highway, it was error to grant an involuntary dismissal in view of the defendant's admission in his answer that the area was a herd district and his testimony that he did not know of the presence of his cows on the highway until after the accident and that he did not know of the removal of the railroad cattle guard through which the cows may have escaped from the pasture. *Whitt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966).

Dismissal of an action against an irrigation district and a railroad for damages to plaintiff's property caused by an overflow of water from a drainage ditch owned by the irrigation district during an abnormal rainfall and snow-melting chinook and caused in part by the clogging by debris of a culvert over which the railroad operated was proper where the evidence showed that in forty-eight years the ditch had overflowed only once, during an intentional dumping into it of excess water from a main canal, and the railroad had no responsibility for the culvert. *Carter Packing Co. v. Pioneer Irrigation Dist.*, 91 Idaho 701, 429 P.2d 433 (1967).

Where the only evidence introduced at the

trial of a personal injury action was plaintiff's deposition, wherein she testified that, after parking in defendant's customer parking lot, she tripped over a curb dividing the parking lot from the sidewalk, fell, and was thereby injured, with no statement concerning her allegation of defendant's negligence in failing to adequately light the area, there was no error in dismissing her action on defendant's motion. *Neer v. Safeway Stores, Inc.*, 92 Idaho 361, 442 P.2d 771 (1968).

In an action for damages for the wrongful death of a child in a two-car collision in which both drivers were killed and to which there were no surviving eye-witnesses and in which the only evidence of negligence was physical facts after the collision showing that the car in which the child was a guest passenger was on the wrong side of the road at the time of the collision, such evidence was sufficient to establish negligence on the part of the driver of that car, but not gross negligence, and a motion for involuntary dismissal was properly sustained. *Petersen v. Parry*, 92 Idaho 647, 448 P.2d 653 (1968).

A motion for directed verdict or a motion for dismissal admits the truth of the adversaries' evidence and every inference of fact which may be legitimately drawn therefrom in the light most favorable to the appellants; it is not for the court to weigh the evidence or resolve conflicts therein. *Curtis v. Dewey*, 93 Idaho 847, 475 P.2d 808 (1970).

In a negligence action against a bowling alley proprietor for injury sustained by the plaintiff player, where the evidence showed that the area and lanes were clean and in good condition and were not within the exclusive control of the defendant and that the plaintiff did not know what caused her foot to stick on the floor, plaintiff did not establish a right to relief and, therefore, the court did not abuse its discretion in granting dismissal. *Meyer v. Whipple*, 94 Idaho 260, 486 P.2d 271 (1971).

Where district court entered findings of fact, fully substantiated by the record, and a review of plaintiff's evidence indicated total failure to prove any arbitrary or capricious action on the part of water resource board, in approving loans, the motion to dismiss was properly granted. *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

In quiet title action where plaintiff-grantee presented probate decree giving title to decedent-grantor and a recorded warranty deed from decedent-grantor to plaintiff-grantee, together with plaintiff-grantee's testimony that she had recorded the deed at the grantor's request, and defendant presented no evidence, granting of defendant's motion to dis-

miss was improper. *Hartley v. Stibor*, 96 Idaho 157, 525 P.2d 352 (1974).

Jury Trial.

A trial court could not take a case from the jury unless, as a matter of law, no recovery could be had upon any view which properly could be taken on the evidence. *Shaffer v. Adams*, 85 Idaho 258, 378 P.2d 816 (1963).

Although question of whether agency existed was not listed as a contested issue of fact but listed under "issue of law" in pre-trial order, it was error to grant dismissal as to employer of defendant since the question of agency was one which should have been submitted to the jury. *Van Vranken v. Fence-Craft*, 91 Idaho 742, 430 P.2d 488 (1967).

In a jury case, a motion for involuntary dismissal made at the close of a proponent's case is indistinguishable from a motion for a directed verdict. *Van Vranken v. Fence-Craft*, 91 Idaho 742, 430 P.2d 488 (1967); *Blackburn v. Boise Sch. Bus Co.*, 95 Idaho 323, 508 P.2d 553 (1973).

When a motion for dismissal under former similar rule was made in a jury case, it was required to be treated as a motion for directed verdict under Rule 50(a). *Blackburn v. Boise Sch. Bus Co.*, 95 Idaho 323, 508 P.2d 553 (1973).

Lateness in Filing Briefs.

Where defendant does not allege that she was hampered in the preparation of her brief or presentation of her case, the refusal to dismiss for noncompliance with the rule pertaining to time for filing briefs is discretionary with the court. *Miller v. Miller*, 96 Idaho 10, 523 P.2d 827 (1974).

Motion for Nonsuit.

On motion for a nonsuit the evidence must be interpreted most strongly against defendant. *Shank v. Great Shoshone & Twin Falls Water Power Co.*, 205 F. 833 (9th Cir. 1913); *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 94 P. 432 (1908); *Culver v. Kehl*, 21 Idaho 595, 123 P. 301 (1912); *Southern Idaho Conference Ass'n v. Hartford Fire Ins. Co.*, 26 Idaho 712, 145 P. 502 (1915); *Goldensmith v. Snowstorm Mining Co.*, 28 Idaho 403, 154 P. 968 (1916); *McAlinden v. St. Maries Hosp. Ass'n*, 28 Idaho 657, 156 P. 115 (1916); *Donovan v. Boise City*, 31 Idaho 324, 171 P. 670 (1918); *Schleiff v. McDonald*, 37 Idaho 423, 216 P. 1044 (1923); *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 186 P.2d 498 (1947).

Moving party must specify particularly points relied upon for nonsuit at time he makes the motion so as to give an opportunity for the removal of the objection, or same will not be sustained on appeal. *Idaho Mercantile*

Co. v. Kalanquin, 7 Idaho 295, 62 P. 925 (1900); Mole v. Payne, 39 Idaho 247, 227 P. 23 (1924); Coulson v. Aberdeen-Springfield Canal Co., 39 Idaho 320, 227 P. 29 (1924).

On motion for nonsuit after the plaintiff has rested, defendant must be deemed to have admitted all facts of which there is any evidence, and all facts which the evidence tends to prove. Bank of Commerce v. Baldwin, 12 Idaho 202, 85 P. 497 (1906), overruled in part, Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1976).

By making motion for nonsuit, party, for purpose of motion, admits all facts which evidence tends to prove. Donovan v. Boise City, 31 Idaho 324, 171 P. 670 (1918); Schleiff v. McDonald, 37 Idaho 423, 216 P. 1044 (1923); Sweetland v. Oakley State Bank, 40 Idaho 726, 236 P. 538 (1925).

On motion by defendant for nonsuit after plaintiff has rested his case, defendant must be deemed to have admitted all the facts of which there is any evidence and all the facts which the evidence tends to prove. Southeast Sec. Co. v. Christensen, 66 Idaho 233, 158 P.2d 315 (1945); Burt v. Blackfoot Motor Supply Co., 67 Idaho 548, 186 P.2d 498 (1947).

Motion for nonsuit which did not set out in what particulars the evidence was insufficient could not be sustained. Koser v. Hornback, 75 Idaho 24, 265 P.2d 988 (1954).

On motion for nonsuit after plaintiff has rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove. Buffat v. Schnuckle, 79 Idaho 314, 316 P.2d 887 (1957).

Nonjury Trial.

When a motion to dismiss is made in a nonjury case, the court may weigh the evidence, and if it finds that the plaintiff has failed to carry the burden of proof, judgment on the merits must be entered in favor of the defendant. Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972); Roemer v. Green Pastures Farms, Inc., 97 Idaho 591, 548 P.2d 857 (1976).

When a motion is made under this rule the trial judge sits as a trier of fact and is not required to construe all the evidence in favor of the plaintiff. B & F, Inc. v. Intermountain Gas Co., 99 Idaho 730, 588 P.2d 458 (1978).

Prima Facie Case.

It is reversible error to grant a nonsuit where plaintiff has made a prima facie case. Kroetch v. Empire Mill Co., 9 Idaho 277, 74 P. 868 (1903); Adams v. Bunker Hill & Sullivan Mining Co., 12 Idaho 637, 643, 89 P. 624 (1906); Mineau v. Imperial Dredge & Exploration Co., 19 Idaho 458, 114 P. 23 (1911);

Culver v. Kehl, 21 Idaho 595, 123 P. 301 (1912); Schleiff v. McDonald, 37 Idaho 423, 216 P. 1044 (1923); Burt v. Blackfoot Motor Supply Co., 67 Idaho 548, 186 P.2d 498 (1947).

On motion for nonsuit the question presented is not whether plaintiff had produced a preponderance of evidence, but whether he has made a prima facie case. Carver v. Ketchum, 53 Idaho 595, 26 P.2d 139 (1933).

Admission of incomplete evidence in a trial by the court without a jury, if there be sufficient competent evidence to make a prima facie case, is not ground for a nonsuit. Buhl State Bank v. Glander, 56 Idaho 543, 56 P.2d 757 (1936).

In a nonjury case, the fact plaintiff may have made prima facie case does not prevent dismissal on grounds of no right to relief, for if the court grants the motion it is a determination of the cause on its merits. Stratton v. Stratton, 87 Idaho 118, 391 P.2d 340 (1964).

Where state introduced sufficient evidence which reasonably established a prima facie case of contempt, trial court erred in granting defendant's motion for involuntary dismissal under former similar rule. State v. Palmlund, 95 Idaho 150, 504 P.2d 1199 (1972).

Res Judicata.

Where the judgment of nonsuit entered in the prior action has as its basis that plaintiff had prematurely brought his action for breach of contract because the contract had not yet in fact been breached, plaintiff was not barred from bringing a second action. National Ro-Tile Corp. v. Loomis, 82 Idaho 65, 350 P.2d 217 (1960).

While a motion for an involuntary dismissal under former similar Rule 41(b) in a jury case was treated as a motion for a directed verdict under former Rule 50(a), where the court in sustaining a motion to dismiss under former Rule 41(b), although in a jury case, made it clear that it was not passing on the merits of the case and considered that a new action might be filed for the same cause, the subject matter of the action would not be regarded as res judicata in a second action for the same cause. Bauscher Grain v. National Sur. Corp., 92 Idaho 229, 440 P.2d 349 (1968).

Submission of Evidence.

Where there is an issue of fact, court should not enter judgment against defendant, upon its failure to appear for trial, without requiring submission of evidence to sustain complaint. Hemminger v. Parks, 37 Idaho 464, 216 P. 1042 (1923).

Substantial Evidence Rule.

The substantial evidence rule standard applies to involuntary nonsuit under former

similar rule and is indistinguishable in operation and effect from a motion for directed verdict made pursuant to Rule 50(a). *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

Venue.

There is no authorization by rule or statute in Idaho for a trial court to dismiss an action on the ground of improper venue and the trial court should have denied the motion to dismiss action for libel. *Bistline v. Eberle*, 85 Idaho 167, 376 P.2d 501 (1962).

Waiver of Errors in Denial.

Any error in denying a motion for non-suit is waived by subsequent introduction of testimony by defendant unless it is renewed at the close of the evidence. *Shields v. Johnson*, 12 Idaho 329, 85 P. 972 (1906); *Barrow v. B.R. Lewis Lumber Co.*, 14 Idaho 698, 95 P. 682 (1908).

A defendant who, after his motion for an involuntary dismissal made at the close of plaintiff's evidence was denied, introduced evidence, waived any error in the denial of such motion by not renewing it at the close of all the evidence. *Christensen v. Stuchlik*, 91 Idaho 504, 427 P.2d 278 (1967).

Want of Prosecution.

Trial court has inherent power to dismiss case for want of prosecution. It may do so of its own motion, if plaintiff fails or refuses to prosecute suit with reasonable diligence. *McAllister v. Erickson*, 45 Idaho 211, 261 P. 242 (1927).

Where it appears that plaintiff is not attempting in good faith to press his action and especially where he fails to appear for trial after several continuances, court has right, without notice to such party and without motion by defendant, to dismiss for want of prosecution. *McAllister v. Erickson*, 45 Idaho 211, 261 P. 242 (1927); *Hansen v. Firebaugh*, 87 Idaho 202, 392 P.2d 202 (1964).

Where the record fails to disclose any action taken in this case for more than a year prior

to the entry of judgment of dismissal, nor does it disclose any reason for failure on the part of appellant to prosecute the case to judgment, other than dissatisfaction with the direction to the referee as to his duties, dismissal was proper. *Judy v. Reilly Atkinson & Co.*, 59 Idaho 752, 87 P.2d 451 (1939).

The court abused its discretion in refusing to reinstate case which had been dismissed for want of prosecution where there was no unreasonable delay and defendant could not be injured thereby. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

Rule of district court requiring dismissal of actions for want of prosecution is not a rule of limitations, since the latter applies only to commencement of action. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

District court rule requiring dismissal of suits for want of prosecution should be construed so as to promote decisions on merit rather than on strict formal procedure. *Stilwell v. Weiser Iron Works, Inc.*, 66 Idaho 227, 157 P.2d 86 (1945).

One of the factors properly considered by the court in exercising its discretion to dismiss for lack of prosecution is the effect of delay upon the adverse party. *Hansen v. Firebaugh*, 87 Idaho 202, 392 P.2d 202 (1964).

Where no showing was made as to what plaintiff would testify nor any affidavit filed in support of the contention that plaintiff, delayed by inclement weather and bad roads, was on his way to the place of trial, the record was not such as to require the court on appeal, to find an abuse of discretion in the trial court's decision to order a dismissal. *Cox v. Widmer*, 94 Idaho 451, 490 P.2d 318 (1971).

Where the case had been pending for five years and passed on four calendar calls, and where over two years elapsed between when the case was ready for trial and when plaintiff requested a trial setting, the court did not abuse its discretion in dismissing the action with prejudice. *Warden v. Lathan*, 96 Idaho 34, 524 P.2d 162 (1974).

RESEARCH REFERENCES

A.L.R. Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question. 4 A.L.R.3d 545.

Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action. 5 A.L.R.3d 1405.

Dismissal of action because of party's perjury or suppression of evidence. 11 A.L.R.3d 1153.

Power of court sitting as trier of fact to

dismiss at close of plaintiff's evidence, notwithstanding plaintiff has made out prima facie case. 55 A.L.R.3d 272.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 A.L.R.3d 1109.

Power of trial court to dismiss prosecution or direct acquittal on basis of prosecutor's opening statement. 75 A.L.R.3d 649.

Judicial qualification of provision of Rule 41(b) of Federal Rules of Civil Procedure that

dismissal for failure to prosecute or to comply with federal rules or court order, certain other dismissals, operator's adjudication upon merits. 5 A.L.R. Fed. 897.

Propriety of dismissal of action with prejudice, under Rule 41(b) of Federal Rules of

Civil Procedure, upon ground of plaintiff's failure to comply with order of court. 15 A.L.R. Fed. 407.

Propriety of dismissal for failure of prosecution under Rule 41(b) of Federal Rules of Civil Procedure. 20 A.L.R. Fed. 488.

Rule 41(c). Dismissal of counterclaim, cross-claim, or third-party claim.

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

STATUTORY NOTES

Cross References. Counterclaims and cross-claims, Rules 13(a)-13(i). Third-party practice, Rules 14(a), 14(b).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Effect of Dismissal by Plaintiff.
Prevention of Dismissal.
Voluntary Dismissal.

Effect of Dismissal by Plaintiff.

A dismissal by the plaintiff of his action does not carry with it ipso facto a dismissal of the action based upon the cross-complaint, but the defendant is entitled to have the issue raised therein determined upon the merits. *Brown v. T.B. Reed & Co.*, 31 Idaho 529, 174 P. 136 (1918).

Prevention of Dismissal.

For purpose of determining standing of a cross-complaint upon a motion of dismissal of

the main action, facts alleged in such cross-complaint which support or purport to relate to the cause of action upon which the action was brought, must be taken to be true. *Brown v. T.B. Reed & Co.*, 31 Idaho 529, 174 P. 136 (1918).

To prevent dismissal, counterclaim or cross-complaint must be one upon which defendant would be entitled to affirmative relief. *Ramsey v. District Court*, 33 Idaho 296, 193 P. 733 (1920).

Voluntary Dismissal.

A defendant may voluntarily dismiss a cross-complaint at any time before the filing of any pleading by his adversary praying affirmative relief. *Jeffery v. Ouldhouse*, 59 Idaho 50, 80 P.2d 685 (1938).

Rule 41(d). Costs of previously dismissed action.

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. (Amended April 22, 2004, effective July 1, 2004.)

STATUTORY NOTES

Cross References. Costs, Rule 54(d)(1).

JUDICIAL DECISIONS

Cited in: *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988).

Rule 42(a). Consolidation of separate trials — Consolidation.

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

STATUTORY NOTES

Cross References. Counterclaims or cross-claims, Rule 13(i).
Judgment upon multiple claims, Rule 54(b).

Preliminary hearings, Rule 12(d).
Separate trials, Rules 20(b), 42(b).
Third-party practice, Rules 14(a), 14(b).

JUDICIAL DECISIONS

ANALYSIS

Summary Judgment Reversed.
Worker's Compensation Claims.

Summary Judgment Reversed.

A negligence action in which summary judgment was granted to the defendants and plaintiffs' motion to join and amend was denied which was later reversed and remanded, should be consolidated with a second action which named the remaining defendants filed by the plaintiffs. *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989).

Worker's Compensation Claims.

Industrial Commission did not abuse its

discretion by denying employee's motion to consolidate his claims against his current employer with claims against his former employer, even though parties stipulated to the consolidation. *Hipwell v. Challenger Pallet & Supply*, 124 Idaho 294, 859 P.2d 330 (1993).

Cited in: *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977); *Heaney v. Board of Trustees*, 98 Idaho 900, 575 P.2d 498 (1978); *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984); *Burlington N., Inc. v. Idaho State Tax Comm'n*, 121 Idaho 808, 828 P.2d 837 (1992).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal of Companion Case.
Conditions for Making Consolidation Order.
Discretion of Court.
Inspection of Pleadings.
Purpose.

Appeal of Companion Case.

This case and a companion case, the *Branom* case (83 Idaho 502, 365 P.2d 958 (1961)), were consolidated for trial and where the companion case on appeal decided certain issues raised by specifications of errors, such decisions were followed in this appeal. *Anderson v. Smith Frozen Foods, Inc.*, 83 Idaho 494, 365 P.2d 965 (1961).

Conditions for Making Consolidation Order.

Whenever the court is of the opinion that it may expedite its business and further the interests of the litigants, at the same time minimizing the expense upon the public and the litigants alike, the order of consolidation should be made. *Branom v. Smith Frozen Foods, Inc.*, 83 Idaho 502, 365 P.2d 958 (1961).

Discretion of Court.

It is generally recognized that if the actions are such as may be consolidated, and unless by statute or rule consolidation is a matter of right (which is not the situation in this State) the trial court is vested with a discretion to consolidate or refuse to do so, and the exercise

of such discretion will not be reviewed except in a case of palpable abuse. *Branom v. Smith Frozen Foods, Inc.*, 83 Idaho 502, 365 P.2d 958 (1961).

Inspection of Pleadings.

The relative merits of conflicting contentions regarding consolidations of actions for trial can very well be determined by the trial judge by an inspection of the pleadings. *Branom v. Smith Frozen Foods, Inc.*, 83 Idaho 502, 365 P.2d 958 (1961).

Purpose.

The object of a provision concerning consolidation of trials is to limit the number of trials where all claims made by the several parties arise out of the same accident and state of facts and where one trial is sufficient to dis-

close all the facts involved in the various contentions; to grant separate trials would be a waste of time and added expense. The fact that one plaintiff sues defendant alone and others sue defendant and such plaintiff on the theory of their combined negligence merely leaves the determination of the question of consolidating or splitting to the discretion of the trial judge. *Nelson v. Inland Motor Freight Co.*, 60 Idaho 443, 92 P.2d 790 (1939).

Former identical rule encouraged trial courts to consolidate the proceedings involving common questions of law or fact, and to issue such other orders as might tend to avoid unnecessary costs or delay. *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

Rule 42(b). Separate trials.

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitutions, statutes or rules of the court.

STATUTORY NOTES

Cross References. Counterclaims or cross-claims, Rule 13(i).

Defense of another action pending, Rules 12(b), 12(d).

Multiple claims, judgment upon, Rule 54(b).

Separate trials, Rule 20(b).

Third-party practice, Rules 14(a), 14(b).

JUDICIAL DECISIONS

ANALYSIS

Denial of Motion.

Unlawful Detainer Actions.

Denial of Motion.

Where the court was presented with both a taking issue and a damage issue, it did not abuse its discretion in denying a motion for bifurcation pursuant to this rule, since a bifurcated trial would have required duplication of proof and a significant waste of the court's time. *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982).

Unlawful Detainer Actions.

Since a counter or cross-claim was im-

proper in an unlawful detainer action filed by a gas company against a bulk distributor operator to recover possession of a bulk plant, dismissal of the operator's counterclaim alleging that gas company's action in terminating distributor and consignment agreements interfered with operator's right to freely sell his business, rather than severance for separate trial as operator requested, was proper. *Texaco, Inc. v. Johnson*, 96 Idaho 935, 539 P.2d 288 (1975).

Cited in: *Heckman Ranches, Inc. v. State*, 99 Idaho 793, 589 P.2d 540 (1979); *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982); *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990).

Rule 43(a). Taking of testimony.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules, the Idaho Rules of

Evidence, or other rules adopted by the Supreme Court of Idaho. (Amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Cross References. Affirmation in lieu of oath, Rule 43(d).

Amendment of pleading to conform to, Rule 15(b).

Evidence necessary for default judgment against state of Idaho, Rule 55(e).

Evidence of offer of judgment, Rule 68.

Evidence on matters referred to master, report on, Rule 53(c).

Evidence on motions, Rule 43(e).

Harmless error, Rule 61.

Official record, proof of, I.R.E., Rule 1005.

Rulings on evidence, I.R.E., Rule 103.

Statement of accounts, form prescribed by master, Rule 53(d)(3).

Subpoena, Rules 45(a)-45(f).

JUDICIAL DECISIONS

Cited in: State v. Phillips, 99 Idaho 354, 581 P.2d 1173 (1978); Win of Mich., Inc. v.

Yreka United, Inc., 137 Idaho 747, 53 P.3d 330 (2002).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Depositions.

Exclusion of Witness Discretionary.

Written Statements.

Depositions.

Former identical rule and former Rules 26(a), (b), (d), (e), (f), 32(c)(1), and 33 presupposed the admission in evidence of a deposition or part thereof desired to be used, or upon which some aspect of the trial might be predicated, by an adverse party, but with the objection thereto saved, particularly by former rules 26(f) and 43(a), should answers to interrogatories be self-serving. Thomas v. Thomas, 83 Idaho 86, 357 P.2d 935 (1960).

Exclusion of Witness Discretionary.

Whatever the interest of a witness in a case

may be, if he is not a party his exclusion is a matter wholly within the discretion of the court. Paine v. Strom, 51 Idaho 532, 6 P.2d 849 (1931).

Written Statements.

In action by a patient against a hospital for negligence, written statements of an attending physician made when the patient was discovered to have a fractured femur that it probably occurred at the time of her fall from the hospital bed were admissible to impeach his refusal as a witness to give an opinion as to when the fracture occurred. Butler v. Caldwell Mem. Hosp., 90 Idaho 434, 412 P.2d 593 (1966).

RESEARCH REFERENCES

A.L.R. Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 A.L.R.3d 812.

Necessity of expert evidence to support action against hospital for injury to or death of patient. 40 A.L.R.3d 515.

The parol evidence rule and admissibility of extrinsic evidence to establish or clarify ambiguity in written contract. 40 A.L.R.3d 1384.

Products liability: Admissibility of evidence of other accidents to prove hazardous nature of product. 42 A.L.R.3d 780.

Admissibility, in civil action, of confession or admission which could not be used against

party in criminal prosecution because obtained by improper police methods. 43 A.L.R.3d 1375.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 A.L.R.3d 1413.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient. 44 A.L.R.3d 24.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of co-conspirators. 46 A.L.R.3d 1148.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability. 47 A.L.R.3d 234.

Admissibility of sound recordings in evidence. 58 A.L.R.3d 598.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule. 81 A.L.R.3d 249.

Rule 43(b)(1). Direct and cross-examination.

The examination of a witness by the party producing the witness is denominated the direct examination; the examination of the same witness, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise directs.

JUDICIAL DECISIONS

Cited in: Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977).

Rule 43(b)(2). Interpreters.

If any party, or person the party intends to call as a witness, needs an interpreter as provided in Idaho Court Administrative Rule 52, the party shall so notify the court at least fourteen (14) days before commencement of the court proceeding, or as soon as practicable in the event of an expedited hearing. If the party fails to do so without good cause and as a result the trial or hearing is postponed, the court in its discretion may impose and tax costs and expenses occasioned thereby against the party or the party's attorney. (Adopted March 17, 2006, effective July 1, 2006.)

Rule 43(b)(3). Rules governing cross-examination. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(4). Cross-examination of adverse party. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(5). Reexamination and recalling of witnesses.

A witness once examined cannot be reexamined as to the same matter without leave of the court, but the witness may be reexamined as to any new

matter upon which the witness has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled by the same party without leave of the court. Leave shall be granted or withheld by the court in the exercise of sound discretion. This rule shall not preclude the adverse party from calling such witness as that party's own witness for direct examination.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.

In General.

Re-Direct Examination.

Discretion of Court.

The recall of a witness solely for the purpose of establishing a foundation for her own impeachment was a discretionary matter for the court. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981).

In General.

Upon a proper showing, court may permit

recall of witness for further examination. *State v. Anthony*, 6 Idaho 383, 55 P. 884 (1899).

Re-Direct Examination.

Objection by defendant charged with rape to testimony of prosecutrix on redirect examination that she complained to mother and showed her condition of clothes on ground that matter was not gone into on cross-examination, was properly overruled where prosecutrix testified on cross-examination that she did not complain to her companions. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

Rule 43(b)(6). Impeachment by adverse party. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975, amended March 31, 1978, effective July 1, 1978) was rescinded by

order of the Supreme Court of March 20, 1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(7). Impeachment of party's own witness. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(8). Impeachment by showing inconsistent statements. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(9). Evidence of good character. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(10). Exclusion of trial witnesses. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(11). Refreshment of memory. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(b)(12). Inspection of writings.

Whenever a writing is shown to a witness it may be inspected by the opposite party.

DECISIONS UNDER PRIOR RULE OR STATUTE

Extent of Right.

The denial of the right of inspection by accused and his counsel of documents shown by the prosecuting attorney to state's witnesses was prejudicial error. *State v. McManhan*, 57 Idaho 240, 65 P.2d 156 (1937).

Fact that witness testified that she had kept notes on matters to which she was testifying does not entitle opposing counsel to right to inspect her notes when she is testifying from memory and is not using them. *Bess v. Bess*, 58 Idaho 259, 72 P.2d 285 (1937).

Rule 43(c). Record of excluded evidence. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 43(d). Affirmation in lieu of oath.

Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

Rule 43(e). Evidence on motions.

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

JUDICIAL DECISIONS**ANALYSIS**

Discretion of Court.

Summary Judgment Proceedings.

Discretion of Court.

This rule authorizes oral testimony at summary judgment proceedings, however, the court may exercise its discretion to request affidavits as the preferred method of presenting facts relevant in such a proceeding, and the court may limit any testimony tending to

create a "mini-trial" on a summary judgment motion. *Johnson v. City of Homedale*, 118 Idaho 285, 796 P.2d 162 (Ct. App. 1990).

Summary Judgment Proceedings.

The general provision in this rule is inapplicable to summary judgment proceedings. *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990).

Cited in: *Rawson v. Idaho State Bd. of Cosmetology*, 107 Idaho 1037, 695 P.2d 422 (Ct. App. 1985).

Rule 43(f). View of premises, property or things.

During a trial, the court, in its discretion, may order that the court or jury shall have a view of, (1) the property which is the subject of the action, or (2) a place in which any material fact occurred or in which any material thing is located, or (3) any other item, thing or circumstance relevant to the action. In jury trials the court shall order the jury to be transported as a group, under the charge of an officer appointed by the court, to the place where the view is to be shown to them. While the jury is conducting such a view, no person shall be permitted to speak with them on any subject connected with the trial of the action, except as authorized by the court, and only the appointed officer shall communicate with them in conducting the view pursuant to order of the court. A view by the court shall be conducted personally by the court after notice to all parties. Counsel shall have the right to be present at any view by the court or jury.

JUDICIAL DECISIONS**ANALYSIS**

Discretion of Court.

No Probative Value.

Discretion of Court.

In action to quiet title as against claimed easements, a personal view of the area by the judge during the proceedings, while appropriate, was not essential to a fair or complete trial, and trial judge did not err in refusing to reopen trial in order to take such view. *Cordwell v. Smith*, 105 Idaho 71, 665 P.2d 1081 (Ct. App. 1983).

No Probative Value.

Where the physical appearance of the site when the case was tried would have had little or no probative impact upon the issue of whether annual labor had been performed on mining claim in the past, there was no abuse of discretion in the trial court's decision to forego a view of the site. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984).

Cited in: *Payne v. Skaar*, 127 Idaho 341, 900 P.2d 1352 (1995).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.
 Effect of Knowledge Gained.
 New Trial.
 Time of View.
 Who Should Attend View of Premises.

Discretion of Court.

Trial court did not abuse discretion in allowing jury to view scene of accident where highway had not been materially changed since date of accident. *Goetz v. Burgess*, 72 Idaho 186, 238 P.2d 444 (1951).

The trial court did not abuse its discretion in denying the motion made by cross-defendant for a view of the property by the jury in an action wherein plaintiff sued defendant for cow and calf which defendant in cross-complaint alleged he had purchased from cross-defendant. *Gooding v. Koonce*, 78 Idaho 515, 306 P.2d 657 (1957).

Effect of Knowledge Gained.

Knowledge gained by the jury by means of a view of premises involved does not supply a want of evidence and is not evidence upon which a verdict may be based, but is to be applied in determining weight and applicability of evidence introduced. *Tyson Creek R.R. v. Empire Mill Co.*, 31 Idaho 580, 174 P. 1004 (1918).

What jury observes during inspection of premises could, in no case, become evidence and jury could only use such as means to

understand and better apply testimony. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, 57 Idaho 240, 65 P.2d 156 (1937).

Jury, permitted to view the premises where accident occurred, was entitled to consider the view in determining the weight and applicability of the evidence introduced at the trial. *Department of Fin. v. Union Pac. R.R.*, 61 Idaho 484, 104 P.2d 1110 (1940).

New Trial.

A new trial for the alleged misconduct of defendant's employee in connection with the jury's view of the premises and prejudice of juror was properly denied where it was apparent that plaintiff seeking the new trial was himself the flagrant offender. *Alesko v. Union Pac. R.R.*, 62 Idaho 235, 109 P.2d 874 (1941).

Time of View.

Trial court did not abuse discretion in allowing jury to view highway in daytime, though accident occurred in nighttime. *Goetz v. Burgess*, 72 Idaho 186, 238 P.2d 444 (1951).

Who Should Attend View of Premises.

A view of allegedly damaged realty by the jury should be had only in the presence of attorneys for the respective parties, the trial judge, and the court bailiff, but any other interested parties, and particularly the landowner and witnesses should not be allowed in the vicinity at the time of the view or allowed to talk to the jury. *Alesko v. Union Pac. R.R.*, 62 Idaho 235, 109 P.2d 874 (1941).

Rule 44(a). Proof of official record — Authentication of copy. **[Rescinded effective July 1, 1985.]**

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 44(b). Proof of lack of record. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20,

1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 44(c). Other proof of record. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted, effective January 1 1975) was rescinded by order of the Supreme Court of March 20, 1985, effective July 1, 1985. For present rule see the Idaho Rules of Evidence.

Rule 44(d). Judicial notice of facts and foreign law.

The court shall take judicial notice as provided by law. When judicial notice is taken of an adjudicative fact, the court shall instruct the jury as provided in Rule 201 of the Idaho Rules of Evidence. If either party to an action intends to request the court to take judicial notice of the statutes or laws of a foreign state, a brief or memorandum citing such foreign law shall be submitted to the court and opposing counsel at least ten (10) days prior to trial or hearing. Opposing counsel may reply thereto within five (5) days following service of such brief. Failure to submit such brief may in the discretion of the court constitute a waiver of the request. (Amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Cross References. Facts judicially noticed, § 9-101.

JUDICIAL DECISIONS

Text of Foreign Law Required.

The Utah Securities Act was foreign law which was to be presented to the ruling court in accordance with Idaho Civil Rule 44(d), and although plaintiff mentioned the Utah Securities Act to the district court several times, Rule 44(d) requires more than the simple invocation of foreign law; it requires, at a

minimum, providing the court with the actual text of the law. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000).

Cited in: *Salazar v. Tilley*, 110 Idaho 584, 716 P.2d 1356 (Ct. App. 1986); *Huerta v. Huerta*, 127 Idaho 77, 896 P.2d 985 (Ct. App. 1995).

RESEARCH REFERENCES

A.L.R. Judicial notice as to assessed valuations. 42 A.L.R.3d 1439.

Public parks, judicial notice of matters relating to. 86 A.L.R.3d 484.

Changes in cost of living or in purchasing power of money, judicial notice of in reviewing damages for personal injuries or death. 21 A.L.R.4th 21.

Blood grouping tests. 43 A.L.R.4th 579.

Fingerprints, palm prints, or bare footprints as evidence. 45 A.L.R.4th 1178.

Judicial notice of opinions held by large sections of the public. 98 A.L.R. Fed. 20.

Rule 45(a). Subpoena — For attendance of witnesses — Issuance.

Every subpoena shall be issued by the clerk of the district court under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to appear to give

testimony at trial, or at hearing, or at deposition at a time and place therein specified. A command to produce or to permit inspection and copying of documents, electronically stored information or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or a hearing or at deposition, or may be issued separately. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. Provided, an attorney licensed in Idaho as officer of the court may also issue and sign a subpoena. (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Cross References. Depositions, subpoena for taking, Rules 45(f)(1), 45(f)(2).

Disobedience of subpoena, penalty, § 9-708. Hearing or trial, for, Rule 45(g).

Production of documentary evidence, Rule 45(b).

Service, Rule 45(e)(2).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Habeas Corpus Proceeding.
Wife of Litigant.

Habeas Corpus Proceeding.

Because a habeas corpus proceeding is civil rather than criminal, it is not subject to the same rules of compulsory process which apply as a matter of constitutional law to criminal trials; rather, the right to secure attendance of witnesses is grounded in the habeas corpus statutes, particularly § 19-4217, and in I.R.C.P. 45. *Sivak v. State*, 114 Idaho 271, 755 P.2d 1309 (Ct. App. 1988).

In a habeas corpus proceeding in which an

inmate challenged the conditions of his confinement, the magistrate did not err in failing to deem the witness "necessary" where the inmate made no offer of proof that the witness knew what food the inmate was personally served, nor that any difference between the official menu and food served had a significant bearing on nutrition. *Sivak v. State*, 114 Idaho 271, 755 P.2d 1309 (Ct. App. 1988).

Wife of Litigant.

The wife of a litigant who is subpoenaed must be afforded the same rights as other witnesses. *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 P. 41 (1906).

RESEARCH REFERENCES

A.L.R. Limiting number of witnesses. 5 A.L.R.3d 169.

Compelling expert to testify. 66 A.L.R.4th 213.

Rule 45(b). Subpoena for production or inspection of documents, electronically stored information or tangible things, or inspection of premises.

(1) A subpoena to attend a deposition, trial or hearing may command the person to whom it is directed to produce or permit inspection and copying of the books, papers, documents, electronically stored information or tangible things designated therein. If the subpoena is for a party to attend a deposition, the scope and procedure shall comply with Rule 34, and the party must be allowed at least 30 days to comply.

(2) A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents, electronically stored informa-

tion, or tangible things, or to permit inspection of premises may be served at any time after all parties have either appeared or have been defaulted, unless otherwise ordered. The party serving the subpoena shall serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party, unless otherwise specified by the court. The party serving the subpoenas shall pay the reasonable cost of producing or copying the documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

(3) A person commanded to produce or permit inspection and copying of documents, electronically stored information or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing or at deposition.

(4) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand. (Adopted March 17, 2006, effective July 1, 2006; amended effective July 23, 2007; amended April 4, 2008, effective July 1, 2008; amended February 9, 2012, effective July 1, 2012.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Cross References. Documents and things, discovery and production, Rule 34(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

In General.

Motion to Inspect Books.

In General.

No error in the quashing of subpoenas duces tecum was shown by a record which did not contain copies of the subpoenas and the praecipe for the record did not specifically request their inclusion. *Carter Packing Co. v. Pioneer Irrigation Dist.*, 91 Idaho 701, 429 P.2d 433 (1967).

Motion to Inspect Books.

A motion by a person against whom a

criminal prosecution is pending for an order giving him and his counsel leave to inspect the records and files of certain mining companies for the purpose of preparing his defense, supported by an affidavit that a subpoena duces tecum, under the statutes of this state, for their production at the trial, would not give adequate relief and would cause great delay partakes of the nature of a bill of discovery and is unwarranted either by common law rules or statutory provisions. *Idaho Galena Mining Co. v. Judge of Dist. Court*, 47 Idaho 195, 273 P. 952 (1929).

Rule 45(c). Form.

The subpoena shall be in substantially the following form.

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR _____ COUNTY

(MAGISTRATE DIVISION)

Party's name
and
designation,

vs.

SUBPOENA

Party's name
and
designation.

The State of Idaho to: _____:
YOU ARE COMMANDED:

- [] to appear at the place, date and time specified below to testify in the above case.
- [] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.
- [] to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below. (list documents or objects)
- [] to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME: _____

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this ____ day of _____, 20____.
By order of the court.

Clerk

Deputy

(Court Seal)
(Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Rule 45(d). Protection against subpoena.

The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or

modify the subpoena if it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden or (2) condition compliance with the subpoena upon the advancement of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things by the person in whose behalf the subpoena is issued. (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Rule 45(e)(1). Witness fees and expenses.

Witness fees and expenses in the district court and the magistrates division thereof shall be in the amounts provided for under Rule 54(d)(1). (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Rule 45(e)(2). Service of subpoena.

A subpoena may be served by an officer authorized by law to serve process or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by giving or offering to the person at the same time, if demanded, the fees for one (1) day's attendance and the mileage allowed by law, except that no prepayment tender of fees and mileage shall be necessary to witnesses subpoenaed by the attorney general or any prosecuting attorney on behalf of the state. Service of a subpoena upon a party to a legal action or proceeding can be made by service on the attorney of record for that party in such legal action or proceeding as provided in Rule 5(b) for attendance at a hearing or trial with or without the production of documents or other objects. No prepayment tender of fees and mileage shall be necessary to that party, but the court in its discretion may, upon a hearing held thereon at any time after service on that party's attorney, determine under all of the circumstances then existing, the reasonable amount of such fees and mileage to be paid, if any, to that party. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. When service is by an officer it must be returned with the officer's certificate of service, and when served by any other person it must be returned with an affidavit of such person of its service. (Adopted March 17, 2006, effective July 1, 2006; amended February 9, 2012, effective July 1, 2012; amended April 27, 2012, effective July 1, 2012.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Rule 45(f)(1). Subpoena for taking depositions — Place of examination.

Proof of service of a notice to take a deposition as provided in Rules 30 and 31, or the presentation of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the clerk of the district court for the county in which the action is pending, or by the clerk of the district court for the county in which a deposition is being taken to be used in an action pending in another state or country, of subpoenas for the person named or described therein. The subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30 and subdivision (b) of this Rule 45, except that if the action is pending out of the state, the court issuing the subpoena shall have the authority to enforce such rules. (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Cross References. Depositions upon oral examination, Rule 30(a).

Documentary evidence, subpoena for production of, Rule 45(b).

Examination, scope of on deposition, Rule 26(b)(1).

Parties and deponents, orders for protection of, Rule 31(d).

Witnesses, depositions upon written interrogatories, notice, Rule 31(a).

Rule 45(f)(2). Depositions — Attendance where required.

A resident of the state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person. A nonresident of the state may be required to attend in any county of the state wherein the nonresident is served with a subpoena. (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

DECISIONS UNDER PRIOR RULE OR STATUTE

Resident of Adjoining County.

A witness who resides in an adjoining county and more than thirty miles from the

place of trial is not obliged to attend in response to a subpoena. *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 P. 41 (1906).

Rule 45(g). Subpoena for a hearing or trial.

At the request of any party subpoenas for attendance at a hearing or trial shall be issued as provided by Rule 45(a), and such subpoenas for a hearing or trial in a district court or magistrates division may be served at any place within the state. (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so

that the former rule was repealed and a new rule enacted.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Necessary Witnesses.

Out of State Witness.

Removal of Venue.

Waiver of Privilege of Nonattendance.

Necessary Witnesses.

The Civil Rules, together with the habeas corpus statutes, provide to a petitioner the right to obtain the testimony of "necessary" witnesses. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

Out of State Witness.

Although witness resides out of state and is not obliged to attend, he is entitled to fees and mileage for the distance actually traveled

within the state in going to place of trial. *State v. Baird*, 13 Idaho 126, 89 P. 298 (1907).

Removal of Venue.

Venue of action was removed to county where cause arose when subpoenaing of witnesses was more convenient in that county. *Spaulding v. Hoops*, 49 Idaho 289, 287 P. 947 (1930).

Waiver of Privilege of Nonattendance.

If witness living beyond specified distance sees fit to waive privilege of not attending, he is entitled to mileage the same as a witness attending under compulsory process. *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 P. 41 (1906).

Rule 45(h). Contempt for nonobedience of subpoena.

Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of the court from which the subpoena issued, in addition to the penalties provided by law. (Adopted March 17, 2006, effective July 1, 2006.)

STATUTORY NOTES

Compiler's Notes. Rule 45 was substantially reorganized and amended in 2006 so that the former rule was repealed and a new rule enacted.

Cross References. Disobedience of subpoena, penalty, § 9-708.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Attorneys.

Termination for Obeying Subpoena Wrongful.

Attorneys.

When an attorney is called as a witness and declines to answer questions or to produce letters or documents on the ground of privilege, the burden is upon him to establish the general privileged character of the communications or documents. In re Niday, 15 Idaho 559, 98 P. 845 (1908).

Termination for Obeying Subpoena Wrongful.

Termination of AIDS consultant employed by the Idaho Department of Education for responding to court-issued subpoena requiring testimony at a sentence reduction hearing was a violation of the public policy of the state of Idaho and was proper basis for claim of wrongful termination. Hummer v. Evans, 129 Idaho 274, 923 P.2d 981 (1996).

Rule 45(i). Interstate depositions and discovery.

This rule shall govern depositions and discovery conducted in Idaho in connection with a civil lawsuit brought in another state. (Adopted March 19, 2009, effective July 1, 2009.)

Rule 45(i)(1). Statement of purpose.

This rule (45(i)) constitutes Idaho's implementation of the Uniform Interstate Depositions and Discovery Act as modified herein. (Adopted March 19, 2009, effective July 1, 2009.)

Rule 45(i)(2). Definitions.

In this rule:

(A) "Foreign jurisdiction" means a state other than this state.

(B) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(C) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(D) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(E) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(i) attend and give testimony at a deposition;

(ii) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(iii) permit inspection of premises under the control of the person.

(Adopted March 19, 2009, effective July 1, 2009.)

Comment. — The Uniform Interstate Depositions and Discovery Act (the Act) has been adopted as Rule 45(i) of the Idaho Rules of

Civil Procedure to enable an attorney prosecuting or defending a lawsuit outside the jurisdiction of Idaho to conduct discovery

within Idaho. The rule does not apply to discovery arising out of litigation originating in foreign countries.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection 45(i)(2)(E)(iii) is limited to inspection of premises). Medical examinations in a per-

sonal injury case, for example, are separately controlled by state discovery rules (the corresponding State rule is Rule 35 of the IRCP).

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the rule. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which may include an attorney of record for a party in the proceeding.

Rule 45(i)(3). Issuance of subpoena for interstate depositions and discovery.

(A) To request issuance of a subpoena under this rule, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this rule does not constitute an appearance in the courts of this state. It does create the necessary jurisdiction in the State of Idaho to:

- (i) enforce the subpoena;
- (ii) quash or modify the subpoena;
- (iii) issue any protective order or resolve any other dispute relating to the subpoena;
- (iv) impose sanctions on the attorney requesting the issuance of the subpoena for any action which would constitute a violation of the Idaho Rules of Civil Procedure.

(B) When a party submits a foreign subpoena to a clerk of court in this state, the clerk shall promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed.

(C) A subpoena under subsection (B) must:

- (i) conform to the requirements of the Idaho Rules of Civil Procedure, including Rule 45, and conform substantially to the form provided in 45(c) but may otherwise incorporate the terms used in the foreign subpoena so long as they conform to the Idaho Rules of Civil Procedure;
- (ii) advise the person to whom the subpoena is directed that such a person has a right to petition the Idaho court to quash or modify the subpoena under Rule 45(i)(6); and
- (iii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel. (Adopted March 19, 2009, effective July 1, 2009.)

Comment. — Submitting a subpoena to the clerk of court in Idaho, so that a subpoena is then issued in the name of Idaho, is the necessary act that invokes the jurisdiction of Idaho, which in turn makes the newly issued subpoena both enforceable and challengeable in Idaho.

The standard procedure under this section will become as follows, using as an example a

case filed in Kansas (the trial state) where the witness to be deposed lives in Idaho (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). The lawyer will then prepare an Idaho subpoena so that it conforms to the requirements of the Idaho Rules of Civil Pro-

cedure and may also incorporate the same terms of the Kansas subpoena — so long as they conform to the Idaho Rules of Civil Procedure. The lawyer will then hire a process server (or local counsel) in Idaho, who will take the completed and executed Kansas subpoena and the completed but not yet executed Idaho subpoena to the clerk's office in Idaho. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that an Idaho subpoena is being sought pursuant to Idaho Rule 45(i)(3). The clerk of court, upon being given the Kansas subpoena, will then issue the Idaho subpoena ("issue" includes signing and stamping). The process server (or other agent of the party) will then serve the Idaho subpoena on the deponent in accordance with Idaho law (which includes any applicable local rules).

The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of Idaho over the deponent. The only documents that need to be presented to the clerk of court in Idaho are the subpoena issued in the trial state and the draft subpoena of Idaho. There is no requirement to hire local counsel to have the subpoena issued in Idaho, and there is no need to present the matter to a judge in Idaho before the subpoena can be issued. However, the rule requires that the Idaho subpoena "conform to the requirements of the Idaho

Rules of Civil Procedure, including Rule 45, and conform substantially to the form provided in Rule 45(c)" In effect, the clerk of court in Idaho issues the new subpoena which is then served on the deponent in accordance with the laws of Idaho. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in Idaho.

The rule requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. This requirement imposes no significant burden on the lawyer obtaining the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits to Idaho, by contrast, are substantial. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

Rule 45(i)(4). Service of subpoena for interstate depositions and discovery.

A subpoena issued by a clerk of court under subdivision 45(i)(3) of this rule must be served in compliance with Rule 45(e)(2), except that the officer or individual responsible for service shall not return a certificate of service or affidavit to the court that issued the subpoena under subdivision 45(i)(3). In issuing the subpoena, the clerk shall not create a file, and shall not collect a fee. Instead, the officer or individual responsible for service shall deliver a certificate of service or affidavit to the attorney who requested the subpoena. That attorney must retain the certificate of service or affidavit and furnish a copy to any party or to the deponent upon request. (Adopted March 19, 2009, effective July 1, 2009.)

Comment. — The Idaho court clerk will not create a file when discovery is initiated nor collect a fee. This rule places the obligation of retaining the original subpoena and

the proof of service on the lawyer initiating the discovery. A file will be created if a motion is brought to enforce, quash, or modify the subpoena.

Rule 45(i)(5). Deposition, production, inspection, witness fees, expenses, place of examination, attendance where required.

Rules 45(a), 45(b), 45(e)(1), 45(f)(1) and 45(f)(2) shall also apply to

subpoenas issued under subdivision 45(i)(3) of this rule. (Adopted March 19, 2009, effective July 1, 2009.)

Comment. — The rule requires that the discovery permitted by this section must comply with the rules and laws of Idaho. Idaho has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a

foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the discovery procedure must be the same as it would be if the case had originally been filed in Idaho.

Rule 45(i)(6). Application to court.

An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under subdivision 45(i)(3) of this rule must comply with the rules or laws of Idaho and be submitted to the court in the county in which discovery is to be conducted or the deponent resides, is employed or transacts business.

(A) **Action to enforce a subpoena.** An action to enforce a subpoena under this rule shall be brought in accordance with any applicable rule or law of Idaho.

(B) **Action to quash or modify a subpoena.** An action to quash or modify a subpoena under this rule shall be instituted by the filing of a petition. The petition shall be made promptly, at or before the time for compliance specified in the subpoena. The court may:

(i) quash or modify the subpoena if it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden; or

(ii) condition compliance with the subpoena upon the advancement of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things by the person in whose behalf the subpoena is issued; and

(iii) impose sanctions. (Adopted March 19, 2009, effective July 1, 2009.)

Comment. — The rule requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this rule, must comply with the law of Idaho. Those laws include Idaho's procedural, evidentiary, and conflict of laws rules. Idaho has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of Idaho. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in Idaho.

Rule 45(i)(6)(A) envisions an action to enforce the subpoena. Ordinarily, such an action

would be brought pursuant to Rule 75, IRCP, since that rule deals with contempt proceedings. However, the identification of Rule 75 should not suggest that is the sole basis to enforce a subpoena.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in Idaho under the laws of Idaho (including its conflict of laws principles).

Nothing in this rule limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on

grounds of relevance, and that motion would presumably be made and ruled on before the deposition subpoena is ever presented to the clerk of court in Idaho.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in Idaho, the lawyer making or responding to

the application must comply with Idaho's rules governing lawyers appearing in its courts. This rule does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Idaho Rule of Professional Conduct 5.5 governing the unauthorized practice of law.)

Rule 45(i)(7). Uniformity of application and construction.

In applying and construing this rule, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that have implemented the Uniform Interstate Depositions and Discovery Act. (Adopted March 19, 2009, effective July 1, 2009.)

Rule 45(i)(8). Application to pending action.

This rule applies to requests for discovery in cases pending on the effective date of this rule, July 1, 2009. (Adopted March 19, 2009, effective July 1, 2009.)

Rule 46. Exceptions unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

STATUTORY NOTES

Cross References. Harmless error, Rule 61. Instructions to jury, objection, Rule 51.

JUDICIAL DECISIONS

Cited in: Davidson v. Beco Corp., 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Certification.
Change of Venue.
Denial of New Trial.
Order Retaxing Costs.
Order Setting Aside Judgment.
Preservation of Exceptions.

incorporated into the record and designated as a bill of exceptions, is not strictly a bill of exceptions, but is a certificate of identification as to the papers used upon the hearing of the motion, and will be considered only as such certificate. A bill of exceptions is not required. Libby v. Spokane Valley Land & Water Co., 15 Idaho 467, 98 P. 715 (1908).

Certification.

The certificate of the trial judge certifying to the different papers and documents used upon a motion to dismiss an appeal, although

Change of Venue.

It is not necessary to take and save exceptions to order refusing change of venue. Morrison v. Finch, 40 Idaho 791, 237 P. 422 (1925).

Denial of New Trial.

No formal exception needs to be taken to an order denying a new trial. *Hattabaugh v. Vollmer*, 5 Idaho 23, 46 P. 831 (1896).

Order Retaxing Costs.

Appellant is not required on appeal from order retaxing costs to prepare and file a formal bill of exceptions, where such order appeared in minutes of district court and was included in transcript. *Feenaughty Mach. Co. v. Turner*, 44 Idaho 363, 257 P. 38 (1927).

Order Setting Aside Judgment.

It is unnecessary to take exception to order setting aside judgment in order to authorize review. *Commonwealth Trust Co. v. Lorain*, 43 Idaho 784, 255 P. 909 (1927).

Preservation of Exceptions.

Decisions to the effect that the exceptions must be preserved in a bill of exceptions to be available on appeal are no longer in point. *Palmer v. Pettingill*, 6 Idaho 346, 55 P. 653 (1898).

Rule 47(a). Selection of master jury list and master jury wheel.

All juries shall be selected as prescribed by the Uniform Jury Selection and Service Act of Idaho. Pursuant to section 2-206, Idaho Code, and in order to foster the policy and protect the rights secured by the Uniform Jury Selection and Service Act, the jury commission of each county shall compile and maintain a master list consisting of: (a) All voter registration lists of the county. (b) The following additional lists, when available: driver's license lists; and such other lists as the administrative judge for the judicial district shall designate. The jury commission shall not be required to eliminate duplication of names on the master list before selection of names for the master jury wheel, unless so directed by the administrative judge. In selecting names from the master list for the master jury wheel, as prescribed in section 2-207, Idaho Code, all duplication of names drawn from the master list shall be eliminated.

STATUTORY NOTES

Cross References. Alternate jurors, Rule 47(l).

Demand for jury trial, Rule 38(b).

Jury trial of right, Rule 38(a).

Trial by jury, Rule 39(a).

JUDICIAL DECISIONS**Voter Registration Lists.**

Where trial court exclusively drew jury venire from voter registration lists because lists of motor vehicle registrations and utility customers were not yet finished by office of

administrative director of the courts, trial court's action did not violate the requirements of § 2-206 and this rule. *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980).

DECISIONS UNDER PRIOR RULE OR STATUTE**Presumption of Compliance with Law.**

It will be presumed, in the absence of proof to the contrary, that former section governing

jury selection was complied with in the selection of the jury list. *State v. Walters*, 61 Idaho 341, 102 P.2d 284 (1940).

RESEARCH REFERENCES

A.L.R. Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 A.L.R.3d 869.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination. 4 A.L.R. Fed. 449.

Rule 47(b). Selection of jury panel.

When any action is called for trial by jury, after the number of qualified jurors on a panel has been determined and the jurors selected in accordance with section 2-210, Idaho Code, the selection of the final trial jury for the trial of the action shall be in accordance with these rules. The entire panel may be divided into two (2) or more panels and thereafter redivided or combined for jury trials in such manner as prescribed by the administrative district judge for trial of individual actions.

RESEARCH REFERENCES

A.L.R. Religious belief as ground for exemption or excuse from jury service. 2 A.L.R.3d 1392.

Rule 47(c). Summons of jurors. [Rescinded effective July 1, 1986.]**STATUTORY NOTES**

Compiler's Notes. This rule (adopted effective January 1, 1975; amended effective July 1, 1977; amended March 31, 1978, effective July 1, 1978) was rescinded by Supreme

Court Order of March 28, 1986, effective July 1, 1986, as such rule has been incorporated into Rule 63 of the Idaho Court Administrative Rules.

Rule 47(d). Juror questionnaires.

In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order. For the limited purpose of trial preparation, copies of the juror questionnaires and answers may be made available by the clerk to an attorney for a party or to a party appearing pro se. Such disclosure shall be subject to the rule of juror confidentiality stated above and any further limiting order of the administrative or trial judge. Such a limiting order may include deletion of the name, address, phone number or any other information about a prospective juror that should remain confidential. (Amended December 19, 1975, effective January 1, 1976; amended May 4, 2001, effective July 1, 2001.)

Rule 47(e). Roll call of jurors.

Upon the commencement of a trial by jury, the court shall instruct the clerk to call the roll of the jury panel assigned for trial of that action and the court shall take appropriate action with regard to any unexcused absences of prospective jurors, including but not limited to the right to order an absent juror to be attached by the sheriff and compelled to attend the trial. The court shall thereupon determine the excuses of any jurors not previously determined.

Rule 47(f). Oath to panel.

The clerk shall administer an oath or affirmation to all prospective jurors of the entire jury panel, that each of them will truthfully answer all questions propounded to them as to their qualifications to sit as jurors in the action.

Rule 47(g). Selecting initial jury.

The names of all prospective jurors on the jury panel present for the trial of an action shall constitute the initial trial jury panel for that action. Under the direction of the court, the clerk shall then select, at random, sufficient prospective jurors to complete jury selection. The court, in its discretion and in consideration for the privacy of the jurors, may have the jurors referred to by name or by number, as the court may deem appropriate. (Amended March 28, 1986, effective July 1, 1986; amended May 4, 2001, effective July 1, 2001.)

JUDICIAL DECISIONS**Random Selection.**

Where a trial court allowed the state two final peremptory challenges and then limited the replacement pool of jurors to two people,

the jury was not selected randomly since the state was permitted, in effect, to choose which of three prospective jurors it preferred. *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

Rule 47(h). Challenges for cause.

Challenges for cause shall be heard and determined by the court after voir dire examination of each prospective juror or of all prospective jurors. The grounds for challenge for cause are as follows:

1. A want of any of the qualifications prescribed by the Idaho Code to render a person competent as a juror.

2. Consanguinity or affinity, within the fourth degree to any party.

3. Standing in the relation of debtor or creditor, guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner, or united in business with either party, or surety on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action, or being then a witness or subpoenaed therein.

5. Pecuniary interest on the part of the juror in the outcome of the action or in the main question involved in the action.

6. Having an unqualified opinion or belief as to the merits of the action, or main question involved therein, founded upon knowledge or information of its material facts or of some of them.

7. The existence of a state of mind in the juror evincing enmity or bias to or against either party.

8. [Rescinded.] (Amended effective January 8, 1976; amended July 2, 1976, effective October 1, 1976; amended April 11, 1979, effective May 1, 1979; amended March 28, 1986, effective July 1, 1986.)

JUDICIAL DECISIONS

ANALYSIS

Discretion.
Doctor-Patient Relationship.
Duties of Judge.
Opinion of Case.
Waiver.

Discretion.

It is in the trial court's discretion to determine whether a juror can render a fair and impartial verdict. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Where court did not deny plaintiff's challenge for cause until it had assured itself that the prospective juror could remain impartial, the court did not abuse its discretion by failing to dismiss her for cause. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Doctor-Patient Relationship.

In medical malpractice actions, there is no rule for automatically disqualifying all jurors with current doctor-patient relationships with the defendant, the parties may challenge for cause current and/or former patients through the use of peremptory challenges. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

A doctor-patient relationship does not fall within the provision of subdivision (3) of this rule as being "united in business" with the defendant for a doctor-patient relationship does not implicate a juror's financial interests. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Challenges Restricted to Statutory Grounds.
Challenge to Panel.
Construction of Terms.
Evidence of Bias.
Opinions Based on Reading of Newspapers.
Scope of Voir Dire Examination.
Stock Ownership.
United in Business.

Challenges Restricted to Statutory Grounds.

The only challenges to an individual juror for implied bias permitted by the laws of Idaho were those enumerated by former similar provision. *State v. Scoble*, 28 Idaho 721, 155 P. 969 (1916).

Duties of Judge.

In order to determine whether a juror should be excused for cause, the trial judge must weigh the pertinent facts and then decide if they justify exclusion of the juror pursuant to the standards set forth in this rule. *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981).

This rule and I.R.C.P. 47(i) together make it clear that the primary responsibility for voir dire and the selection of competent jurors rests upon the trial judge. *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981).

In ruling on a challenge for cause, the trial court must consider the facts and decide if the juror should be excused pursuant to this rule. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Opinion of Case.

Ordinarily, a juror who has formed an opinion of the case and is a personal friend of one of the parties should be excused when challenged for cause and a litigant should not be forced to exercise a peremptory challenge to exclude the prospective juror when it clearly appears that he is disqualified for cause. *Stoddard v. Nelson*, 99 Idaho 293, 581 P.2d 339 (1978).

Waiver.

In malpractice action, plaintiff waived all objection to certain jurors when he failed to challenge them for cause and cannot on appeal object to their inclusion on the panel on the basis that they or their family members were patients of defendant. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Challenge to Panel.

Disqualification of any individual juror is not ground for challenge to panel. *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924).

Construction of Terms.

"Debtor" means one liable, on either an express or implied contract or by operation of law, to respond to another in money, service, goods, or chattels, either in the present or at some future date. *Hall v. Chattin*, 17 Idaho 664, 106 P. 1132 (1910).

Evidence of Bias.

It is discretionary with the court whether it will permit a challenge to a juror for actual bias to be tried by other evidence than that of

the juror himself. *State v. Shelton*, 46 Idaho 423, 267 P. 950 (1928).

Opinions Based on Reading of Newspapers.

Opinion of a juror as to merits of cause, based solely on what has been read in newspapers, published as a matter of news, should rarely, if ever, be accepted by court as a sufficiently unqualified opinion to disqualify juror. *Gibbert v. Washington Water Power Co.*, 19 Idaho 637, 115 P. 924 (1911).

Scope of Voir Dire Examination.

Scope of voir dire examination rests in the sound discretion of the court. *State v. Pettit*, 33 Idaho 326, 193 P. 1015 (1920).

Stock Ownership.

In an action involving negligence, plaintiff

may inquire of the jurors as to whether or not they own stock in a named insurance company. *Faris v. Burroughs Adding Mach. Co.*, 48 Idaho 310, 282 P. 72 (1929); *Byington v. Horton*, 61 Idaho 389, 102 P.2d 652 (1940).

United in Business.

The word "business" is employed in a general sense, and refers to the commercial, industrial, and professional enterprises and engagements into which men jointly enter, whether for a brief or considerable length of time. *Hall v. Chattin*, 17 Idaho 664, 106 P. 1132 (1910).

Where the party litigant and a juror are jointly and contingently liable for payment of expenses of a business venture, they are "united in business." *Hall v. Chattin*, 17 Idaho 664, 106 P. 1132 (1910).

RESEARCH REFERENCES

A.L.R. Racial, religious, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal cases. 63 A.L.R.3d 1052; 94 A.L.R.3d 15; 95 A.L.R.3d 172; 28 A.L.R. Fed. 26; 85 A.L.R. Fed. 864.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. 38 A.L.R.4th 267.

Professional or business relations between proposed juror and attorney as ground for challenge for cause. 52 A.L.R.4th 964.

Personal injury or death action, questions to jury in, as to interest in or connection with, indemnity insurance company. 40 A.L.R. Fed. 541.

Rule 47(i). Opening statements — Voir dire examination of jurors — Challenges — Struck jury.

(1) **Opening Statements to the Entire Jury Panel.** — The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion, the court may require counsel to do so. Following such statements, if any, the court shall conduct a thorough examination of prospective jurors.

(2) **Examination and Challenges for Cause.** — Voir dire examination of the prospective jurors drawn from the jury panel shall first be conducted by the court. The attorney for the plaintiff, and then the attorney for the defendant, and then the attorney for each other party to the action shall then be permitted to propound questions to each prospective juror concerning qualifications to sit as a juror in the action. The voir dire examination shall be under the supervision of the court and subject to such limitations as the court may prescribe in the furtherance of justice and the expeditious disposition of the case. Any question propounded by an attorney to a prospective juror which is not directly relevant to the qualifications of the juror, or is not reasonably calculated to discover the possible existence of a ground for challenge, or has been previously answered, shall be disallowed by the court upon objection or upon the court's own initiative. Challenges for cause may be made by an attorney at any time while questioning a

prospective juror, or no later than the conclusion of all questions propounded to an individual prospective juror, or the prospective jury if questioned as a whole, except that a challenge for cause may be permitted by the court at a later time upon a showing of good cause. Challenges for cause, as provided by law, must be tried by the court. The challenged juror, and any other person, may be examined as a witness on the trial of the challenge. Whenever a juror is excused by the court in sustaining a challenge for cause, the clerk shall immediately draw another name from the jury panel to fill the vacancy. There shall be no limit upon the number of challenges which may be made for cause by any party, and it shall not be necessary for any coparties to join in making such challenges. Unless otherwise stipulated in the record by all parties to the action, the entire voir dire examination of all prospective jurors and the court's rulings on all challenges shall be reported verbatim.

(3) **Use of Struck Jury.** — The Court may, in its discretion, cause a panel of jurors to be questioned and passed for cause in a number equal to the number of jurors required for the final jury and alternates, and an additional number equal to the number of peremptory challenges of the parties. Such prospective jurors when chosen shall be seated in such manner as to be designated numerically with the lower numbered jurors constituting the initial panel and the subsequent numbered jurors becoming the replacement jurors in the event any of the jurors of the original panel are removed by a peremptory challenge. (Amended January 8, 1976, effective March 1, 1976; amended March 28, 1986, effective July 1, 1986; amended May 4, 2001, effective July 1, 2001.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Judge.
Judge's Duties.
Voir Dire.

Discretion of Judge.

The trial judge is given broad discretion in supervision of the jury selection process to ensure that a panel of competent jurors is selected. As with other matters discretionary with the trial judge, a reviewing court will not grant relief from the judge's decision to deny secluded questioning of prospective jurors absent the demonstration of an abuse of discretion; an abuse of discretion would occur if failure to segregate the veniremen prejudiced the defendant by making the selection of a fair and impartial jury unlikely. *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985).

Judge's Duties.

I.R.C.P. 47(h) and this rule together make it clear that the primary responsibility for voir dire and the selection of competent jurors rests upon the trial judge. *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981).

Voir Dire.

Trial court did not abuse its discretion in allowing defense counsel in a medical malpractice case to ask potential jurors to rate themselves on a scale of sympathy during voir dire. *Thomson v. Olsen*, 147 Idaho 99, 205 P.3d 1235 (2009).

Cited in: *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Juror's Employment.
Scope of Voir Dire Examination.
Stock Ownership.

Juror's Employment.

Respondents propounded the following question to prospective juror on his voir dire examination: "Are you or have you been employed by an insurance company insuring automobiles and trucks against accidents?" The theory of objection thereto was that the question had a tendency to inform the jury that appellant was protected by insurance against loss in the event a judgment for damages should be secured against him. If respondents' counsel was not in good faith in propounding the question to the prospective juror, in an effort to ascertain whether he was, or had been, engaged in employment which would have a tendency to bias him in his consideration of the case, it is not apparent from the record. He was within his rights in propounding the question. *Wilson v. St. Joe Boom Co.*, 34 Idaho 253, 200 P. 884 (1921); *Cochran v. Gritman*, 34 Idaho 654, 203 P. 289 (1921); *Bressan v. Herrick*, 35 Idaho 217, 205 P. 555 (1922); *Faris v. Burroughs Adding Mach. Co.*, 48 Idaho 310, 282 P. 72 (1929);

Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279 (1938); *Byington v. Horton*, 61 Idaho 389, 102 P.2d 652 (1940).

Scope of Voir Dire Examination.

Scope of voir dire examination rests in the sound discretion of the court. *State v. Pettit*, 33 Idaho 326, 193 P. 1015 (1920).

In an action for the wrongful death of a guest passenger, there was no error in refusing to permit defense counsel to ask a juror on voir dire if he had any prejudice against a married man going out with a woman not his wife where counsel failed to inform the court that evidence would probably be presented to show that defendant was married and, at the time of the accident, was with decedent, who was not his wife and did not know of his marriage. *Mattson v. Bryan*, 92 Idaho 587, 448 P.2d 201 (1968).

Stock Ownership.

In an action involving negligence, plaintiff may inquire of the jurors as to whether they own stock in a named insurance company, and the court should permit this. *Faris v. Burroughs Adding Mach. Co.*, 48 Idaho 310, 282 P. 72 (1929); *Shaddy v. Daley*, 58 Idaho 536, 76 P.2d 279 (1938); *Byington v. Horton*, 61 Idaho 389, 102 P.2d 652 (1940).

RESEARCH REFERENCES

A.L.R. Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror. 20 A.L.R.3d 1420.

Racial, religious, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal cases. 63 A.L.R.3d 1052; 94 A.L.R.3d 15; 95 A.L.R.3d 172; 28 A.L.R. Fed. 26; 85 A.L.R. Fed. 864.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 A.L.R.3d 126.

Use of peremptory challenge to exclude from jury persons belonging to race or class. 79 A.L.R.3d 14; 20 A.L.R.5th 398; 110 A.L.R. Fed. 690.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 A.L.R.4th 429.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. 38 A.L.R.4th 267.

Rule 47(j). Peremptory challenges — Number.

After all challenges for cause have been ruled upon by the court, each party shall have four (4) peremptory challenges which shall be exercised in accordance with this rule. In the event there are coparties as plaintiffs, defendants or otherwise, the court shall determine the degree of conflict of interest, if any, between or among the coparties and shall in its discretion allocate the full number of peremptory challenges authorized by this rule to

each of the coparties, or apportion the authorized peremptory challenges between and among the coparties, or in its discretion allocate an equal or unequal number of peremptory challenges to each of the coparties. (Amended effective January 8, 1976; amended April 11, 1979, effective May 1, 1979; amended March 28, 1986, effective July 1, 1986.)

JUDICIAL DECISIONS

Allocation to Coparties.

The trial court did not abuse its discretion in allocating only four peremptory challenges to all coplaintiffs while allocating four peremptory challenges to each of the codefendants where a review of the record showed nothing to indicate an antagonistic position between the plaintiffs, where the trial court allowed one of the plaintiffs to exercise all of the challenges allocated to the plaintiffs and where no conflict or antagonism arose between the plaintiffs during the course of trial. *McBride v. Ford Motor Co.*, 105 Idaho 753, 673 P.2d 55 (1983).

The trial court's denial of the defendants' motion for a new trial was affirmed where the fact that certain defendants were found to have committed more acts than others did not create the type of conflict requiring additional peremptory challenges, and where the overall approach of the defense was uniform in that they believed they were justified in their environmental protest actions against a forest road building company. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

Cited in: *Stoddard v. Nelson*, 99 Idaho 293, 581 P.2d 339 (1978).

DECISIONS UNDER PRIOR RULE OR STATUTE

Failure to Object.

In a farmer's action for damages against the seller and the applicator of fertilizer where each defendant was allowed four peremptory challenges during jury selection but where plaintiff did not object to that proce-

cedure at trial, the trial court's alleged error could not be considered on plaintiff's appeal from the judgment rendered in favor of the defendants. *Suchan v. Henry's Farm Sales, Inc.*, 97 Idaho 78, 540 P.2d 263 (1975).

RESEARCH REFERENCES

A.L.R. Number of peremptory challenges allowable in civil case where there are more than two parties involved. 32 A.L.R.3d 747.

Rule 47(k). Exercise of peremptory challenges.

Peremptory challenges shall be exercised alternatively, one (1) at a time, by the parties; first by the plaintiff, then by the defendant, and then by any other party as prescribed by the court. All peremptory challenges shall be exercised as directed by the court but in such manner so as not to indicate to the panel which party exercised a peremptory challenge. Any juror whose name is selected to replace a peremptorily challenged juror shall first be examined for challenges for cause before continuing with the peremptory challenges, except when all prospective jurors have been previously passed or challenged for cause. Any party who waives a peremptory challenge shall be deemed to have waived only that particular peremptory challenge and may subsequently exercise any remaining challenges as to any juror; provided, if all parties consecutively waive their peremptory challenges, the trial jury shall be deemed accepted by the parties and any remaining

peremptory challenges are waived. (Amended December 19, 1975, effective January 1, 1976; amended March 28, 1986, effective July 1, 1986.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Right of Examination.

Waiver of Peremptory Challenges.

Right of Examination.

In civil actions each party has right to examine whole twelve jurors, or less number if agreed upon, in open court, before exercising right of peremptory challenge as to any.

Hurt v. Monumental Mercury Mining Co., 35 Idaho 295, 206 P. 184 (1922).

Waiver of Peremptory Challenges.

Either party may waive or exercise his right of peremptory challenge, and this must be done alternately. Hurt v. Monumental Mercury Mining Co., 35 Idaho 295, 206 P. 184 (1922); Dopp v. Union P.R.R., 95 Idaho 702, 518 P.2d 964 (1974).

Rule 47(1). Additional jurors.

(1) **Selection.** A court may direct that one or more jurors in addition to the regular panel be called and impaneled to sit as jurors. All jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges prior to deliberations.

If one or two additional jurors are called, each party is entitled to one (1) peremptory challenges in addition to those otherwise allowed by law. If more than two (2) additional jurors are called, each party shall be entitled to two (2) peremptory challenges in addition to those otherwise provided by law. At the conclusion of closing arguments, jurors exceeding the number required of a regular panel shall be removed by lot. Those removed by lot may be discharged after the jury retires to consider its verdict, unless the court otherwise directs as indicated below.

(2) **Jurors removed by lot.** If the court determines that those jurors removed by lot must be available to replace any jurors who may be excused during deliberations due to death, illness or otherwise as determined by the court, the bailiff, sheriff or other person appointed by the court shall take custody of said jurors until discharged by the court. In the event a deliberating juror is removed, the court shall order the juror discharged and draw the name of an alternate juror who shall then take the discharged juror's place in the deliberations. The court shall instruct the panel to set aside and disregard all past deliberations and begin anew with the new juror as a member of the panel. (Amended March 28, 1986, effective July 1, 1986; amended March 1, 2000, effective July 1, 2000; amended May 4, 2001, effective July 1, 2001; amended March 22, 2002, effective July 1, 2002.)

RESEARCH REFERENCES

A.L.R. Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial. 15 A.L.R.4th 1127; 88 A.L.R.4th 711;

10 A.L.R. Fed. 185; 115 A.L.R. Fed. 381; 119 A.L.R. Fed. 589.

Alternate jurors in Federal Trials under Rule 24(c) of Federal Rules of Criminal Pro-

cedure or Rule 47(b) of Federal Rules of Civil Procedure. 10 A.L.R. Fed. 185; 115 A.L.R. Fed. 381; 119 A.L.R. Fed. 589.

Rule 47(m). Oath of jurors.

After all peremptory challenges have been exercised or waived, the court shall excuse all of the jury panel except those finally chosen as the trial jury in the action and the clerk shall thereupon administer the jury oath or affirmation to the trial jury and alternates as prescribed by law.

Rule 47(n). Separation of jury — Admonition by court.

The court shall determine, in its discretion, whether a jury may be permitted to separate during a trial or after the case has been submitted to them for their determination. The court shall admonish the jury not to talk to or associate in any way with the parties, their attorneys, agents, or witnesses, nor discuss the case with any person during the trial, and not to discuss the case among themselves until it has been submitted to them for deliberation. (Amended March 24, 1982, effective July 1, 1982.)

DECISIONS UNDER PRIOR RULE OR STATUTE

Absence of Prejudice.

Rule requiring the judge to admonish the jury upon each separation of the jury during the course of the trial should be followed. Particularly a complete admonition should be given upon the first separation after the jury is impanelled. In this case however, in view of the admonitions given, the failure of appel-

lants to object or call attention to the want of admonition and the absence of any appearance or suggestion of prejudice, the Supreme Court did not regard the failure of the trial court more closely to comply with the rule as reversible error. *Howard v. Missman*, 81 Idaho 82, 337 P.2d 592 (1959).

Rule 47(o). Notes by jurors — Juror notebooks.

(1) A juror may take or make written notes during a trial and take them with the juror when the jury retires for deliberation. The court shall give the jury appropriate instruction on how to exercise the right to take notes. At the conclusion of the proceedings, the Court shall take custody of the notes and provide for their destruction.

(2) In the discretion of the court, jurors may be provided notebooks containing documents for use by the jurors during trial to aid them in performing their duties. Notebooks may contain, but are not required to have or be limited to: (1) a copy of all jury instructions; (2) juror notes; (3) the names of witnesses, including photographs and biographies; (4) copies of exhibits, including an index thereto, but excepting depositions, and (5) a glossary of technical terms. (Amended May 4, 2001, effective July 1, 2001.)

RESEARCH REFERENCES

A.L.R. Taking and use of trial notes by jury.
36 A.L.R.5th 255.

Rule 47(p). Taking documents and exhibits to jury room.

Upon retiring for deliberation the jury shall, if practical, take with them all written jury instructions and exhibits which have been admitted as evidence in the trial, except depositions.

JUDICIAL DECISIONS

Cited in: State v. Winkler, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Exhibits.
Pleadings.

Exhibits.

It is error to refuse to allow the jury to take with them a certified copy of a writ of attachment under which a seizure was made. *Sears v. Lydon*, 5 Idaho 358, 49 P. 122 (1897).

Pleadings.

Pleadings should not be delivered to jury and practice of so doing is not to be commended; but taking pleadings into jury room is not reversible error unless prejudice is shown. *Walton v. Mays*, 33 Idaho 339, 194 P. 354 (1920).

Rule 47(q). Juror questioning of witnesses.

In the discretion of the court, jurors may be instructed that they are individually permitted to submit to the court a written question directed to any witness. If questions are submitted, the parties or counsel shall be given the opportunity to object to such questions outside the presence of the jury. If the questions are not objectionable, the court shall read the question to the witness. The parties or counsel may then be given the opportunity to ask follow-up questions as necessary. (Amended May 4, 2001, effective July 1, 2001.)

Rule 47(u). Declaration of mistrial — Sanctions.

After trial is commenced, at any time prior to the rendering of a verdict, the court on its own motion or upon motion of any party may declare a mistrial if it determines an occurrence at trial has prevented a fair trial. If the court determines that a mistrial was caused by the deliberate misconduct of a party or attorney, the court may require the adverse party or the attorney, or both, to pay the reasonable expenses including attorney fees incurred by the opposing party or parties resulting from such misconduct. (Adopted February 10, 1993, effective July 1, 1993; amended May 4, 2001, effective July 1, 2001.)

Rule 48(a). Juries of less than twelve — Majority verdict.

In civil actions the jury may consist of twelve (12) or of any number less than twelve (12) upon which the parties may agree in open court, except that in civil actions which may be assigned to the magistrates division under Rule 82(c), whether such case or action be tried by a magistrate or by a district judge, the jury shall consist of not more than six (6). Three-fourths (¾) of the jury may render a verdict. The cost of a jury shall not be taxed as

costs to any party in any civil action. (Amended effective January 8, 1976.)

STATUTORY NOTES

Cross References. Advisory jury, Rule 39(c).

Constitution of a trial jury, § 2-105.
Jury trial of right, Rule 38(a).

JUDICIAL DECISIONS

In General.

The founders of the Idaho Constitution recognized that the practical considerations concerning delay, retrials and hung juries, are important considerations in arriving at justice, and that justice is served without prejudicing a fair trial by reducing the requirement of unanimous juries to a three-fourths re-

quirement, and to adopt the argument of plaintiff and require that the same nucleus of jurors approve each material issue in the case would increase substantially the risk of hung juries and mistrials without any substantial concomitant increase in the fairness or justice of the trial. *Tillman v. Thomas*, 99 Idaho 569, 585 P.2d 1280 (1978).

DECISIONS UNDER PRIOR RULE OR STATUTE

Verdict by Less Than Entire Jury.

Where a verdict is reached but not agreed to by entire jury, it should be signed by each member of the jury agreeing to same; but when this requirement is not observed but the jury is polled in open court and can answer that the verdict returned and signed by the foreman is their verdict, and their names are

entered on the minutes of the court and no objection or exception is taken to the form of the verdict, and no request is made to have it signed by the jurors agreeing to it, the error is not prejudicial, and objection cannot be raised for the first time in appellate court. *Keim v. Gilmore & Pac. R.R.*, 23 Idaho 511, 131 P. 656 (1913).

Rule 48(b). Rendering verdict — Polling jury.

When the jurors have agreed upon their verdict, they must be conducted into court and the verdict delivered to the court by their foreman. The verdict must be in writing and signed by the foreman if all the jurors agree, but if not all jurors agree, the written verdict must be signed by all agreeing jurors. The verdict shall be read by the clerk to the jury and the inquiry made whether it is their verdict. If more than one-fourth ($\frac{1}{4}$) of the jury disagree with the verdict, the court shall return the jury for further deliberation. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is the juror's verdict. If three-fourths ($\frac{3}{4}$) of the jury acknowledge the verdict to be their decision, the verdict shall be accepted and the jury discharged.

JUDICIAL DECISIONS

ANALYSIS

Inconsistent Verdict.
In General.

Inconsistent Verdict.

Although ordinarily where either court or counsel consider a verdict to be uncertain, the proper procedure is to refuse to accept the verdict and request correction by the jury, where inconsistency in jury's verdict was dis-

covered prior to release of jury and because the rules, while not mandating the practice, do not prohibit refusing a special verdict and requesting that the jury deliberate further, the district court took the proper course of action under the circumstances and thus its refusing the verdict upon discovering an inconsistency in it and asking the jury to continue its deliberation was not an abuse of discretion. *Beco Constr. Co. v. Harper Con-*

tracting, Inc., 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

In General.

The founders of the Idaho Constitution recognized that the practical considerations concerning delay, retrials and hung juries, are important considerations in arriving at justice, and that justice is served without prejudicing a fair trial by reducing the requirement of unanimous juries to a three-fourths re-

quirement, and to adopt the argument of plaintiff and require that the same nucleus of jurors approve each material issue in the case would increase substantially the risk of hung juries and mistrials without any substantial concomitant increase in the fairness or justice of the trial. *Tillman v. Thomas*, 99 Idaho 569, 585 P.2d 1280 (1978).

Cited in: *Fish Breeders of Idaho, Inc. v. Rangen, Inc.*, 108 Idaho 379, 700 P.2d 1 (1985).

DECISIONS UNDER PRIOR RULE OR STATUTE

Signing of Verdict.

Where verdict is reached but not agreed to by entire jury, it should be signed by each member of the jury agreeing to same; but where this requirement is not observed but the jury is polled in open court and ten answer that the verdict returned and signed by the foreman is their verdict, and their

names are entered on the minutes of the court and no objection or exception is taken to the form of verdict, and no request is made to have it signed by the jurors agreeing to it, the error is not prejudicial, and objection cannot be raised for the first time in appellate court. *Keim v. Gilmore & Pac. R.R.*, 23 Idaho 511, 131 P. 656 (1913).

RESEARCH REFERENCES

A.L.R. Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury. 77 A.L.R.3d 769.

Rule 49(a). Special verdicts and interrogatories — Special verdicts.

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

STATUTORY NOTES

Cross References. Advisory jury, Rule 39(c). New trials, Rules 59(a)-59(e).

General verdict accompanied by answer to, Rule 49(b).

JUDICIAL DECISIONS

ANALYSIS

Delineation of Types of Damages.

Discretion of Court.

Issues Resolved by Jury.

Judgment Consistent with Special Verdict.

Preservation of Issue for Appeal.

Waiver of Objections.

Delineation of Types of Damages.

This rule does not mandate that if a special verdict form is used, the trial court must delineate the special damages from the general damages; to make such a delineation is within the trial court's broad discretion. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Discretion of Court.

In wrongful death action, it was not an abuse of the court's discretion to require the jury to determine whether defendant's truck throttle stuck prior to the accident impact even though that determination might technically be an evidentiary fact rather than an ultimate fact, since the trial court is given broad discretion under this rule to determine the nature, scope and form of questions put to the jury. *Garrett v. Nobles*, 102 Idaho 369, 630 P.2d 656 (1981).

The trial court is given broad discretion under this rule to determine the nature and form of a special verdict. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Issues Resolved by Jury.

Although, in a personal injury action against the sailboat manufacturer, its parent corporation, and the power company, the plaintiff's complaint raised no issue concerning parent-subsidary liability, evidence was admitted on the issue of parent company liability and the plaintiff himself requested the instruction advising the jury that they could find the parent company liable for the manufacturer's defective or negligent design of the sailboat if they found that the parent company for a profit or other benefit participated in a composite business enterprise with the manufacturer; therefore, any issue of parent-subsidary liability was subsumed by the instruction and special verdict questions answered by the jury in the negative, and the trial court erred in concluding that those issues had not been resolved by the jury. *Ross*

v. Coleman Co., 114 Idaho 817, 761 P.2d 1169 (1988).

Judgment Consistent with Special Verdict.

Where the court decided, and stated on the record, that the outcome of the trial hinged on whether a gift has been made and the jury decided that no gift had been made, the judgment, recognizing alleged donor's right to possession and title to the vehicle, was consistent with the jury's special verdict; thus, there was an implied finding that there was no oral contract of sale and that donee's affirmative defenses were invalid. *Briscoe v. Nishitani*, 105 Idaho 175, 667 P.2d 278 (Ct. App. 1983).

An appellate court has a duty to attempt to reconcile a jury's answers to interrogatories in a special verdict form based upon the evidence and the instructions given, and where there is a view of the case that makes the jury's answers consistent, it must be resolved in that way. *Lopez v. Langer*, 114 Idaho 873, 761 P.2d 1225 (1988).

Preservation of Issue for Appeal.

Once a request is made to include a tort feason on the special verdict form and that request is refused by the trial court, there is no added requirement for counsel to again object to the form chosen by the court in order to preserve its right to raise the issue on appeal. *Lasselle v. Special Prods. Co.*, 106 Idaho 170, 677 P.2d 483 (1983).

Waiver of Objections.

Where no objection by party to the form or content of the special verdict appeared on the record, party waived his right to a jury determination of other issues which were not encompassed in the verdict. *Briscoe v. Nishitani*, 105 Idaho 175, 667 P.2d 278 (Ct. App. 1983).

Cited in: *Bair v. Barron*, 97 Idaho 26, 539 P.2d 578 (1975); *First Realty & Inv. Co. v. Rubert*, 100 Idaho 493, 600 P.2d 1149 (1979); *Buckley v. Orem*, 112 Idaho 117, 730 P.2d 1037 (Ct. App. 1986); *Nilsson v. Mapco*, 115 Idaho 18, 764 P.2d 95 (Ct. App. 1988); *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991); *Toews v. Funk*, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994); *Jones v. Crawforth*, 147 Idaho 11, 205 P.3d 660 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Alternative Verdicts.
 Answer of Questions.
 Authority of Trial Court.
 Conclusions of Law.
 Correction of Verdict.
 Determination of Negligence.
 Discretion of Court.
 Discretion of Jury.
 Equitable Issues.
 Final Verdict.
 Findings of Fact Inconsistent with General.
 Form of Questions.
 Formulating Issues by Court.
 Immaterial Questions.
 Necessity for Demanding Special Verdict.
 Separate Verdicts Against Master and Servant.

Alternative Verdicts.

The verdicts need not be in the alternative. *Tannahill v. Lydon*, 31 Idaho 608, 173 P. 1146 (1918).

In action for claim and delivery where plaintiff filed supplemental petition seeking alternative relief by money judgment, defendants were in no position to assert that court should have submitted alternative forms of verdict, under the rule, as regards which party was entitled to possession of tractor and its value, since defendants were in possession of tractor at all times covered by supplemental complaint including time of trial and plaintiff was satisfied with relief granted. *National Motor Serv. Co. v. Walters*, 85 Idaho 349, 379 P.2d 643 (1963).

Answer of Questions.

Failure to compel answers to questions which jury have ignored is equivalent to withdrawal of questions, and effect is same as though court had refused to submit them in first instance. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

Authority of Trial Court.

The trial court, under the statutes of Idaho, is authorized to render a judgment on general and special verdicts. *Menasha Woodenware Co. v. Spokane Int'l R.R.*, 19 Idaho 586, 115 P. 22 (1911).

Conclusions of Law.

Jury has no authority to make conclusion of law in special verdict and such finding is not binding in any way. *Geddes v. Davis*, 36 Idaho 201, 210 P. 584 (1922).

Correction of Verdict.

When verdict expresses manifest variance

with real intention of jury, it is duty of court to send jury back to return verdict in proper form. *Bates v. Price*, 30 Idaho 521, 166 P. 261 (1917).

Where facts indicate that finding of special verdict was inadvertence and not what jury intended, court may permit jury to show verdict which they found and intended to return. *Groefsema v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 86, 190 P. 356 (1920).

Determination of Negligence.

Where, in order to determine whether appellant was over 50 per cent responsible for an accident, each juror placed on a slip of paper the degree of negligence he felt was the correct degree of blame and the 12 slips were added and divided by 12 to get the average percentage, thus arriving at the degree of negligence involved in the case, such verdict was invalid. *Clark v. Foster*, 87 Idaho 134, 391 P.2d 853 (1964).

Discretion of Court.

It is the province of the court to determine what particular facts the jury shall find specially, and neither party has a right to dictate the terms of such questions or to assign error on the refusal of the court to comply with such dictation. *Lufkins v. Collins*, 2 Idaho 256, 10 P. 300 (1886).

Discretion of court is not absolute but must be properly exercised; thus it is error to refuse to submit special issues when a proper request therefor is made and the issues are such as to make their special submission desirable. *Burke v. McDonald*, 2 Idaho 679, 33 P. 49 (1890).

It is within discretion of court to cause jury to correct verdict or to again retire and consider case; adoption of latter alternative is not ground for reversal, especially in absence of objection. *Downing v. Panata*, 33 Idaho 300, 193 P. 849 (1920).

Where submission of particular questions is matter of discretion, they may be withdrawn by court at any time before special findings are given. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

Giving of special interrogatories is within properly exercised discretion of court and where such discretion has not been abused there is no warrant for reversal. *Ellis v. Ashton & St. Anthony Power Co.*, 41 Idaho 106, 238 P. 517 (1925).

Discretion of Jury.

It is within the discretion of the jury, on an appeal from an order of the board of county

commissioners allowing a claim, to render a general or special verdict. *Fisher v. Board of County Comm'rs*, 4 Idaho 381, 39 P. 552 (1895).

In an action for the recovery of money only, it is within the discretion of the jury to return a general or special verdict, and neither the court by instructions nor counsel by stipulation can require them to find a special verdict though, of course, such court may, in a proper case, direct them to bring in special findings, and would, no doubt, be obeyed. *Norman v. Rose Lake Lumber Co.*, 22 Idaho 711, 128 P. 85 (1912).

Equitable Issues.

Where complaint was framed in terms of an unidentified trust relationship, an accounting and claim that conveyance was in fact a mortgage and requesting that mortgage be foreclosed and sold, such claims were cognizable as equitable and trial court did not err in treating special findings of jury as advisory only, and in disregarding certain special verdicts of the jury as advisory only. *Rowe v. Burrup*, 95 Idaho 747, 518 P.2d 1386 (1974).

Final Verdict.

Until verdict is received and recorded, it is not final and it lies within power of jury to alter, amend, or correct it. *Downing v. Panata*, 33 Idaho 300, 193 P. 849 (1920).

Findings of Fact Inconsistent with General.

Where the special findings of fact made by a jury are inconsistent with the general verdict, the former controls. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Form of Questions.

Questions should be drawn so as to admit of answer by yes or no, and where information desired cannot be elucidated thus, questions should be framed to require answer as direct

as nature of inquiry will permit. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

Formulating Issues by Court.

Where the issues are not numerous and their nature such as likely to confuse the jury, court should insist on a special verdict and should formulate the issues into distinct propositions and logical and concise questions. *Fodey v. Northern Pac. R.R.*, 21 Idaho 713, 123 P. 835 (1912).

Immaterial Questions.

If questions have become immaterial by reason of answers of preceding questions, they need not be answered. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

Necessity for Demanding Special Verdict.

In an action on a health and accident insurance policy the failure of the court to submit to the jury the issue of whether the insured learned of material facts between the time of execution of the application and the issuance of the insurance certificate, which they should have disclosed to the insurer, was waived by failure of the insurer to demand the submission of such issue. *Milligan v. Continental Life & Accident Co.*, 91 Idaho 191, 418 P.2d 554 (1966).

Separate Verdicts Against Master and Servant.

Submission to jury of two forms of verdicts for the plaintiff in an action against a railroad company and a locomotive engineer for death or personal injuries and the receiving of separate verdicts, one against the engineer for a nominal sum, and another against the railroad company for a substantial sum, is no ground for disturbing either verdict. *Judd v. Oregon S. L. R.R.*, 55 Idaho 461, 44 P.2d 291 (1935).

Rule 49(b). General verdict accompanied by answer to interrogatories.

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry

of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

JUDICIAL DECISIONS

ANALYSIS

Inconsistent Verdict.

Verdict Unsupported by Evidence.

Inconsistent Verdict.

Although ordinarily where either court or counsel consider a verdict to be uncertain, the proper procedure is to refuse to accept the verdict and request correction by the jury, where inconsistency in jury's verdict was discovered prior to release of jury and because the rules while not mandating the practice, do not prohibit refusing a special verdict and requesting that the jury deliberate further, the district court took the proper course of action under the circumstances and thus its refusing the verdict upon discovering an in-

consistency in it and asking the jury to continue its deliberation was not an abuse of discretion. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

Verdict Unsupported by Evidence.

A verdict can be displaced by a judgment notwithstanding the verdict only if the verdict is unsupported by substantial evidence, not if it is merely inconsistent. *Herbst v. Bothof Dairies, Inc.*, 110 Idaho 971, 719 P.2d 1231 (Ct. App. 1986).

Cited in: *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *Country Ins. Co. v. Agricultural Dev., Inc.*, 107 Idaho 961, 695 P.2d 346 (1984).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.

General Verdict Controlling.

Immaterial Questions.

Informal or Insufficient Verdict.

Special Finding Controlling.

Sufficiency of General Finding.

Test of Consistency.

Verdict Uncertain.

Discretion of Court.

The verdict in an action of claim and delivery need not find the value of specific articles of the property claimed, or that defendant is entitled to the return of such specific articles in terms, except when court in its instructions requires jury to so find; matter of requiring such a finding is within discretion of court. *Johnson v. Fraser*, 2 Idaho 404, 18 P. 48 (1888).

In action for recovery of money only or specific real property, submission of "particular questions of fact" to be answered by jury in addition to general verdict is matter within discretion of court; neither party can require it as matter of right. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

In mortgagor's action against mortgagee in

conversion, judge had discretion whether he would instruct to find particular questions of fact if jury found general verdict. *Peterson v. Hailey Nat'l Bank*, 51 Idaho 427, 6 P.2d 145 (1931).

The refusal of the court to require the jury to answer three interrogatories submitted by defendant when the issues to which the interrogatories were directed were fully covered by the court's instructions was not error since the giving or refusing of the interrogatories was discretionary with the court. *C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 372 P.2d 752 (1962).

General Verdict Controlling.

Where jury finds general verdict in favor of plaintiff, failing to agree upon any of the special questions, general verdict is properly received. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

The general verdict is controlling when a special verdict finding is not inconsistent therewith. *Village of Heyburn v. Security Sav. & Trust Co.*, 55 Idaho 732, 49 P.2d 258 (1935).

Immaterial Questions.

If questions are immaterial, or are fairly embraced within those already answered, or

within general verdict of jury, omission to answer them does not affect right to judgment of party in whose favor general verdict is rendered. *Watkins v. Mountain Home Coop. Irrigation Co.*, 33 Idaho 623, 197 P. 247 (1921).

Informal or Insufficient Verdict.

Objection to informal or insufficient verdict must be made at time verdict is received and cannot be raised later. *Johnson v. Fraser*, 2 Idaho 404, 18 P. 48 (1888).

Objection to an informal verdict cannot for the first time be raised in the Supreme Court. All objections to a verdict on grounds of informality of insufficiency must be made in seasonable time in trial court. *Judd v. Oregon S. L. R.R.*, 55 Idaho 461, 44 P.2d 291 (1935).

Special Finding Controlling.

Where suit is brought on a note for a definite sum and jury finds generally for plaintiff without stating for what amount, court may enter judgment for the amount of the note. *Betts v. Butler*, 1 Idaho 185 (1868).

When there is an inconsistency between special findings and the general verdict, a judgment in accordance with the special findings is proper, although it is for a different amount than the sum specified in the general verdict. *Bradbury v. Idaho & Or. Land Improvement Co.*, 2 Idaho 239, 10 P. 620 (1886), *aff'd*, 132 U.S. 509, 10 S. Ct. 177, 33 L. Ed. 433 (1889).

Where the special finding of facts made by a jury is inconsistent with the general verdict,

former controls. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Sufficiency of General Finding.

In an action for claim and delivery, a general verdict, finding for or against either party, is sufficient to enable court to enter judgment for the return of property, when such return is the appropriate remedy. *Johnson v. Fraser*, 2 Idaho 404, 18 P. 48 (1888).

When a general-verdict is not sustained by a special finding of facts, or the special findings are so contradictory that no conclusion can be based thereon, such general verdict cannot be sustained. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Where a general verdict is submitted to the jury and no special verdict is requested, a general finding for either party is sufficient. *Campbell v. First Nat'l Bank*, 13 Idaho 95, 88 P. 639 (1907); *Keim v. Gilmore & Pac. R.R.*, 23 Idaho 511, 131 P. 656 (1913); *Tannahill v. Lydon*, 31 Idaho 608, 173 P. 1146 (1918).

Test of Consistency.

True test as to whether special findings are consistent or contradictory either in themselves or with the general verdict is whether they would authorize a different verdict or judgment from that given. *Gwin v. Gwin*, 5 Idaho 271, 48 P. 295 (1897).

Verdict Uncertain.

If either the court or counsel consider the verdict uncertain, the proper procedure is to refuse to accept the verdict and require the jury to correct it. *Baldwin v. Ewing*, 69 Idaho 176, 204 P.2d 430 (1949).

RESEARCH REFERENCES

A.L.R. Submission of special interrogatories in connection with general verdict under federal Rule 49(B) and state counterparts. 6 A.L.R.3d 438.

Quotient verdicts. 8 A.L.R.3d 335.

Verdict-urging instructions in civil case stressing desirability and importance of agreement. 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors. 41 A.L.R.3d 1154.

Joint tortfeasors, right of jury to apportion or sever damages as between, and effect of

their attempt to do so. 108 A.L.R. 792, 46 A.L.R.3d 801.

Damages, curing error of jury in attempting to apportion as between joint tortfeasors by remittitur in all but one defendant. 46 A.L.R.3d 801.

Propriety and effect of jury's apportionment of damages as between tortfeasors jointly and severally liable. 46 A.L.R.3d 801.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa. 66 A.L.R.3d 472.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering. 55 A.L.R.4th 186.

Rule 50(a). Motion for directed verdict — When made — Effect.

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

STATUTORY NOTES

Cross References. Conditional rulings on granted motions, Rule 50(c).

Involuntary dismissal of action at completion of plaintiff's evidence, Rule 41(b).

Motion for judgment notwithstanding the verdict, Rule 50(b).

New trials, grounds for, Rule 59(a).

JUDICIAL DECISIONS**ANALYSIS**

Admission of Facts.

Findings of Fact.

Inference of Nonagreement.

Properly Granted.

Scope of Review.

Substantial Evidence Rule.

Time for Motion.

Admission of Facts.

On a motion for directed verdict pursuant to this subsection or for judgment notwithstanding the verdict pursuant to subsection (b), the moving party admits the truth of the adverse evidence and every inference that may legitimately be drawn therefrom. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

One who moves for directed verdict pursuant to this rule thereby admits the truth of the adverse evidence and every inference that may legitimately be drawn therefrom in the light most favorable to the opposing party. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984).

On a motion for a directed verdict, the moving defendant admits the truth of all the plaintiff's evidence and every legitimate inference that can be drawn therefrom. *Fouche v. Chrysler Motors Corp.*, 107 Idaho 701, 692 P.2d 345 (1984); *Verway v. Blincoe Packing Co.*, 108 Idaho 315, 698 P.2d 377 (Ct. App. 1985).

A party who moves for a directed verdict pursuant to this rule necessarily admits the truth of the adverse evidence and every inference that may legitimately be drawn therefrom in the light most favorable to the oppos-

ing party. *All v. Smith's Mgt. Corp.*, 109 Idaho 479, 708 P.2d 884 (1985).

Findings of Fact.

Since a motion for directed verdict in a jury trial presents the trial judge with a pure question of law, there is no need for him to enter his own findings of fact in such circumstances; the entry of findings, though superfluous, does not constitute reversible error. *Gmeiner v. Yacte*, 100 Idaho 1, 592 P.2d 57 (1979).

Inference of Nonagreement.

The trial court concluded that a listing agreement and earnest money agreement were properly excluded because there was no evidence to indicate that there was ever any drawing of the boundary lines upon the 68 acre parcel; this created an inference that the parties were not in agreement as to this term in the listing agreement, and based on this lack of evidence the district court should not have granted the motion for directed verdict. *Shields & Co. v. Green*, 100 Idaho 879, 606 P.2d 983 (1980).

Properly Granted.

Employer's motion for directed verdict was properly granted on the employee's Age Discrimination in Employment Act of 1967 claim, 29 U.S.C.S. § 631(a), as the employee failed to show that comments established discriminatory intent, that he was constructively discharged, or that the employer took adverse employment action against him. *Waterman v. Nationwide Mut. Ins. Co.*, 146 Idaho 667, 201 P.3d 640 (2009), cert. denied, *U.S.*, 129 S. Ct. 2838, 174 L. Ed. 2d 555 (2009).

Scope of Review.

The requirement of this rule, that specific grounds for the motion for a directed verdict be stated at trial, restricts the scope of review on appeal; thus, where the grounds urged at trial differed from the ground pressed on appeal, the appellate court declined to address the propriety or the denial of the defendant's motion for directed verdict. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984).

Whether a verdict should be directed is purely a question of law and on those questions, the parties are entitled to full review by the appellate court without special deference to the views of the trial court. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In determining whether a directed verdict or judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

When reviewing the disposition of a motion for a directed verdict under this rule the appellate court utilizes the same standard that governs the trial court's decision, and determines whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Substantial Evidence Rule.

A motion for directed verdict will not be granted if there is substantial evidence to justify submitting the case to the jury. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

Where the evidence, viewed favorably to the plaintiff ranch, showed that defendant helicopter service performed herbicide applications which were contracted for, but that weed infestations occurred in noticeable strips in some fields, alternating with strips which were relatively weed-free, that weeds of that type were controllable with the proper application of the herbicide used, that more pounds of herbicide per acre were used and billed for than was necessary for weed control, that experts believed the stripping was caused by misapplication, and that even if an inadequate amount of herbicide had been applied due to plaintiff's error, weed infestation would have been uniform rather than stripped, there was enough evidence to take the issue of defendant's negligence to the jury, and a directed verdict under this rule was improper. *Thomas Helicopters, Inc. v. San*

Tan Ranches, 102 Idaho 567, 633 P.2d 1145 (1981).

A motion for directed verdict, made at the conclusion of a plaintiff's case-in-chief, should not be granted if there is substantial evidence to justify submitting the case to a jury. *Fouche v. Chrysler Motors Corp.*, 103 Idaho 249, 646 P.2d 1020 (Ct. App. 1982), rev'd on other grounds, 107 Idaho 701, 692 P.2d 345 (1984).

Supreme Court, in determining whether there is substantial evidence to submit the case to the jury, will examine the evidence in favor of the plaintiff and will not consider any conflicting evidence presented by the defendants. *Curtis v. DeAtley*, 104 Idaho 787, 663 P.2d 1089 (1983).

In action for damages for injuries sustained when chandelier plaintiff was cleaning fell, where there was no evidence that the supplier or distributor of the chandelier had any knowledge that the chandelier might be unsafe, or that plaintiff's employer negligently installed it, trial court did not err in granting a directed verdict in each case. *Curtis v. DeAtley*, 104 Idaho 787, 663 P.2d 1089 (1983).

Where plaintiff was injured while cleaning chandelier, testimony of engineer that chandelier was defective in that it did not contain an anti-rotation device and that there was nothing incorporated into the design to preclude faulty installation or to allow a person to observe on a casual basis that something was wrong, was sufficient evidence of a defect to justify submitting strict liability claim to the jury even though experiment on one point of engineer's testimony failed, and thus trial court erred in directing verdict on strict liability claim. *Curtis v. DeAtley*, 104 Idaho 787, 663 P.2d 1089 (1983).

A motion for directed verdict should not be granted if there is substantial evidence to justify submitting the case to the jury; substantial evidence is not, however, synonymous with uncontradicted evidence; it is enough that the evidence is of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion was made is proper. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984).

In negligence action, where there was sufficient evidence from which reasonable jurors could have concluded that the absence of a handrail on stairway was the actual cause of plaintiff's injuries; i.e., that plaintiff would not have fallen, or at least would have been able to catch herself, had there been a handrail available for her to grab, it was error to direct a verdict in favor of landlord, builder and architect. *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984).

A motion for directed verdict made at the conclusion of plaintiff's case-in-chief should not be granted if there is substantial evidence to justify submitting the case to the jury; the "substantial evidence" test does not require the evidence be uncontradicted, but instead requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper. *All v. Smith's Mgt. Corp.*, 109 Idaho 479, 708 P.2d 884 (1985).

In considering a motion for a directed verdict under the substantial evidence standard, the case should be submitted to the jury if the evidence is of sufficient quantity and probative value that reasonable minds could have concluded that a verdict in favor of the non-moving party was proper; however, a verdict cannot be based on conjecture. *Elce v. State*, 110 Idaho 361, 716 P.2d 505 (1986).

The jury had before it evidence of sufficient quantity and probative value for a reasonable jury to find that plaintiff had suffered a loss of past wages, and assess the amount of that loss due to a car accident and there also was evidence of sufficient quantity and probative value for reasonable persons to have concluded that a verdict in favor of plaintiff on his claim for lost equity was proper; therefore, the District Court properly refused to direct a verdict against plaintiff on this issue. *Lambert v. Hasson*, 121 Idaho 133, 823 P.2d 167 (Ct. App. 1991).

Car manufacturer should have been granted its motion for directed verdict under Idaho R. Civ. P. 50(a) where an implied warranty could not be read to require the distribution of a mouse proof vehicle by the manufacturer; there was no showing of how the mice entered the vehicle, and the theoretical defect could not be identified as only the fact that mice entered the vehicle in some fashion was proved, which was insufficient evidence to submit the issue to the jury. *Powers v. Am. Honda Motor Co.*, 139 Idaho 333, 79 P.3d 154 (2003).

Denying the employer's motion for directed

verdict, pursuant to Idaho R. Civ. P. 50(a), was not error, where there was evidence that the employee's notice of tort claim was timely filed under the Idaho Tort Claims Act, § 6-901 et seq., and there was adequate evidence presented to support a reasonable jury's finding that there was a violation of the whistleblower statute, § 6-2101 et seq. *Smith v. Mitton*, 140 Idaho 893, 104 P.3d 367 (2004).

Time for Motion.

The court's dismissal with prejudice of the plaintiff's action on the plaintiff's failure to have an expert witness testify on the first day of trial could not be characterized as a summary judgment pursuant to I.R.C.P. 56(c) where the requisite notice was not given. Since the action was dismissed because the plaintiffs could not make out a prima facie case, the dismissal would be considered a directed verdict pursuant to this rule; however, under this rule, a directed verdict would have only been proper after the plaintiffs had presented their case-in-chief, and thus the court's premature order of dismissal was error. *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987).

Cited in: *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977); *Barnett v. Aetna Life Ins. Co.*, 99 Idaho 246, 580 P.2d 849 (1978); *Desert Irrigation Co. v. Tolmie*, 103 Idaho 673, 651 P.2d 938 (Ct. App. 1982); *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982); *Fouche v. Chrysler Motors Corp.*, 107 Idaho 701, 692 P.2d 345 (1984); *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986); *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 827 P.2d 706 (Ct. App. 1992); *Quinto v. Millwood Forest Prods., Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997); *Idaho State Tax Comm'n v. Beacom*, 131 Idaho 569, 961 P.2d 660 (Ct. App. 1998); *Olson v. EG&G Idaho, Inc.*, 134 Idaho 778, 9 P.3d 1244 (2000); *Gunter v. Murphy's Lounge, L.L.C.*, 141 Idaho 16, 105 P.3d 676 (2005); *Horne v. Sani-Top, Inc.*, 143 Idaho 230, 141 P.3d 1099 (2006).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Admission of Facts.
Discharge of Jury.
Inapplicable to Involuntary Dismissal.
Involuntary Dismissal in Jury Case.
Issues Taken from Jury.
Judgment Notwithstanding Disagreement of the Jury.
Jury Trial.

No Conflict in Evidence.
Opening Statement of Counsel.
Prima Facie Case Necessary.
Review on Appeal.
Res Judicata.
Specification of Grounds.
Substantial Evidence.
Waiver of Right of Assignment As Error — Denial of Motion.

Admission of Facts.

On motion for nonsuit after the plaintiff has rested, defendant must be deemed to have admitted all facts of which there is any evidence, and all facts which the evidence tends to prove. *Bank of Commerce v. Baldwin*, 12 Idaho 202, 85 P. 497 (1906), overruled in part, *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976).

Discharge of Jury.

If, instead of directing a verdict, the court discharges the jury and enters the judgment which would have properly followed the directed verdict, the procedure, while irregular, is not ground for a reversal on appeal. *Bowman v. Bohnney*, 36 Idaho 162, 210 P. 135 (1922).

Inapplicable to Involuntary Dismissal.

The former directed verdict rule was inapplicable to an order granting a motion for involuntary dismissal. *Whitney v. Continental Life & Accident Co.*, 89 Idaho 96, 403 P.2d 573 (1965).

Involuntary Dismissal in Jury Case.

In a jury case, a motion for involuntary dismissal made at the close of proponent's case is indistinguishable from a motion for a directed verdict. *Van Vranken v. Fence-Craft*, 91 Idaho 742, 430 P.2d 488 (1967); *Blackburn v. Boise Sch. Bus Co.*, 95 Idaho 323, 508 P.2d 553 (1973).

Issues Taken from Jury.

The removal of issues from the jury's consideration by the trial court had the effect of a directed verdict for plaintiff on such issues. *National Motor Serv. Co. v. Walters*, 85 Idaho 349, 379 P.2d 643 (1963).

Undisputed evidence that no payments were made on a conditional sales contract for a tractor after the October revision of the contract met the burden of proof required to make a prima facie case for plaintiff; therefore the trial court did not err in removing such issue from the jury's consideration when defendant failed to adduce evidence to controvert the issue of default. *National Motor Serv. Co. v. Walters*, 85 Idaho 349, 379 P.2d 643 (1963).

Judgment Notwithstanding Disagreement of the Jury.

In considering a motion for a judgment notwithstanding the disagreement of the jury which is in effect a renewal of a motion for a directed verdict, made at the close of the evidence, the evidence and all reasonable inferences to be drawn therefrom, must be considered in the light most favorable to the

opponent. *Pigg v. Brockman*, 85 Idaho 492, 381 P.2d 286 (1963).

Jury Trial.

When a motion for dismissal under Rule 41(b) is made in a jury case, it must be treated as a motion for directed verdict under this rule. *Blackburn v. Boise Sch. Bus Co.*, 95 Idaho 323, 508 P.2d 553 (1973).

No Conflict in Evidence.

When there was no conflict in evidence on any material allegation, directed verdict for plaintiff for principal remaining due on note, after allowance of all just credits, was correct. *First Nat'l Bank v. Poling*, 42 Idaho 636, 248 P. 19 (1926).

Opening Statement of Counsel.

There is no authority in a court to dismiss an action on the opening statement of counsel, or grant a directed verdict thereon where the counsel for the plaintiff in such opening statement failed to state facts sufficient to entitle plaintiff to recover. *Wheeler v. Oregon R.R. & Nav. Co.*, 16 Idaho 375, 102 P. 347 (1909).

Prima Facie Case Necessary.

On motion for nonsuit the question presented is not whether plaintiff has produced a preponderance of evidence, but whether he has made a prima facie case. *Carver v. Ketchum*, 53 Idaho 595, 26 P.2d 139 (1933).

Review on Appeal.

Where, at the conclusion of testimony offered by the parties, they each move for a judgment on the pleadings and for a directed verdict and the verdict was directed for the defendants, whereupon plaintiff requested that the case go to the jury but did not specify particular question of fact he desired to be submitted to the jury nor offer any requested instructions, the verdict will not be disturbed on appeal if there is any substantial evidence to support it. *McCall v. First Nat'l Bank*, 47 Idaho 519, 277 P. 562 (1929).

Res Judicata.

While a motion for an involuntary dismissal under Rule 41(b) in a jury case will be treated as a motion for a directed verdict under Rule 50(a), where the court in sustaining a motion to dismiss under Rule 41(b), although in a jury case, made it clear that it was not passing on the merits of the case and considered that a new action might be filed for the same cause, the subject matter of the action will not be regarded as res judicata in a second action for the same cause. *Bauscher Grain v. National Sur. Corp.*, 92 Idaho 229, 440 P.2d 349 (1968).

Specification of Grounds.

In a personal injury case, a motion that specifies that the evidence is insufficient to establish negligence, or that plaintiff's injuries resulted from negligence, on the part of the defendant is a sufficient compliance with the last sentence of this rule. *Ness v. West Coast Airlines*, 90 Idaho 111, 410 P.2d 965 (1965).

Substantial Evidence.

The court should act cautiously and carefully scrutinize all the evidence before granting a motion for nonsuit. *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 186 P.2d 498 (1947).

Motion for nonsuit which did not set out in what particulars the evidence was insufficient could not be sustained. *Koser v. Hornback*, 75 Idaho 24, 265 P.2d 988 (1954).

In an action for malicious prosecution where the evidence showed clearly that defendant acted in good faith and upon advice of counsel in filing criminal charges against the plaintiff, the trial court should have granted defendant's motion for a directed verdict, hence a judgment should be granted notwithstanding the verdict instead of granting a new trial. *Thomas v. Hinton*, 76 Idaho 337, 281 P.2d 1050 (1955).

The substantial evidence rule standard applies to involuntary nonsuit under Rule 41(b) and is indistinguishable in operation and effect from a motion for directed verdict made pursuant to former directed verdict rule. *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

A motion for judgment notwithstanding the verdict is a delayed motion for directed verdict; therefore, court's new standard of substantial evidence must also be applied to directed verdicts. *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

Where testimony presented at the trial was

conflicting and plaintiffs introduced substantial competent evidence, denial by the trial court of defendant's motions for directed verdict and judgment notwithstanding the verdict was proper as the moving party on such motions admits the truth of the adverse evidence presented and every inference that may be legitimately drawn therefrom, and neither motion should be granted if there is substantial evidence to justify submitting the case to the jury or to support the verdict once it has been returned. *Barlow v. International Harvester Co.*, 95 Idaho 881, 522 P.2d 1102 (1974).

Waiver of Right of Assignment As Error — Denial of Motion.

Because a motion for a directed verdict and a motion for an involuntary dismissal both serve the same function in a jury case, the rule that a defendant waives his right on appeal to assign as error the denial of his motion for a directed verdict, made at the close of the plaintiff's case, when he presents evidence, applies with equal force to a motion for an involuntary dismissal. *Eckman v. Jones*, 85 Idaho 10, 375 P.2d 180 (1962).

Should the moving party present evidence after the denial of his motion for a directed verdict, his right to assign error grounded on the denial of his motion is waived, unless the motion is renewed at the close of all evidence. If the motion is renewed and denied by the trial court, the moving party may claim such ruling as error on appeal. *Smith v. Sharp*, 85 Idaho 17, 375 P.2d 184 (1962).

In a jury case, a motion for involuntary dismissal under Rule 41(b) is indistinguishable from a motion for a directed verdict under this rule and a defendant who introduced evidence after the denial of such motion waived any error in the denial thereof by not renewing it at the close of all the evidence. *Christensen v. Stuchlik*, 91 Idaho 504, 427 P.2d 278 (1967).

RESEARCH REFERENCES

A.L.R. Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action. 5 A.L.R.3d 1405.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case. 82 A.L.R.3d 974.

Rule 50(b). Motion for judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict shall be served not later than fourteen (14) days after entry of the judgment and may be made whether or not the party moved for a directed verdict; or if a verdict was not returned a motion for judgment notwithstanding the verdict shall be served not later than fourteen (14) days after discharge of the jury. A motion for a new trial may be joined with this motion, or a new trial may be prayed for

in the alternative, in conformance with the requirements of Rule 59(a); and a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include this motion as an alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial. The failure of a party to move for a directed verdict, for a judgment notwithstanding the verdict or for a new trial shall not preclude appellate review of the sufficiency of the evidence when proper assignment of error is made in the appellate court. (Amended March 31, 1978, effective July 1, 1978; amended June 15, 1987, effective November 1, 1987; amended February 10, 1993, effective July 1, 1993.)

JUDICIAL DECISIONS

ANALYSIS

Admission of Facts.
Appeal from Denial.
Conflicting Evidence.
Effect of Motion.
Evidence.
Evidentiary Standard.
Function.
Lien Action.
Motion Timely.
Proper Denial of Motion.
Question of Law.
Return of Verdict.
Scope of Appellate Review.
Separate Ruling on Alternative Motion.
Substantial Evidence Rule.
Time Limitations.
Treatment of Motion.
Untimely Motion.

Admission of Facts.

On a motion for directed verdict pursuant to subsection (a) or for judgment notwithstanding the verdict pursuant to this subsection, the moving party admits the truth of the adverse evidence and every inference that may legitimately be drawn therefrom. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

Upon a motion for a judgment n.o.v. the moving party admits the truth of the adverse evidence and every inference that may be legitimately drawn therefrom. *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981).

In making the motion for judgment n.o.v., the defendant necessarily admits the truth of all of the plaintiffs' evidence and every legitimate inference that can be drawn therefrom in the light most favorable to the plaintiff. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In ruling on a motion for judgment n.o.v., a trial court must view the facts as if the moving party has admitted the truth of all the nonmoving party's evidence. *Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990).

A motion for judgment n.o.v. under this rule admits the truth of all adverse evidence; every reasonable inference is drawn in the light most favorable to the nonmoving party, and the question is not whether the record is literally devoid of evidence supporting the nonmoving party, but whether there is substantial evidence upon which the jury could properly find a verdict for that party. *Bryant Motors, Inc. v. American States Ins. Cos.*, 118 Idaho 796, 800 P.2d 683 (Ct. App. 1990).

A motion for judgment n.o.v. under this rule admits the truth of all adverse evidence and every inference that may legitimately be drawn therefrom. *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992).

Appeal from Denial.

The denial of a motion for judgment notwithstanding the verdict is an appealable order under I.A.R. 11(a)(4), and an appeal from such a denial is also deemed to include and present all interlocutory judgments, orders and decrees. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App. 1984).

Conflicting Evidence.

Where there is conflicting evidence, the court is required to construe all of the evidence in favor of the jury verdict, including all reasonable inferences therefrom, to determine whether there is substantial evidence to support the verdict; therefore, where plaintiff presented evidence that there was an inadequate "caution" decal on the combine and that a "danger" symbol and a graphical decal showing a person's leg caught in an auger

should have been used and the plaintiff offered further evidence that the operator's manual failed to indicate that the combine should be adjusted for grass seed harvesting, the court could not hold as a matter of law that the danger imposed by the auger was so plain, open and obvious that it precluded a duty to warn. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Effect of Motion.

A motion for judgment n.o.v. has been described as a delayed motion for directed verdict and it can be used by the district court to correct its error in denying a directed verdict. *Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990).

Evidence.

Although a child eight years, 11 months of age is legally capable of negligence, it is presumed that he exercised due care, and where defendant admitted that she had earlier seen decedent riding in a careful and prudent manner, and admitted at the time of the accident she was driving at or above the maximum posted speed of 50 m.p.h., facing the sun, not wearing sunglasses, and with the windshield dirty, and where there was no proof decedent had not been riding his bicycle as close to the right edge of the road as practicable, there was insufficient evidence to rebut the presumption of decedent's due care and the trial court did not err in granting summary judgment as to the child's own negligence. *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979).

Where there was no evidence that the parents of deceased child had been negligent in permitting their son to bicycle along road where defendant's car struck him, nor assuming this to be negligence, that the child himself was negligent, the parent's negligence, if any, would not be a proximate cause of the accident, and the trial judge did not err in granting judgment notwithstanding the verdict. *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979).

In action for breach of contract, where none of the affirmative defenses of modification, waiver, impossibility and estoppel raised by the defendant were supported by substantial evidence, the jury verdict for defendant was unsupported by sufficient and competent evidence and the district court erred in not granting the plaintiff's motion for a judgment n.o.v. *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981).

When ruling on a motion for judgment n.o.v., the district court looks at all of the evidence which was before the jury; accordingly, it was error to grant judgment n.o.v.

based solely on the evidence presented by the plaintiffs. *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Trial court did not err by refusing to grant a judgment n.o.v. or a new trial on liability for firing of housing authority employee, where there was sufficient evidence to show that the housing authority breached employment contract while acting under color of state law. *Lubcke v. Boise City/ADA City Hous. Auth.*, 124 Idaho 450, 860 P.2d 653 (1993).

In a trial for damages resulting from an accident in which the defendant's car crossed the center lane and struck the victim's car head on, as there was no evidentiary basis for the jury's apportionment of part of the negligence to the accident victim, the district court's denial of the accident victim's motion for a judgment notwithstanding the verdict on the issue of liability was in error. *Leavitt v. Swain*, 131 Idaho 765, 963 P.2d 1202 (Ct. App. 1998).

Evidentiary Standard.

The trial court is not free to weigh the evidence or pass on the credibility of witnesses, making its own independent findings of fact and comparing them to the jury's findings, as would be the case in deciding a motion for a new trial; rather, the requisite standard is whether the evidence is of sufficient quantity and probative value that reasonable minds could reach the same conclusion as did the jury. *Smith v. Praegitzer*, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988).

Trial court used the wrong standard in denying a softball player's motion for a new trial in her personal injury trial. The trial court set forth the standard for a judgment n.o.v., and the standard for a new trial, but then it appeared to have combined the two standards, and it applied the combined standard. *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (Ct. App. 2004).

Injured parties, who struck a cow carcass, moved for a new trial after a verdict was returned in favor of the cow owner, the pasture owner, and the state where they attempted to argue that the trial court erred in not analyzing the motion under a clear weight of the evidence standard; trial court need not separately restate and reanalyze the same facts or evidence in deciding an I.R.C.P. 59(a)(6) motion for a new trial that were previously applied in deciding a motion for judgment n.o.v. since a proper disposition of each motion necessarily rests upon the same facts or evidence. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004).

On a motion for a J.N.O.V., the moving party admits the truth of the adverse evidence and every inference that may legiti-

mately be drawn from the evidence. The motion should be denied when the district court finds that there is sufficient evidence of quantity, quality, and probative value that reasonable minds could reach the same conclusion as the jury. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

Function.

A motion for judgment notwithstanding the verdict has been described as a “delayed motion for directed verdict” and can be used by a district court to correct its error in denying the directed verdict. *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Where state asserted that defendant in criminal trial did not preserve the issue regarding sufficiency of evidence because defendant did not first seek a ruling from the district court by moving for an acquittal or dismissal based on alleged insufficiency of the evidence, the Court of Appeals held that this rule specifically provides that the failure of a party to move for a directed verdict, for a judgment notwithstanding the verdict, or for a new trial shall not preclude appellate review of the sufficiency of the evidence when proper assignment of error is made in the appellate court, and that in the absence of any rule to the contrary in the Idaho Criminal Rules, consistency between civil and criminal rules was preferable. *State v. Ashley*, 126 Idaho 694, 889 P.2d 723 (Ct. App. 1994).

Lien Action.

Where the district court concluded that an insurer’s recovery on its claim of lien was barred by the open account defense because substantial evidence demonstrated that the claimant attributed none of the insured’s premiums to its work in Idaho, the court’s decision to enter judgment notwithstanding the verdict was affirmed. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

Motion Timely.

Where a jury returned its verdict March 17, 1976, but formal judgment was not filed until April 19, 1976, motions filed for judgment n.o.v. on April 19 and 20, 1976 were timely since this rule is specifically worded in terms of “entry of judgment,” not rendering of verdict. *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979).

Proper Denial of Motion.

In an action for personal injuries sustained when a van collided with the defendant’s truck which had stopped because of fog, resulting in a number of rear-end collisions, the district judge did not err when he denied the

defendants’ motion for a judgment n.o.v., where the instructions given to the jury and the evidence presented to them did not mandate a finding that the van was driving at an unsafe speed upon entering the fog bank. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

It was proper to let the jury decide whether the credit report on debtors furnished to the credit reporting agency was accurate, whether it was damaging to the debtors, and whether the bank was negligent or breached the written contract with the debtors, therefore, denial of bank’s request for judgment notwithstanding the verdict was proper. *Hoglan v. First Sec. Bank*, 120 Idaho 682, 819 P.2d 100 (1991).

In a suit challenging the competency of a deceased testator, a post-trial motion for judgment notwithstanding the verdict and for a new trial were properly denied where there was a lack of satisfying demonstration by plaintiff’s witnesses that their observations required the conclusion that the decedent was not competent, and where there was some testimony by defendant and his witnesses from which it was possible to conclude that the decedent was competent. *Montgomery v. Montgomery*, 115 Idaho 524, 768 P.2d 787 (1989).

There was sufficient, albeit conflicting, evidence presented at trial to support plaintiff/farmer’s products liability claims against manufacturer of combine based on size of opening in which plaintiff’s foot was mangled and expert testimony on design and safety issues; viewing all of the evidence in the light most favorable to plaintiff, the Idaho Supreme Court held that the jury’s verdict was supported by substantial evidence and that it was not error for the trial court to deny defendant’s motion for judgment notwithstanding the verdict. *Watson v. Navistar Int’l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

The evidence supported the view that the defendants, although purportedly doing otherwise, indirectly gave all of their interest in home to third party purchasers. Apparently, the jury concluded that an equity exchange, which was supposed to finance a limited option to purchase, actually was a perpetual down payment with an option exercised at the third party’s choice, even years after the option was supposed to have expired. Reasonable minds could reach the same conclusion as the jury; accordingly, the motion for j.n.o.v. was properly denied. *Haag v. Pollack*, 122 Idaho 605, 836 P.2d 551 (Ct. App. 1992).

Considering as true all the evidence presented by the defendants, there was substan-

tial and competent evidence to support the jury's verdict that plaintiff was fifty percent responsible for the accident and court correctly denied a j.n.o.v. *Dabestani ex rel. Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998).

Motion for judgment n.o.v. by high school girl who had consensual affair with her coach/teacher was properly denied. Because a reasonable jury could have concluded that plaintiffs failed to prove their damages, the jury did not err by failing to award monetary compensation after it found the school district liable for negligent supervision and a proximate cause of the damages, especially since the student offered no evidence of her past medical, counseling, or therapy costs, or of economic loss. *Hei v. Holzer*, 145 Idaho 563, 181 P.3d 489 (2008).

District court did not err in failing to grant the motion for judgment notwithstanding the verdict where the electric company did not bring up the issue that the contractor had waived the claimed defects and fraud by ratifying the contracts until after the trial. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 188 P.3d 854 (2008).

Question of Law.

The determination of whether the evidence before a court considering a judgment n.o.v. is sufficient to create an issue of fact is purely a question of law. *Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990).

Return of Verdict.

By its own language this rule distinguishes between the running of the 10-day period in the situation where, the jury has returned a verdict as opposed to the situation where the jury had not returned a verdict. *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979).

Scope of Appellate Review.

In determining whether a directed verdict or judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Whether a verdict should be directed is purely a question of law and on those questions, the parties are entitled to full review by the appellate court without special deference to the views of the trial court. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In determining whether a judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally. *Smith v. Praegitzer*, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988).

On appeal from denial of motion for judgment notwithstanding the verdict, court of appeals exercises free review of the record, without deference to the views of the trial court, to determine whether the verdict can be supported under any reasonable view of the evidence. *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992).

In considering district court's denial of a j.n.o.v. motion, the court will review the record and determine whether, as a matter of law, there was sufficient evidence upon which reasonable jurors could return a verdict in favor of plaintiffs or whether there can be but one conclusion as to the verdict that reasonable minds could have reached. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

Separate Ruling on Alternative Motion.

If an alternative motion for a new trial is made with the motion for judgment n.o.v., the trial court must rule on both motions separately. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

Substantial Evidence Rule.

A motion for judgment notwithstanding the verdict will not be granted if there is substantial evidence to support the verdict once it has been returned; by substantial, it is not meant that the evidence be uncontradicted but that the evidence must be of sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

A judgment n.o.v. should be granted when there is no substantial competent evidence to support the verdict of the jury. *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981).

A jury verdict will not be overturned if it is supported by substantial and competent evidence; evidence is substantial if it is of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

In considering a motion for judgment n.o.v., the trial judge is not free to weigh the evidence or pass on the credibility of witnesses and make his or her own separate findings of fact and compare them to the jury's findings as the judge would in deciding on a motion for a new trial; rather, the trial judge must view all of the evidence and all inferences drawn therefrom in favor of the non-moving party, and decide if there was substantial evidence to justify submitting the case to the jury, or, in

other words, that there can be but one conclusion as to the verdict that reasonable minds could have reached. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In considering a motion for judgment n.o.v., the question is not whether there is literally no evidence supporting the party against whom the motion is made, but whether there is substantial evidence upon which the jury could properly find a verdict for that party. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Trial court did not err when it failed to grant the insurer's motion for judgment notwithstanding the verdict where there was substantial and competent evidence to support the jury's verdict. *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 179 P.3d 276 (2008).

Time Limitations.

The time limitation affecting the power of the trial court to grant motions for a new trial, for judgment notwithstanding the verdict, or to alter or amend a judgment includes action by the court on its own initiative. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

Having once ruled on the post-trial motions for a judgment notwithstanding the verdict or for a new trial and an appeal being taken following its ruling, the district court did not have authority to reconsider this earlier ruling on its own initiative more than ten days

after the entry of the judgment. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

Treatment of Motion.

A motion for judgment n.o.v. based on this rule is treated as simply a delayed motion for a directed verdict and the standard for both is the same. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Untimely Motion.

The trial court has no power to grant the relief requested by a motion for a new trial, for judgment notwithstanding the verdict, or to alter or amend a judgment if the motion is not timely filed, but instead the court is obligated to deny the motion. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

Cited in: *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977); *Thomas Helicopters, Inc. v. San Tan Ranches*, 102 Idaho 567, 633 P.2d 1145 (1981); *First Bank & Trust v. Parker Bros.*, 112 Idaho 30, 730 P.2d 950 (1986); *Eddins Constr., Inc. v. Bernard*, 119 Idaho 340, 806 P.2d 433 (1991); *Mitchell v. Barendregt*, 120 Idaho 837, 820 P.2d 707 (Ct. App. 1991); *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 821 P.2d 973 (1991); *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991); *Young v. State Farm Mut. Auto. Ins. Co.*, 127 Idaho 130, 898 P.2d 61 (Ct. App. 1994); *Toews v. Funk*, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adversary's Evidence Admitted to Be True.
Affidavits.
Effect of Motion.
Evidence Showing Good Faith.
Failure to Renew.
Failure to Timely Object.
Findings of Fact and Conclusions of Law.
Judgment Notwithstanding Disagreement of Jury.
Jurisdiction of Court.
Quotient Verdict.
Review on Appeal.
Time of Motion.
When Motion to Be Denied.

Adversary's Evidence Admitted to Be True.

A motion for judgment notwithstanding verdict admits the truth of the adversary's evidence and every inference of fact which may be legitimately drawn therefrom. *Hendrix v. City of Twin Falls*, 54 Idaho 130, 29 P.2d 352 (1934).

Trial courts have power to grant motions for judgment notwithstanding verdict only in cases where moving party is entitled to a directed verdict and a motion for a directed verdict admits truth of the adversary's evidence and every inference of fact which may be legitimately drawn therefrom. *Hobson v. Security State Bank*, 56 Idaho 601, 57 P.2d 685 (1936).

A motion for judgment notwithstanding the verdict under this rule, admits the truth of the adversary's evidence and every inference of fact which may be legitimately drawn therefrom, and should be granted only where there is absence of evidence to support the verdict. *Foster v. Thomas*, 85 Idaho 565, 382 P.2d 792 (1963), overruled on other grounds, *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974); *Mabe v. State ex rel. Rich*, 86 Idaho 254, 385 P.2d 401 (1963); *Annau v. Schutte*, 96 Idaho 704, 535 P.2d 1095 (1975).

Affidavits.

An affidavit submitted on motion for judg-

ment notwithstanding the verdict is not an appropriate substitute for a timely objection properly recorded. *Annau v. Schutte*, 96 Idaho 704, 535 P.2d 1095 (1975).

Effect of Motion.

A motion for judgment notwithstanding the verdict is a delayed motion for a verdict; such motion affords trial court opportunity to correct its previous refusal to grant a motion for directed verdict if erroneous. *Ralph v. Union Pac. R.R.*, 82 Idaho 240, 351 P.2d 464 (1960).

Evidence Showing Good Faith.

In an action for malicious prosecution, where the evidence showed clearly that defendant acted in good faith and upon advice of counsel in filing criminal charges against the plaintiff, the trial court should have granted defendant's motion for a directed verdict, hence a judgment should be granted notwithstanding the verdict instead of granting a new trial. *Thomas v. Hinton*, 76 Idaho 337, 281 P.2d 1050 (1955).

Failure to Renew.

The trial court was foreclosed from considering the motion for judgment notwithstanding the verdict made by a defendant who had failed to renew his motion for directed verdict made at the close of plaintiff's evidence at the close of all the evidence. *Christensen v. Stuchlik*, 91 Idaho 504, 427 P.2d 278 (1967).

Failure of a defendant to renew his motion for directed verdict at the close of all the evidence did not preclude the Supreme Court from reviewing the sufficiency of the evidence on appeal and, where such review resulted in affirmance of the judgment for plaintiff, plaintiff was not prejudiced by the court's rejection of his contention that defendant's failure to so renew his motion precluded such review. *Stephens v. New Hampshire Ins. Co.*, 92 Idaho 537, 447 P.2d 14 (1968).

Failure to Timely Object.

Alleged prejudicial remarks by defendant's counsel during his final argument would not support a motion for a judgment notwithstanding the verdict, where plaintiff's counsel failed to make timely objection to the remarks. *Annau v. Schutte*, 96 Idaho 704, 535 P.2d 1095 (1975).

Findings of Fact and Conclusions of Law.

When a judgment notwithstanding the verdict is had, findings of fact and conclusions of law are not necessary, particularly where the judgment does not grant affirmative relief. *Ralph v. Union Pac. R.R.*, 82 Idaho 240, 351 P.2d 464 (1960).

Judgment Notwithstanding Disagreement of Jury.

The motion for a judgment notwithstanding

the disagreement of the jury was authorized by former identical rule and is subject to the same rules as are applied in considering a motion for a judgment notwithstanding the verdict of the jury. *Pigg v. Brockman*, 85 Idaho 492, 381 P.2d 286 (1963).

Where the evidence was insufficient to establish breach of warranty and proximate cause on plaintiff's complaint and plaintiff's only defense to defendant's counterclaim was grounded upon the alleged breach of warranty, the trial court properly dismissed the complaint on defendant's motion for judgment notwithstanding the disagreement of jury and granted defendant's motion for judgment on its counterclaim. *Chisholm v. J.R. Simplot Co.*, 94 Idaho 628, 495 P.2d 1113 (1972).

Jurisdiction of Court.

A denial of defendant's motions for a directed verdict or new trial did not deprive the court of jurisdiction to enter a judgment for the defendant, notwithstanding the jury's verdict for the plaintiff, since the statutory provision for such judgments gives the court opportunity to correct error in refusing to direct a verdict. *Petersen v. Bannock County*, 61 Idaho 419, 102 P.2d 647 (1940).

Quotient Verdict.

A quotient verdict obtained by the addition of the several amounts to which each juror thinks the party entitled, and division of the sum by twelve, is a chance verdict and should be set aside. *Flood v. McClure*, 3 Idaho 587, 32 P. 254 (1893); *Beakley v. Optimist Printing Co.*, 28 Idaho 67, 152 P. 212 (1915).

Review on Appeal.

In reviewing the record on appeal to determine the correctness of granting a judgment notwithstanding the verdict, the record must be closely scrutinized to determine whether there is any evidence to sustain the verdict because the motion for judgment notwithstanding the verdict admits the truth of the adversary's evidence and every inference of fact which legitimately may be drawn therefrom. *Banz v. Jordan Motor Co.*, 94 Idaho 369, 487 P.2d 1123 (1971), overruled on other grounds, *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

In reviewing on appeal trial court's order granting a new trial, the test to be applied is whether the record discloses manifest abuse of discretion by trial court. *Banz v. Jordan Motor Co.*, 94 Idaho 369, 487 P.2d 1123 (1971), overruled on other grounds, *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

Reviewing court may not uphold a judgment n.o.v. unless the facts are undisputed and permit only one reasonable conclusion to

be reached after all inferences are drawn in favor of appellants. *Dawson v. Olson*, 94 Idaho 636, 496 P.2d 97 (1972).

Time of Motion.

A judgment notwithstanding verdict cannot be entered in favor of party unless such party moved for a directed verdict at the close of testimony and was entitled thereto. *Hendrix v. City of Twin Falls*, 54 Idaho 130, 29 P.2d 352 (1934); *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957 (1934).

When Motion to Be Denied.

With evidence that plaintiff entered an uncontrolled intersection at 25 miles per hour and was struck by defendant in the middle of the intersection and that defendant approached the intersection at 45 to 50 miles per

hour, seeing plaintiff's car entering the intersection when 60 feet from intersection, and applied his brakes, leaving skid marks of 42½ feet, it was error for the trial court to set aside a verdict for plaintiff and enter judgment for defendant non obstante. *Loosli v. Bollinger*, 90 Idaho 464, 413 P.2d 684 (1966), modified, *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

Following a jury-verdict for defendants the trial court's denial of plaintiffs' alternative motion for judgment notwithstanding the verdict or for a new trial was not an abuse of discretion where conflicting evidence indicated that issues of negligence and proximate cause were questions for the jury. *Annau v. Schutte*, 96 Idaho 704, 535 P.2d 1095 (1975).

**Rule 50(c). Motion for judgment notwithstanding verdict —
Conditional rulings on granted motions.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall rule on the motion for new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. An appeal from a judgment granting or denying a motion for judgment notwithstanding the verdict presents for review all reviewable error against either the appellant or appellee.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may, not later than ten days after entry of judgment, serve a motion for a new trial, which shall be conditionally granted or denied, with the consequences stated in section (1) of this subdivision.

(3) Any party who fails to make a motion for a new trial as provided in sections (1) and (2) of this subdivision shall be deemed to have waived the right to apply for a new trial.

STATUTORY NOTES

Cross References. Motion for judgment notwithstanding verdict, Rule 50(b).

JUDICIAL DECISIONS

Cited in: *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979); *Smith v. Praegitzer*, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Court's Power to Grant.
Discretion of Court.
Failure to Pass on New Trial Motion.
Form and Contents of Motion.
Grounds for New Trial.
Part of Parties Applying Granted.
Prematurity of Motion.
Prosecution of Motion.
Sufficiency of Evidence.
When Necessary.

Court's Power to Grant.

Court properly denied motions to vacate judgments which were in effect motions for a new trial and were not filed within ten days after verdict. *Mountain States Implement Co. v. Arave*, 49 Idaho 710, 291 P. 1074 (1930).

Where a judgment is affirmed on appeal, trial court still has power to grant a new trial and set aside the judgment. *Idaho Gold Dredging Corp. v. Boise-Payette Lumber Co.*, 54 Idaho 270, 30 P.2d 1076 (1934).

Discretion of Court.

An order granting a new trial will not be disturbed in absence of abuse of discretion. *Jacksha v. Gilbert*, 4 Idaho 738, 44 P. 555 (1896); *Brossard v. Morgan*, 6 Idaho 479, 56 P. 163 (1899); *Wolfe v. Ridley*, 17 Idaho 173, 104 P. 1014 (1909); *Say v. Hodgins*, 20 Idaho 64, 116 P. 410 (1911); *Caravelis v. Cacavas*, 38 Idaho 123, 220 P. 110 (1923); *Turner v. First Nat'l Bank*, 42 Idaho 597, 248 P. 14 (1926).

Failure to Pass on New Trial Motion.

Where judgment n.o.v. was granted but judge did not pass on alternate motion for a new trial, and where the trial judge had resigned, it was up to the Supreme Court to make the required determination when case was brought up on appeal. *Nafus v. Campbell*, 96 Idaho 366, 529 P.2d 266 (1974).

Form and Contents of Motion.

A motion for a new trial follows after notice and may be oral or in writing, and is not required to be in any particular form or to state grounds upon which same is made. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912).

Grounds for New Trial.

Indefiniteness of a verdict is not a ground

for granting a new trial. *Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 P. 1073 (1914).

Grounds for new trial are wholly statutory. *Dayton v. Drumheller*, 32 Idaho 283, 182 P. 102 (1919), overruled on other grounds, *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953); *Wright v. Stewart*, 32 Idaho 490, 185 P. 69 (1919); *Jenness v. Co-Operative Publishing Co.*, 36 Idaho 697, 213 P. 351 (1923).

Grounds set forth in motion for new trial which are not included in notice will not be stricken, but they will not be considered, as scope of appeal from order denying motion for a new trial is limited to specifications of error listed in notice. *Cook v. Lammy*, 73 Idaho 445, 253 P.2d 244 (1953).

Part of Parties Applying Granted.

A new trial may be granted as to one party and denied as to others who had joined in the application. *Gaffney v. Hoyt*, 2 Idaho 199, 10 P. 34 (1886).

Prematurity of Motion.

Motion filed after court's oral announcement of judgment for defendant, but before filing of such findings and conclusions, was premature. *Forsman v. Holbrook*, 47 Idaho 241, 274 P. 111 (1929).

Prosecution of Motion.

Former provisions governing motions for new trial contemplated that the party intending to move for a new trial shall prosecute such action with diligence. *Behrensmeyer v. Gwinn*, 25 Idaho 186, 136 P. 623 (1913).

Sufficiency of Evidence.

In an action for malicious prosecution where the evidence showed clearly that defendant acted in good faith and upon advice of counsel in filing criminal charges against the plaintiff the trial court should have granted defendant's motion for a directed verdict, hence a judgment should be granted notwithstanding the verdict instead of granting a new trial. *Thomas v. Hinton*, 76 Idaho 337, 281 P.2d 1050 (1955).

Trial court erred in setting aside a verdict of a jury in favor of the defendant and granting a new trial to the plaintiff where the verdict was supported by substantial and competent

evidence. *National Produce Distribs., Inc. v. Grube*, 78 Idaho 33, 297 P.2d 284 (1956).

When Necessary.

Motion for new trial is only necessary in

case party desires trial court to review referee's actions together with evidence of insufficiency. *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

Rule 50(d). Denial of motion.

If the motion notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling that party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

JUDICIAL DECISIONS

Assertion of Grounds for New Trial.

Where defendants obtained a jury verdict in their favor, and motion for judgment n.o.v. was denied, with the result that the trial judge never ruled as to whether they should be granted a new trial as to their counterclaim or as to any errors that may have occurred during trial, which denied them

their right to adequately present a defense, defendants' failure to allege grounds for a new trial during appeal from denial of motion did not constitute a waiver since this rule does not require the defendant to assert such grounds before the appeal or on the appeal. *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981).

Rule 51(a)(1). Instructions to jury — Requests — Objections.

Prior to the presentation of evidence, the court may instruct the jury on the role of the court, counsel and jury, the elements of all claims in dispute and any known defenses, and any other matter it believes necessary and appropriate to aid in resolution of the issues at hand. The Court shall hold an instruction conference prior to trial to consider these initial instructions to the jury.

No later than five (5) days before the commencement of any trial by jury, any party may file written requests that the court instruct the jury on the law as set forth in such request, and such requested instructions must be served upon and received by all parties to the action at least five (5) days before the commencement of the trial. The court shall not be required to consider any requested instructions not filed and served upon the parties as required by this rule, but the court may reasonably permit any party to file and serve written requests for instructions at any time up to and including the close of the evidence at the trial upon the grounds that such requested instructions concern matters arising during the trial of the action which could not reasonably have been anticipated by the party requesting such instructions or were overlooked in the original requested instructions. All requested instructions shall be submitted to the court in duplicate with the appropriate citation of law indicated on the copy thereof upon which the party relies in requesting such instruction. The original shall contain a blank space for numbering and all duplicate copies shall be numbered by the party submitting the same in consecutive numbers at the top of the first

page of each requested instruction. The duplicate copy shall also contain blank spaces at the bottom thereof identified as “Given,” “Refused,” “Modified,” “Covered,” and “Other.” The court shall rule upon such requests at the close of the evidence at the trial and shall verbally indicate its ruling on the record or shall indorse upon the duplicate copy of each requested instruction the court’s ruling as to such request in the blanks provided. The court may also prepare other written instructions to be given of its own motion, and shall submit to the parties the instructions that will be given, and provide adequate time and opportunity to all parties to read and consider said instructions, to discuss them with court and counsel off the record, and to make objections thereto in the absence of the jury. All objections thereto, and any objections to the giving or the failure to give an instruction, and any court’s ruling thereon, must be made a part of the record. (Amended effective March 1, 1976; am. effective October 1, 1976; am. effective July 1, 1977; amended, effective July 1, 2000; amended effective July 1, 2001.)

STATUTORY NOTES

Cross References. Exceptions unnecessary, Rule 46.

Motion for directed verdict, Rule 50(a).

JUDICIAL DECISIONS

ANALYSIS

Deviation from Pattern Instruction
 Effect of Requesting Instructions.
 Error in Failure to Give Instruction.
 Error in Instructing Jury Deemed Immaterial.
 Failure to Object.
 Failure to Provide Preliminary Oral Instructions.
 Harmless Error.
 Instruction Not Requested.
 Instructions Too Broad.
 Objections.
 Preserving Objection to Propriety.
 Requested Instruction As Binding on Appeal.

Deviation from Pattern Instruction

Trial court could diverge from the standard pattern jury instructions where a different instruction more adequately, accurately, or clearly stated the law; thus, the trial court properly deviated from the standard pattern jury instructions to exclude mention of the “but for” test. In a medical malpractice action, where there was evidence of two or more possible causes of the plaintiff’s injury, the jury had to be instructed that the doctor’s negligence was a proximate cause of the injury if it was a substantial factor in bringing about the damage. *Newberry v. Martens*, 142 Idaho 284, 127 P.3d 187 (2005).

Effect of Requesting Instructions.

In a wrongful death action, where plaintiffs had requested an instruction defining the defense of assumption of risk, plaintiffs were precluded from assigning as grounds for reversal the court’s giving of a substantially identical instruction, regardless of whether it was a correct statement of law. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

Where the record revealed that counsel for the parties and the court had an extended discussion about whether the court should instruct the jury that a directed verdict had been granted on the liability issue and counsel for plaintiff stated, not once, but three times, his request that the jury be expressly told that their deliberations were limited to the amount of damages, such repeated requests constituted a sufficient compliance with the requirement of rule. *Grooms v. Amos*, 99 Idaho 351, 581 P.2d 809 (1978) (decision prior to amendment of rule).

Error in Failure to Give Instruction.

To establish error for failure to give an instruction, it must be shown at a minimum that: the instruction was not argued against by the appellant; the instruction was a correct statement of Idaho law; and the failure to instruct was assigned as error on appeal. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

Error in Instructing Jury Deemed Immaterial.

In action that alleged that defendant's feedlot constituted a nuisance, where plaintiff's complaint invoked the equitable jurisdiction of the district court, the jury's verdict and findings would be advisory only, and under I.R.C.P. 52(a), the judge has the responsibility of making the ultimate findings and decision in the case, which the district judge did in finding that no nuisance existed; therefore, whether or not the trial court erred in instructing the jury is immaterial since the judge, not the jury, had the responsibility for making the ultimate findings and decision in the matter. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

Failure to Object.

Failure to make an objection to instruction on the record precludes raising the issue on appeal. *Briscoe v. Nishitani*, 105 Idaho 175, 667 P.2d 278 (Ct. App. 1983).

Failure to object to instructions given by the trial court prior to instructing the jury does not necessarily preclude raising the issue on appeal. *Country Ins. Co. v. Agricultural Dev., Inc.*, 107 Idaho 961, 695 P.2d 346 (1984).

Failure to Provide Preliminary Oral Instructions.

While attorneys were not given any preview of preliminary jury instructions, where the instructions informed the jury of the nature of the action, the trial procedure, the jurors' responsibilities and similar matters helpful to the jury, no showing of prejudice was made. *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990).

Harmless Error.

While the trial court did not follow the procedures required by Idaho R. Civ. P. 51(a)(1) when proposing an instruction to the jury, the error was harmless where the instruction contained a correct statement of the law and defendant had not shown any prejudice. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

Instruction Not Requested.

Failure to give an instruction in a civil case is not reversible error if such an instruction was not requested. *Goodwin v. Wulfenstein*, 107 Idaho 492, 690 P.2d 947 (Ct. App. 1984).

While this rule is silent on whether a party must object to a given instruction or specifically request an instruction in order to assign as error the giving of the instruction or failure to give the instruction, when the instructions given by the trial court are correct insofar as they go, one cannot complain of the failure to give additional instructions if none are re-

quested. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

The Supreme Court will not find reversible error in the failure to give an instruction where the plaintiff argued against the giving of such an instruction at trial. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

Instructions Too Broad.

In a breach of contract action, a writ of execution was not allowed against city funds. *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993).

In a breach of contract action between city and contractor, language in a jury instruction on liquidated damages, which instructed that the city need only have contributed to the delay in "any way," was overly broad; city was entitled to an instruction recognizing its right to take actions authorized by or allowed under the contract without forfeiting liquidated damages. *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993).

Objections.

Under this rule, objections must be made on the record in order to preserve them for appeal. *Goodwin v. Wulfenstein*, 107 Idaho 492, 690 P.2d 947 (Ct. App. 1984).

A party may object either to jury instructions given, or those requested but not given, and such objections, when proffered, must be made part of the record; nevertheless, counsel is not required to object to instructions in order to preserve error on appeal. *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985).

Although the Idaho Supreme Court recently may have shed some doubt on the necessity of an objection, when it held in a civil case that an erroneous instruction could be challenged for the first time on appeal, until the Supreme Court decides otherwise, the Idaho Court of Appeals, in criminal cases, will require timely objections to preserve claims of error, but will continue to review any claim of "fundamental" error. *State v. Randles*, 115 Idaho 611, 768 P.2d 1344 (Ct. App. 1989), *aff'd in part*, 117 Idaho 344, 787 P.2d 1152 (1990).

Preserving Objection to Propriety.

It is apparent that the amendment to I.C.R. 30 that was made in 1980 was designed to parallel the amendments to this rule made in 1976 and 1977; by these amendments to the rules of civil and criminal procedure, it is not necessary to object to instructions in either civil or criminal cases in order to preserve an issue of the propriety of the instructions. *State v. Smith*, 117 Idaho 225, 786 P.2d 1127 (1990).

Requested Instruction As Binding on Appeal.

In plaintiff's action for recovery of damages for injuries sustained in fall where plaintiff submitted a proposed jury instruction on comparative negligence which was based on § 6-801, plaintiff could not argue on appeal from verdict denying any recovery that Idaho's comparative negligence statute was unconstitutional as a denial of equal protection of the law. *Jackson v. Vangas*, 97 Idaho 790, 554 P.2d 968 (1976).

Cited in: *Stoddard v. Nelson*, 99 Idaho 293,

581 P.2d 339 (1978); *State v. Watson*, 99 Idaho 694, 587 P.2d 835 (1978); *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981); *McBride v. Ford Motor Co.*, 105 Idaho 753, 673 P.2d 55 (1983); *Hale v. Walsh*, 113 Idaho 759, 747 P.2d 1288 (Ct. App. 1987); *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988); *Wiseman v. Schaffer*, 115 Idaho 537, 768 P.2d 800 (Ct. App. 1989); *State v. Wilkerson*, 121 Idaho 345, 824 P.2d 920 (Ct. App. 1992); *Lunders v. Estate of Snyder*, 131 Idaho 689, 963 P.2d 372 (1998).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Absence of Request.
 Correct Statement of Law in Charge.
 Effect of Noncompliance.
 Erroneous Instructions.
 Excluded Evidence.
 Failure to Object or Show Prejudice.
 Failure to Request.
 Guest or Joint Enterprise.
 Instructions Taken to Jury Room.
 Instructions to Be Based on Evidence Ad-
 duced.
 Omission of Instruction.
 Oral Instructions.
 Personal Injuries.
 Presumptions.
 Questions by Jury.
 Review on Appeal.
 Statutory Rape Case.
 Theory of Case.
 When Instructions Read.

Absence of Request.

Where neither party asked for instructions on particular point, failure to give them is not error. *Joyce Bros. v. Stanfield*, 33 Idaho 68, 189 P. 1104 (1920); *Owen v. Taylor*, 62 Idaho 408, 114 P.2d 258 (1941).

Correct Statement of Law in Charge.

Where rules of law sought to be invoked in requested instructions were correctly stated by the judge in the charge given to the jury requested instructions may be refused. The refusal to state the law, in language in which it was expressed in the requests, when correctly stated in other appropriate language in the charge to the jury was not error. *Burns v. Getty*, 53 Idaho 347, 24 P.2d 31 (1933); *Reinhold v. Spencer*, 53 Idaho 688, 26 P.2d 796 (1933); *State v. Richardson*, 56 Idaho 150, 50 P.2d 1012 (1935); *Shaddy v. Daley*, 58 Idaho 536, 76 P.2d 279 (1938); *Basye v. Hayes*, 58 Idaho 569, 76 P.2d 435 (1938).

Effect of Noncompliance.

Noncompliance with former rule concerning jury instructions and objections thereto could not be deemed of sufficient prejudicial error to warrant a reversal of the verdict and judgment as the rights of the parties are adequately protected on appeal whether or not the instructions are submitted to counsel in advance and, if submitted, no objection thereto is taken. *Archer v. Shields Lumber Co.*, 91 Idaho 861, 434 P.2d 79 (1967).

If the failure of the trial court to submit instructions to the parties was error, such cannot be considered prejudicial error in the absence of counsel granting the trial court an opportunity to correct such error by timely notice and/or objection. *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971).

Erroneous Instructions.

A party is under no obligation to first object to instructions given before assigning as error the giving of such instructions, if such instructions were erroneous. *Harper v. Johannesen*, 84 Idaho 278, 371 P.2d 842 (1962); *Evans v. Small*, 94 Idaho 448, 489 P.2d 1404 (1971).

Contention of the plaintiff that defendant, having failed to submit requested instructions covering the points assigned as error, cannot complain of the court's failure to instruct on those points, is without merit since erroneous instructions were given. *Harper v. Johannesen*, 84 Idaho 278, 371 P.2d 842 (1962).

Excluded Evidence.

It is reversible error for court to exclude evidence and then instruct upon it. *Jones v. Caldwell*, 20 Idaho 5, 116 P. 110 (1911).

Failure to Object or Show Prejudice.

In an action brought by airplane passengers against the pilot and the owner following the crash of a private plane, plaintiffs were not prejudiced by trial court's failure to in-

struct the jury prior to the giving of closing arguments where plaintiffs did not object to the variance in trial procedure and failed to show how they were prejudiced. *Annau v. Schutte*, 96 Idaho 704, 535 P.2d 1095 (1975).

Failure to Request.

Where neither party asks for instructions on particular point, failure to give them is not error. *Joyce Bros. v. Stanfield*, 33 Idaho 68, 189 P. 1104 (1920); *Owen v. Taylor*, 62 Idaho 408, 114 P.2d 258 (1941).

Failure to instruct jury as to measure of damages is not reversible error in absence of a request for such instruction. *Joyce Bros. v. Stanfield*, 33 Idaho 68, 189 P. 1104 (1920).

Where alleged instructions are contained in record but there is no notation in writing by judge or court that same were requested and refused, they cannot be reviewed in appellate court. *Hoy v. Anderson*, 39 Idaho 430, 227 P. 1058 (1924).

Assignment that court erred in failing to give certain instructions is without merit where record fails to show that court actually refused to give instructions requested. *Ellerbe v. Shank Auto Co.*, 43 Idaho 780, 254 P. 1055 (1927).

In an action by a guest where the court instructed upon ordinary and gross negligence, and the law of the road, such instructions were not misleading and defendant could not complain of the failure to instruct as to the distinction between the unlawful act and a negligent act, or an unlawful act and an act of gross negligence, where no requests were made. *Owen v. Taylor*, 62 Idaho 408, 114 P.2d 258 (1941).

Guest or Joint Enterprise.

Instruction in auto accident case ignoring difference between one riding as guest and one engaged in joint enterprise violates the statutory provisions. *French v. Tebben*, 53 Idaho 701, 27 P.2d 474 (1933).

Instructions Taken to Jury Room.

It is the duty of the court to send all written instructions to the jury room for use of jury in considering the case unless proper objection is made. *Hilbert v. Spokane Int'l Ry.*, 20 Idaho 54, 116 P. 1116 (1911).

The court did not err in permitting jury to take instruction to jury room where defendant admitted that instruction was most favorable to him. *O'Connor v. Meyer*, 66 Idaho 15, 154 P.2d 174 (1944).

Instructions to Be Based on Evidence Adduced.

Where there is no pleading or proof of contributory negligence, it is proper to refuse

a request for instruction thereon. *Owen v. Taylor*, 62 Idaho 408, 114 P.2d 258 (1941).

Instructions should not be given which are not based on evidence adduced at trial. *Bratton v. Slininger*, 93 Idaho 248, 460 P.2d 383 (1969).

Omission of Instruction.

Failure to object to instructions given does not preclude any party from assigning as error any omission by the court to give proper instruction. *Evans v. Small*, 94 Idaho 448, 489 P.2d 1404 (1971).

Oral Instructions.

While the former rule concerning jury instructions and objections thereto implied that the instruction should be written, the rule in that respect was directory and not mandatory. *Meyer v. Brown*, 91 Idaho 369, 421 P.2d 740 (1966).

Personal Injuries.

It was error for the court to refuse to give the following requested instruction: "If you find from the evidence that the plaintiff was caused to fall by a defect in the sidewalk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily followed the injury in the condition of health in which the plaintiff then was at the time of such fall, and it is no defense that such injury may have been aggravated and rendered more difficult to cure by reason of the plaintiff's state of health at that time, or that by reason of a latent disease the injuries were rendered more serious to her than they would have been to a person in robust health." *Jones v. Caldwell*, 20 Idaho 5, 116 P. 110 (1911).

Presumptions.

Ordinarily, the necessity of resorting to presumptions disappears when there is direct and positive evidence on the point, but it is not prejudicial to instruct the jury that there is a presumption that a motorcyclist was exercising due care for protection of his person at the time of the accident, but that the presumption was not conclusive even though there were eye witnesses who testified directly to the acts of the motorcyclist. *Packard v. O'Neil*, 45 Idaho 427, 262 P. 881, 56 A.L.R. 317 (1927).

Questions by Jury.

The court's orally answering a question by the jury, with the jury's question and the court's answer taken down and transcribed by the report, was in accord with former similar provision. *Meyer v. Brown*, 91 Idaho 369, 421 P.2d 740 (1966).

Review on Appeal.

When instructions given and refused are filed with the clerk and included in his transcript in obedience to praecipe, and duly certified by clerk, they are subject to review on appeal. *Stringer v. Redfield*, 34 Idaho 378, 201 P. 714 (1921); *Marnella v. Froman*, 35 Idaho 21, 204 P. 202 (1922); *Sherman v. Nixon*, 37 Idaho 358, 216 P. 727 (1923); *T.W. & L.O. Naylor Co. v. Bowman*, 37 Idaho 514, 217 P. 263 (1923).

Statutory Rape Case.

In a prosecution for the commission of statutory rape, on or about a certain date, where the court instructed that it was sufficient for the state to prove that the crime was committed on any date within three years prior to the filing of the information, the refusing of an instruction that the testimony of the prosecutrix regarding other alleged acts of sexual intercourse had been admitted in evidence for the purpose of only corroborating her, and that the other independent acts of such intercourse could not be considered for any other purpose, was error requiring a reversal. *State v. Hirsch*, 64 Idaho 20, 127 P.2d 764 (1942).

Theory of Case.

It is not error for the trial court to give instructions requested by counsel on each

side of the case setting forth the law applicable to the theory of the case advanced by the party requesting the instruction, if such instructions correctly state the law and there is any evidence in the case which would justify the jury adopting the theory advanced by either one or the other of the respective parties. *Keim v. Gilmore & Pac. R.R.*, 23 Idaho 511, 131 P. 656 (1913).

Refusal to give a requested instruction on an issue presented by the pleadings and the theory on which the case is tried is reversible error. *Investors Mtg. Sec. Co. v. Strauss & Co.*, 50 Idaho 562, 298 P. 678 (1931).

Where defendants' theory of the case was that defendants had not crossed center line of road, no instruction concerning justification of a violation of a statute by defendants was required to be given by the court, since according to defendants' theory there was no violation of any statute by defendants. *Bratton v. Slininger*, 93 Idaho 248, 460 P.2d 383 (1969).

When Instructions Read.

Instructions should be read to jury before argument of counsel, but departure from order prescribed by statutory provisions is not reversible error in absence of timely objection. *Schmidt v. Williams*, 34 Idaho 723, 203 P. 1075 (1921).

RESEARCH REFERENCES

A.L.R. Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written. 10 A.L.R.3d 501.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property. 20 A.L.R.3d 1081.

Admissions or statements not *res gestae* by one through whose fault or negligence damage is caused, duty to instruct as to admissibility of, against one constructively liable for the former's fault, in an action against both. 27 A.L.R.3d 966.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony. 34 A.L.R.3d 775.

Verdict-urging instructions in civil case stressing desirability and importance of agreement. 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransi-

gence or reflecting on integrity or intelligence of jurors. 41 A.L.R.3d 1154.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case. 52 A.L.R.3d 101.

Per diem or similar mathematical basis for fixing damages for pain and suffering. 3 A.L.R.4th 940.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 A.L.R.4th 589.

Effect of Anticipated Inflation On Damages For Future Losses — Modern Cases. 21 A.L.R.4th 21.

Changes in cost of living or in purchasing power of money, instruction requiring or permitting consideration of in fixing damages. 21 A.L.R.4th 21.

Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract. 41 A.L.R.4th 131.

Liability of osteopath for medical malpractice. 73 A.L.R.4th 24.

Liability of chiropractors and other drug-

less practitioners for medical malpractice. 77 A.L.R.4th 273.

Precautionary instructions on consideration of evidence of repairs, change of conditions, or precautions taken after accident. 15 A.L.R.5th 119.

Necessity of expert testimony on issue of permanence of injury and future pain and suffering. 20 A.L.R.5th 1.

Wrongful death damages for loss of expectancy of inheritance from decedent. 42 A.L.R.5th 465.

Rule 51(a)(2). Use of Idaho Jury Instructions (IDJI).

Whenever the latest edition of Idaho Jury Instructions (IDJI) contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the IDJI instruction unless the judge finds that a different instruction would more adequately, accurately or clearly state the law. Whenever the latest edition of IDJI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an IDJI instruction cannot be modified to submit the issue properly, the instruction given on that subject should be simple, brief, impartial and free from argument. When an instruction requested by a party is a modified IDJI instruction, the party should indicate therein, by use of parentheses or other appropriate means, the respect in which it is modified.

JUDICIAL DECISIONS

ANALYSIS

Deviation from Pattern Instruction.
Recommendatory Nature of Instructions.
Refusal to Give Requested Instruction.
Use Not Mandated.
Use of Modified Instruction.
Use Proper.

Deviation from Pattern Instruction.

Where the instruction told the jury to consider the time and expense invested in preparing and presenting the case and that if another jury heard the case, the same evidence, law and arguments would be presented, the instruction deviated from the pattern instruction and misstated the law. *State v. Clay*, 112 Idaho 261, 731 P.2d 804 (Ct. App. 1987).

The trial court committed an error of law by choosing to use the defendant's proposed jury instructions, rather than the pattern instructions, where they failed to instruct the jury that punitive damages are also intended to take account of a defendant's egregious actions and punish him accordingly, and where they were a misstatement of state law and punitive damages law in general. *Schaefer v. Ready*, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000).

Recommendatory Nature of Instructions.

Pattern jury instructions are not a separate

source of substantive law; rather, they seek to embody existing law and are recommendatory in nature, not mandatory. Thus, the substantive standard by which a particular jury instruction would be judged was not a subsequently promulgated pattern instruction, but the underlying case law. *Packard v. Joint Sch. Dist. No. 171*, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

Refusal to Give Requested Instruction.

In a personal injury action, where the record showed that the undisputed facts were stipulated by counsel in the presence of the jury, the trial court did not err in refusing to give plaintiff's proposed instruction listing the undisputed facts because repeating the facts was unnecessary and would only burden the jury with more paper work. *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981).

In action for breach of contract where defendant requested that the court give an instruction stating architectural firm's duty to defendant and court declined to give such instruction but gave an instruction that accurately stated the law of substantial performance as well as adequately stating the duty of architectural firm to defendant, since such given instruction properly stated the applicable law, failure to give requested instruction was not error. *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 835 P.2d 1282 (1992).

Use Not Mandated.

It is not error per se to fail to follow recommendations in Idaho Jury Instructions (IDJI); this rule does not make IDJI recommendations mandatory. *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990).

Use of Modified Instruction.

In a wrongful death action, where the trial court's instruction explaining to the jury its obligation to weigh the evidence omitted the final paragraph from the model jury instruction IDJI 100, the court's failure to give the complete instruction was not error. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

While it clearly is not error to modify any of the Idaho Jury Instructions (IDJI), and they are not mandatory, modification of an IDJI instruction constitutes error if the modified instruction does not conform to the state of the law, or omits elements basic to the case. *Ramco v. H-K Contractors*, 118 Idaho 108, 794 P.2d 1381 (1990).

Where a modified jury instruction improperly suggested that the jury might itself determine that a contract was ambiguous, but it did not purport to limit the jury's inquiry once it made that determination, and where the jury instruction as a whole guided the jury to evidence beyond the four corners of the document in question, as was the appropriate scope of inquiry for the trier of fact once the judge had determined that the contract was ambiguous, the erroneous instruction did not amount to an error of the degree requiring the judge to grant motion for new trial. *Ramco v. H-K Contractors*, 118 Idaho 108, 794 P.2d 1381 (1990).

A former Idaho Jury Instruction 230 correctly stated the proper proximate cause in-

struction under the circumstances of this case, therefore, in an action for medical malpractice when there is evidence of two or more causes that contributed to the damage suffered, for only one of which the doctor is responsible, the proper proximate cause instruction should instruct the jury that any negligence of the doctor was a proximate cause of the injury if it was a substantial factor in bringing about the damage, and the Supreme Court specifically rejected the inclusion of an instruction under these circumstances requiring the claimant to prove that the injury would not have occurred "but for" the doctor's negligence. *Fussell v. St. Clair*, 120 Idaho 591, 818 P.2d 295 (1991).

Use Proper.

In an action for damages brought by a passenger injured in an auto accident, in which passenger was found five percent negligent, the trial court did not err in using the IDJI-approved special verdict form, which inquired whether passenger was negligent in causing the "accident," rather than using opposing party's requested form which would have inquired whether she was negligent in causing her own "injuries," where opposing party produced no evidence that use of their form would have more accurately stated the law or changed the result. *Howes v. Fultz*, 115 Idaho 681, 769 P.2d 558 (1989).

Cited in: *Carpenter v. Double R Cattle Co.*, 105 Idaho 320, 669 P.2d 643 (Ct. App. 1983); *McPheters v. Peterson*, 108 Idaho 107, 697 P.2d 447 (1985); *Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 717 P.2d 1033 (1986); *Hilden v. Ball*, 117 Idaho 314, 787 P.2d 1122 (1989); *L & L Furn. Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991).

RESEARCH REFERENCES

A.L.R. Construction of statutes or rules making mandatory the use of pattern or uni-

form approved jury instruction. 49 A.L.R.3d 128.

Rule 51(b). Rulings on objections — Final instructions and arguments.

The court may give instructions to the jury at any time, and at various times, during the trial, all of which shall be made written instructions and constitute part of the record. Prior to giving any opening or final instructions, the court shall furnish copies of them to all parties and allow counsel a reasonable time to examine them and make objections outside the presence of the jury. No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which that party objects and the grounds of the objection. After the court makes all rulings on

requested instructions and objections, and advises the parties of the final instructions to be given, the court shall read to the jury the written instructions before the final arguments of the parties are given. All final arguments shall be reported verbatim unless otherwise stipulated in the record by all of the parties to the action. The written instructions, and a minimum of two copies thereof, shall be given to the jury to take when the jury retires for deliberation. Any request by the jury to be further informed of any point concerning the action shall be communicated to the court in writing, at which time the attorneys for the parties shall be given the opportunity to be present, if the attorney is available and can be present within a reasonable period of time, and the court in its discretion may further instruct the jury in writing or explain the instructions in open court which shall be made part of the record. (Amended January 8, 1976, effective March 1, 1976; amended March 28, 1986, effective July 1, 1986; amended May 4, 2001, effective July 1, 2001; amended March 22, 2002, effective July 1, 2002; amended effective July 1, 2004.)

JUDICIAL DECISIONS

ANALYSIS

Burden of Proof.
Further Instructions.
Harmless Error.
Objection Requirement.
Presence of Counsel.
Procedure on Violation of Rule.
Time for Instructions.

Burden of Proof.

Where the losing party shows that some private communication was made by the judge to the jury, it devolves upon the successful party to show what the communication was, and unless he does this the verdict must be set aside; and where it clearly appears what the communication was, then, if it be of such a character that it may have affected the jury, the verdict must be set aside; but if the court can see from the record that it could not have had any effect, the verdict should stand. *Rueth v. State*, 100 Idaho 203, 596 P.2d 75 (1978).

Further Instructions.

If, after start of its deliberations, a jury wishes further instructions, it must communicate this desire in open court, and counsel for both parties have a right to be present unless, by absenting themselves or by expressly so stating, they waive this right; and while the trial judge may, in his discretion, give or refuse to give any further instructions, all communication must be made a matter of record and a minute entry must be made to note the occurrence. *Rueth v. State*, 100 Idaho 203, 596 P.2d 75 (1978).

Harmless Error.

Where the communication between judge and jury was known, the instruction did not influence the jury to find liability, and the defendant did not claim that the instruction was an erroneous statement about which figure to include in the verdict, the supplemental instruction concerning the question of whether or not to apportion the damages according to each party's negligence did not effect the outcome of the verdict and was therefore harmless. *Mendes Bros. Dairy v. Farmers Nat'l Bank*, 111 Idaho 511, 725 P.2d 535 (Ct. App. 1986).

Objection Requirement.

Company was precluded from assigning error to the special verdict jury instructions because it failed to object to those instructions before the trial court. *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009).

This rule requires a specific, distinct objection, instead of just a blanket objection, to an instruction before the giving, or failure to give, can be assigned as error. *Jones v. Crawford*, 147 Idaho 11, 205 P.3d 660 (2009).

Presence of Counsel.

Where the record contained only the jury's handwritten question and the supplemental instruction given in response, this rule was violated, as it was not apparent from the record that counsel was even given the opportunity to be present. *Mendes Bros. Dairy v. Farmers Nat'l Bank*, 111 Idaho 511, 725 P.2d 535 (Ct. App. 1986).

Procedure on Violation of Rule.

When this rule has been violated, the procedure is: (1) for the losing party, in the first instance, to show that there was some communication off the record and not in open court; (2) the burden then shifts to the winning party to show what the communication was; if he cannot show what it was, the verdict must be set aside; (3) if he can show what the communication was but it appears to have been of such a character that it may have affected the jury, then the verdict must be set aside; (4) only if it is made clearly to appear that the communication could not have had any effect, can the verdict be allowed to stand. *Mendes Bros. Dairy v. Farmers Nat'l Bank*, 111 Idaho 511, 725 P.2d 535 (Ct. App. 1986).

Time for Instructions.

The rule that the trial court read the instructions to the jury before final arguments of the parties was essential to uniformity in court proceedings as required by article 5, § 26 of the Idaho Constitution; therefore, trial court erred in instructing the jury after closing arguments without first obtaining the express waiver by counsel. *McDrummond v. Montgomery Elevator Co.*, 97 Idaho 679, 551 P.2d 966 (1976).

Cited in: *Verway v. Blincoe Packing Co.*, 108 Idaho 315, 698 P.2d 377 (Ct. App. 1985); *Mackay v. Four Rivers Packing Co.*, — Idaho —, 257 P.3d 755 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Answering Questions Orally.
Failure to Object or Show Prejudice.
Taking of Instructions to Jury Room.
When Instructions Read.

Answering Questions Orally.

The oral answering by the court of a question asked by the jury after a period of deliberation was in accordance with former similar provision. *Meyer v. Brown*, 91 Idaho 369, 421 P.2d 740 (1966).

Failure to Object or Show Prejudice.

Trial court did not err in not instructing the jury until after the closing arguments, where plaintiffs-appellants failed to object to such procedure and did not disclose how they were prejudiced by such procedure. *Annau v. Schutte*, 96 Idaho 704, 535 P.2d 1095 (1975).

Taking of Instructions to Jury Room.

It is the duty of the court to send all written instructions to the jury room for use of jury in considering the case unless proper objection is made. *Hilbert v. Spokane Int'l Ry.*, 20 Idaho 54, 116 P. 1116 (1911).

The court did not err in permitting jury to take instruction to jury room where defendant admitted that instruction was most favorable to him. *O'Connor v. Meyer*, 66 Idaho 15, 154 P.2d 174 (1944).

When Instructions Read.

Instructions should be read to jury before

argument of counsel, but departure from order prescribed by former statute was not reversible error in absence of timely objection. *Schmidt v. Williams*, 34 Idaho 723, 203 P. 1075 (1921).

The trial court's action in requiring arguments to be made before instructing the jury was not reversible error, in the absence of a showing that a request to the contrary was called to the trial judge's attention or ruled on. *Byington v. Horton*, 61 Idaho 389, 102 P.2d 652 (1940); *Dowd v. Dowd*, 62 Idaho 157, 108 P.2d 287 (1940).

It is discretionary with the trial judge when he shall read the written instructions to the jury and it has become the custom of some of the trial judges in the state to give the "stock instructions" at the very beginning of a trial after a jury has been selected, but going beyond the giving of mere stock instructions at such time is a practice which should be discouraged. *Archer v. Shields Lumber Co.*, 91 Idaho 861, 434 P.2d 79 (1967).

It is reversible error to allow the instructions of the court to be read to the jury in the jury room by the court reporter unless the record affirmatively discloses that no prejudicial results flowed therefrom, and the fact that the court certified that the reading was without repetition or emphasis does not save the judgment of the court based on a verdict from the consequence of reversal. *Little v. United States*, 73 F.2d 861, 96 A.L.R. 889 (10th Cir. 1934).

Rule 52(a). Findings by the court — Effect.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of

law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for the purposes of review. Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appear personally before it. The findings of the master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary in support of a judgment by default, or an interlocutory order made pursuant to a show cause hearing or on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b); in all instances findings of fact and conclusions of law may be waived by stipulation of all parties upon approval by the court. A written memorandum decision issued by the court may constitute the findings of fact and conclusions of law only if the decision expressly so states or if it is thereafter adopted as the findings of fact and conclusions of law by order of the court. (Amended July 2, 1976, effective October 1, 1976.)

STATUTORY NOTES

Cross References. Advisory jury, Rule 39(c).

Amendment, Rule 52(b).

Defenses and objections presented by motion, Rules 12(a)-12(f).

Involuntary dismissal for failure to prosecute motion, Rule 41(b).

Master's report, contents and filing, Rule 53(e)(1).

Motion for summary judgment and proceedings thereon, Rule 56(c).

Special verdicts, findings on, Rule 49(a).

JUDICIAL DECISIONS

ANALYSIS

Advisory Findings.

Appellate Review.

Child Custody Settlement.

Clearly Erroneous Standard.

Compliance.

Conflicting Evidence.

Contents of Findings.

Credibility of Witnesses.

Default Judgment.

Divorce Actions.

Failure to Make Findings.

Failure to Request Findings.

Findings of Court.

Findings of Fact.

—Summary Judgment.

Findings of Hearing Committee.

Findings of Law.

Findings Not Supported by Evidence.

Findings Supported by Evidence.

—Adoption of Party's Findings of Fact.

Habeas Corpus Proceedings.

Inadequate Findings.

Industrial Commission Decisions.

Material Factual Issues.

Misapplication of Law.

Necessity of Findings.

Post-Conviction Relief.

Proceedings to Which Not Applicable.

Role of Counsel.

Specificity.

Standard of Review.

Advisory Findings.

In action that alleged that defendant's feedlot constituted a nuisance where plaintiff's complaint invoked the equitable jurisdiction of the district court, the jury's verdict and findings would be advisory only, and under

this rule, the judge has the responsibility of making the ultimate findings and decision in the case, which the district judge did in finding that no nuisance existed; therefore, whether or not the trial court erred in instructing the jury is immaterial since the judge, not the jury, had the responsibility for making the ultimate findings and decision in the matter. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

Appellate Review.

A district court, in making an appellate review of a magistrate's decision, should perform that task in the same manner as the Supreme Court performs its appellate review of the trial decision of a district court; in reviewing a magistrate's findings, therefore, the district courts should adhere to the well-recognized rule that findings based on substantial and competent, though conflicting, evidence will not be set aside on appeal. *Hawkins v. Hawkins*, 99 Idaho 785, 589 P.2d 532 (1978).

Review by the Supreme Court of findings of fact by a trial court in a case where a fact must be established by clear and convincing evidence is simply to determine whether there is substantial and competent evidence to sustain that finding; thus where there is evidence in the record from which the trial court might conclude the issue has been resolved by clear and convincing evidence, the court will not set its resolution aside. In *re Estate of Courtright*, 99 Idaho 575, 586 P.2d 265 (1978).

Where the trial court's findings of fact are clearly erroneous and against the weight of the evidence, those findings will be set aside on appeal. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

Appellate review is precluded where trial court, in its memorandum decision findings of fact and conclusions of law entered pursuant to this rule, failed to make specific findings and conclusions regarding plaintiff's theory of an agreed-upon boundary in land dispute and only addressed defendant's theory of adverse possession. *Morris v. Frandsen*, 101 Idaho 778, 621 P.2d 394 (1980).

Findings on issues before a trial court must necessarily be made by the court pursuant to this rule before the supreme court may perform its appellate function of ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Owen v. Boydstun*, 102 Idaho 31, 624 P.2d 413 (1981).

Upon appellate review, the findings of fact of the trial court will be accepted if they are supported by substantial, competent though

conflicting evidence, however meager; this standard of appellate review is salutary in effect, and reflects the view that deference must be afforded to the special opportunity to assess and weigh the credibility of the witnesses who appear before it personally. *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982).

When the court sits as the trier of fact, it is charged with the duty of preparing findings of fact and conclusions of law in support of the decision which it reaches. The purpose behind requiring the court to "find the facts specially and state separately its conclusions of law thereon" is to afford the appellate court a clear understanding of the basis of the trial court's decision, so that it might be determined whether the trial court applied the proper law to the appropriate facts in reaching its ultimate judgment in the case. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

The Supreme Court will not disturb a trial court finding that is supported by substantial and competent, although conflicting, evidence. *Circle C Ranch Co. v. Jayo*, 104 Idaho 353, 659 P.2d 107 (1983).

When the Court of Appeals reviews the trial court's application of law to the facts found, it will consider whether appropriate criteria were applied and whether the result is one that logically follows. Thus, if (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under I.R.C.P., Rule 60(b)(1), and (c) the trial court's decision follows logically from application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion and its decision will not be overturned on appeal. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983).

Ordinarily, in reviewing a decision of the district court on appeal from a magistrate, the Court of Appeals must determine from the trial court (magistrate) record whether substantial evidence supports the magistrate's findings of fact and whether those findings support the magistrate's conclusions of law; if so, and if correct legal principles have been applied, then the district court's decision affirming a magistrate judgment will be upheld. *Spencer v. Idaho First Nat'l Bank (In re Estate of Spencer)*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

Where the findings of the factfinder are supported by substantial, competent, though conflicting, evidence, they will not be set aside on appeal. *Stout v. Westover*, 106 Idaho 533, 681 P.2d 1008 (1984).

Considering the letter and spirit of this rule, even where the evidence is entirely in

written form, the standard of review of a district court's findings of fact is whether they are clearly erroneous. *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 688 P.2d 1191 (Ct. App. 1984).

When a judge exercises the power to choose inferences or to resolve a conflict in wholly documentary evidence, the appropriate standard of review is whether the record is sufficient to support the district court's findings; this standard is equivalent to the standard of clear error prescribed by this rule. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

In an action originally heard in a magistrate's court, with a first appeal to a district court, and a further appeal to the Court of Appeals, the Court of Appeals is required to accept the findings of fact made by the magistrate unless they are clearly erroneous. *Allison v. Bradley (In re Estate of Bradley)*, 107 Idaho 860, 693 P.2d 1062 (Ct. App. 1984).

In declaratory judgment actions submitted with evidence entirely in writing an appellate court may draw its own impressions but it will not substitute those impressions for findings of fact made by the trial court unless the trial court's findings are clearly erroneous. *Mutual of Enumclaw Ins. Co. v. Wood By-Products, Inc.*, 107 Idaho 1024, 695 P.2d 409 (Ct. App. 1984).

On review of the trial court's application of law to the facts found on a motion to set aside a default judgment upon the grounds set forth in I.R.C.P. 60(b)(1), the reviewing court will consider whether appropriate criteria were applied and whether the result is one that logically follows; thus, if (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under I.R.C.P. 60(b)(1) (tempered by the policy favoring relief in doubtful cases), and (c) the trial court's decision follows logically from the application of such criteria to the facts found, then the trial court will be deemed to have acted within its sound discretion, and its decision will not be overturned on appeal. *Shelton v. Diamond Int'l Corp.*, 108 Idaho 935, 703 P.2d 699 (1985).

The party challenging the findings has the burden of showing error, and the appellate court will review the evidence in the light most favorable to the prevailing party. *Martsch v. Nelson*, 109 Idaho 95, 705 P.2d 1050 (Ct. App. 1985).

The findings of fact of the trier of fact will not be disturbed on appeal if they are supported by substantial competent, although conflicting, evidence; this standard of appellate review reflects the view that deference

must be accorded to the trial judge's special opportunity to assess and weigh the credibility of the witnesses who appear. *State v. Tierney*, 109 Idaho 474, 708 P.2d 879 (1985).

Where in an action to terminate parental rights, the burden of proving neglect by clear and convincing evidence has been noted explicitly and applied by the trial judge, the appellate court will not disturb his findings unless they are unsupported by substantial evidence. *Hofmeister v. Bauer*, 110 Idaho 960, 719 P.2d 1220 (Ct. App. 1986).

In a motion to amend findings of fact, the decision of the trial court denying the motion will not be disturbed on appeal where the court's findings are supported by competent and substantial evidence. *Johnson v. Edwards*, 113 Idaho 660, 747 P.2d 69 (1987).

Findings of fact by a trial court will not be disturbed on appeal unless they are clearly erroneous; consequently, the standard for reviewing a trial court's findings and conclusions is to determine whether they are supported by substantial, competent evidence and to determine whether the trial court properly applied the law to the facts as found. *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 748 P.2d 410 (Ct. App. 1987).

Where the issue on appeal concerns the sufficiency of evidence to support a judgment and the parties in the trial court waived findings of fact and conclusions of law, and none were made, the Court of Appeals will presume that the trial court found every fact necessary for its judgment, and it will uphold the judgment on any reasonable theory supported by substantial, competent evidence. *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 759 P.2d 905 (Ct. App. 1988).

When a trial court's findings of fact are challenged on appeal, the appellant has the burden of showing error, and the reviewing court will review the evidence in a light most favorable to the respondent. *Muniz v. Schrader*, 115 Idaho 497, 767 P.2d 1272 (Ct. App. 1989).

The reviewing court is precluded from substituting its own opinion of a witness's credibility for that of the trier of fact. *Muniz v. Schrader*, 115 Idaho 497, 767 P.2d 1272 (Ct. App. 1989).

The Court of Appeals will give due regard to the special opportunity of the trial court to judge the credibility of witnesses appearing personally before it and will recognize the trial court as the arbiter of the weight, if any, ascribed to expert opinion testimony. *Knowlton v. Mudd*, 116 Idaho 262, 775 P.2d 154 (Ct. App. 1989).

The Court of Appeals will not weigh the evidence when reviewing a finding of fact;

rather, it inquires whether the finding is supported by substantial, albeit conflicting, evidence in the record. If it is so supported, the finding cannot be deemed clearly erroneous. *Knowlton v. Mudd*, 116 Idaho 262, 775 P.2d 154 (Ct. App. 1989).

Where the Court of Appeals expressly concluded that the findings of fact made by the district court are supported by the evidence, are not clearly erroneous and should not be set aside, the facts, having been decided, were final, they had become the law of the case, and the Court of Appeals' pronouncement had to be adhered to, both in the trial court and on subsequent appeal. *Insurance Assocs. Corp. v. Hansen*, 116 Idaho 948, 782 P.2d 1230 (1989).

A reviewing court may reverse the trial court's decision when findings are absent or inadequate, however, such reversal is unnecessary if the record gives the appellate court a complete understanding of the material issues. *Clayton v. State*, 118 Idaho 59, 794 P.2d 648 (Ct. App. 1990).

Because a post-conviction proceeding is civil in nature, this rule applies and requires that written findings of fact and conclusions of law be made on all of the material issues raised. However, a reversal is unnecessary if the record gives the appellate court a complete understanding of the material issues raised on appeal. *Ramirez v. State*, 119 Idaho 1037, 812 P.2d 751 (Ct. App. 1991).

A trial court's findings which are supported by substantial and competent, although conflicting, evidence will not be set aside on appeal; the findings of fact will be liberally construed in favor of the judgment entered, and will not be set aside unless clearly erroneous. *Kootenai Elec. Coop. v. Washington Water Power Co.*, 127 Idaho 432, 901 P.2d 1333 (1995).

A district court's findings of fact will not be set aside unless they are clearly erroneous, although the appellate court exercises free review over conclusions of law. *Carney v. Heinson*, 133 Idaho 275, 985 P.2d 1137 (1999).

Child Custody Settlement.

Where mother represented that third party had facilitated a negotiated child custody settlement and asked magistrate to enter order resolving the custody issue based on third party's recommendations and testimony, and order was entered without objection, mother was foreclosed from attacking the sufficiency of the evidence supporting that order. *Ratliff v. Ratliff*, 129 Idaho 422, 925 P.2d 1121 (1996).

Clearly Erroneous Standard.

The standard of clear error under this rule applies to all findings, whether made upon

testimonial or documentary evidence. *DeMarco v. Stewart*, 107 Idaho 555, 691 P.2d 801 (Ct. App. 1984).

The "clear error" standard of review applies regardless of whether the evidence adduced below is documentary or testimonial. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988).

As to the "clearly erroneous" standard under subdivision (a) of this rule, clear error will not be deemed to exist if the court's findings are supported by substantial and competent, though conflicting, evidence. *Muniz v. Schrader*, 115 Idaho 497, 767 P.2d 1272 (Ct. App. 1989).

Whether mitigation action taken by seller was reasonable was a question of fact for the trial court, and would not be overturned on appeal unless found to be clearly erroneous. *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 846 P.2d 904, 39 A.L.R.5th 817 (1993).

District court's finding that a boundary by agreement existed was not clearly erroneous because a fence had been standing between two properties for more than 50 years; moreover, the parties involved were adjoining landowners, despite being separated by a dedicated road, because the parties had an ownership interest up to the center of the dedicated street. *Neider v. Shaw*, 138 Idaho 503, 65 P.3d 525 (2003).

Compliance.

In an action concerning an easement and trespass dispute, although the district court's order on remand failed to comply with the requirements of this rule, it was sufficient to permit appellate review. *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175 (2009).

Conflicting Evidence.

Trial court's findings and conclusions which are based on substantial although conflicting evidence will not be disturbed on appeal. *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 794 P.2d 1389 (1990).

Contents of Findings.

A trial judge may cite authority and identify legal rules and principles for his conclusions or reasons, but there is no requirement that he must do so. Nor is there any law which states that a failure to cite authority renders faulty a trial judge's decision. *Josephson v. Josephson*, 115 Idaho 1142, 772 P.2d 1236 (Ct. App. 1989).

Credibility of Witnesses.

The credibility of a witness who testifies in open court is for the trier of fact to determine.

Rasmussen v. Martin, 104 Idaho 401, 659 P.2d 155 (Ct. App. 1983).

Regard is to be given to the special opportunity of the trial court to judge the credibility of witnesses who appear personally before it; where there exists sufficient evidence in the record to support a lower court's findings on credibility, an appellate court sitting without the firsthand observation necessary to evaluate witness credibility, will not set aside those findings. *Wolford v. Tankersley*, 107 Idaho 1062, 695 P.2d 1201 (1984).

Credibility of witnesses and weight of testimony are matters resolved by the trial court as trier of fact and will not be set aside on appeal unless clearly erroneous, and a factual finding is clearly erroneous only if it is not supported by substantial and competent evidence in the record. *Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995), cert. denied, 517 U.S. 1234, 116 S. Ct. 1877, 135 L. Ed. 2d 173 (1996).

When a case has been tried to a court, it is the province of the trial judge to weigh the conflicting evidence and testimony and to judge the credibility of witnesses. *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 982 P.2d 945 (Ct. App. 1999).

Default Judgment.

In a debt collection action, the trial court did not abuse its discretion in denying defendant's application to set aside a default judgment where the return of service indicated that defendant was duly served with process, but where defendant contended that she never received service and that she knew nothing of the action. *Credit Bureau, Inc. v. Harrison*, 101 Idaho 554, 617 P.2d 858 (1980).

A trial court decision on a motion for relief from a default judgment will not be disturbed on appeal unless it represents an abuse of discretion. Where oral testimony has been received, the Court of Appeals will give due regard to the trial judge's special opportunity to evaluate the credibility of the witnesses. Where the evidence is entirely in writing, the Court of Appeals may draw its own impressions from the record, but the Court of Appeals will not substitute its impressions for findings of fact by the trial judge unless the Court of Appeals is convinced that those findings are clearly erroneous. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983).

Where judge does not make any findings in ruling of motion to vacate default judgment as he is permitted to do by this rule, the appellate court has no meaningful way to review the decision to determine whether the lower court has properly applied correct legal principles to the facts. Consequently, it is at

liberty to form its own impression from the record and exercise its own discretion in deciding whether the default judgment should have been set aside. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Divorce Actions.

A requirement of specific findings in divorce cases demonstrates to the parties that the trial court has examined their case with due care and attention to the evidence; such a requirement also encourages a judge to rely upon objectively supportable grounds for his decision, and discourages subjective or attitude-influenced perceptions of the case. *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984).

In all divorce cases where substantial equality is sought to be achieved not by splitting each asset, but by valuing the assets and allocating them in a manner designed to achieve a substantially equal, aggregate result, the trial judge must make findings concerning the value of each material asset; an asset or debt is "material" if it is sufficiently valuable to affect the substantial equality sought to be achieved by the decree. *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984).

Failure to Make Findings.

The absence of findings and conclusions may be disregarded by the appellate court only where the record is clear, and yields an obvious answer to the relevant question. Absent such circumstances, the failure of the trial court to make findings of fact and conclusions of law concerning the material issues arising from the pleadings, upon which proof is offered, will necessitate a reversal of the judgment and a remand for additional findings and conclusions, unless such findings and conclusions would not affect the judgment entered; and, where there is no evidence which would support further findings material to the judgment, the judgment will simply be reversed, the plaintiff having failed to prove his claim. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Where appellant did not specify as an issue on appeal the district court's failure to enter written findings of fact and conclusions of law addressing his counterclaim, but only asserted the court erred in dismissing his counterclaim, the appellate court nevertheless found it necessary to raise and address the issue of the district court's failure to enter written findings and conclusions. *Schneider v. Curry*, 106 Idaho 264, 678 P.2d 56 (Ct. App. 1984).

Only where the record is so clear as to give

the appellate court a complete understanding of the material issues and the basis of the magistrate's reasoning will the absence of findings of fact not result in a remand for adequate findings. *Spencer v. Idaho First Nat'l Bank* (In re Estate of Spencer), 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

A lack of findings may be disregarded by an appellate court only if the record is clear and yields an obvious answer to the relevant factual question; absent those circumstances, a failure to make findings of fact on material issues affecting the judgment requires the judgment to be set aside and the case remanded. *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984).

Where the trial court's findings of fact and conclusions of law in a motion for involuntary dismissal were embodied in a single paragraph, such cursory treatment did not satisfy the requirements of I.R.C.P. 41(b) and this rule, and made appellate review virtually impossible. *Powers v. Tiegs*, 108 Idaho 4, 696 P.2d 855 (1985).

In an action to recover real estate commissions, the district court erred in failing to make the findings of fact and conclusions of law required by this rule on the questions of whether the agent misrepresented the amount of payment to the seller and whether such misrepresentation was a material breach of the agent's fiduciary obligation. *Schroeder v. Rose*, 108 Idaho 707, 701 P.2d 327 (Ct. App. 1985).

The court, when sitting as the trier of fact, is charged with the duty of preparing findings of fact in support of its decision, and absence of findings may be disregarded by the appellate court only where the record is clear and yields an obvious answer to the relevant question. *Trautman v. Hill*, 116 Idaho 337, 775 P.2d 651 (Ct. App. 1989).

It was error for the court to fail to make a specific decision supported by findings of fact and conclusions of law, as required by this rule. *Ramco v. H-K Contractors*, 118 Idaho 108, 794 P.2d 1381 (1990).

By accepting the order, by attorney's signature, for interim payments as to form to be made by tenant/alleged purchaser to landlord/alleged vendors, the tenant/alleged purchaser waived objection that such order constituted a preliminary injunction and findings of fact or statement of reasons in the order were required pursuant to I.R.C.P. 65(d) and this rule. *Hinkle v. Winey*, 126 Idaho 993, 895 P.2d 594 (Ct. App. 1995).

The failure of the trial court to make specific findings of fact and conclusions will be disregarded only where the answers are clear and obvious from the record. *The Highlands,*

Inc. v. Hosac, 130 Idaho 67, 936 P.2d 1309 (1997).

The fact that counsel for a party sincerely contended for a position does not mean that findings must be made on that position, since a decision between the positions of two litigants necessarily rejects contentions made by one or the other. *Browning v. Ringel*, 134 Idaho 6, 995 P.2d 351 (2000).

Failure to Request Findings.

Neither an objection to findings nor a request or motion for findings is a prerequisite to appellate review and such failure to bring the matter to the attention of the trial court does not waive the right to bring it up on appeal. *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981).

This rule does not mean that failure to request findings is an absolute impediment to appeal; the purpose of the rule is to assist the appellate court by affording it a clear understanding of the basis of the lower court decision. *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981).

Findings of Court.

In an action to foreclose mortgage, where only evidence of defendant's alleged interest in resort property was the self-serving testimony in defendant's deposition, and where defendant made no effort to appear and assert his claim, the trial court's findings that defendant's judgment creditors proved that defendant owned an interest in the disputed property and that plaintiff agreed to pay him for such interest were not supported by substantial evidence. *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 548 P.2d 72 (1976).

In an action to recover damages for allegedly fraudulent misrepresentations in connection with an exchange of real property between the parties, the trial court's finding that plaintiffs failed to establish that defendant intentionally misrepresented any information and its finding that plaintiffs failed to establish that they were damaged as a result of defendant's representations were not error, in light of trial court's opportunity to judge credibility of those witnesses who appeared before it. *Roemer v. Green Pastures Farms, Inc.*, 97 Idaho 591, 548 P.2d 857 (1976).

In action by owner of easement across strip of land for specific performance of agreement to devise the strip and to quiet title, where easement owner asserted that fair market value of the strip should have been determined according to its value as beach access but presented no expert testimony as to such value, the district court did not err by finding value of the strip to be \$4,500 based upon the

testimony of defendant's expert witness whose opinion did not take into consideration the value of the strip as beach access. *Garmo v. Clanton*, 97 Idaho 696, 551 P.2d 1332 (1976).

Findings of fact made by the court shall not be set aside unless clearly erroneous. *Marshall Bros. v. Geisler*, 99 Idaho 734, 588 P.2d 933 (1978).

This rule requires the trial court in a judge-tried case to exercise its independent judgment in the preparation of findings of fact and conclusions of law. *Marshall Bros. v. Geisler*, 99 Idaho 734, 588 P.2d 933 (1978).

The question of the sufficiency of a record to sustain a trial court's findings of fact and conclusions of law is limited to whether there is substantial, competent, although conflicting, evidence in the record to support these findings, and where such evidence exists it will not be disturbed on appeal. *Cougar Bay Co. v. Bristol*, 100 Idaho 380, 597 P.2d 1070 (1979).

If the trier of fact finds a fact to be established by clear and convincing evidence, that finding will not be reversed unless the finding is clearly erroneous or not supported by substantial and competent evidence. *Jensen v. Bledsoe*, 100 Idaho 84, 593 P.2d 988 (1979).

Under this rule of procedure, a trial court's findings of fact will be liberally construed in favor of the judgment entered, and on appeal, the findings of fact will not be disturbed unless clearly erroneous. *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982).

The credibility of a witness, and the inferences to be drawn from the evidence, are determinations to be made by the trial court. *Eliopoulos v. Kondo Farms, Inc.* 102 Idaho 915, 643 P.2d 1085 (Ct. App. 1982).

A trial court's findings will not be set aside unless they are clearly erroneous. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).

The district court's determination that the defendant failed to prove that the prosecutor and an investigator in the prosecutor's office manufactured evidence, "brainwashed" witnesses and concealed exculpatory evidence was not clearly erroneous where the court chose to ignore the defendant's testimony as not credible. *Young v. State*, 115 Idaho 52, 764 P.2d 129 (Ct. App. 1988).

The judge's determination that the defendant failed to prove coercion or intimidation of witnesses at the sentence reduction hearing was not clearly erroneous, where the record did not include a transcript of the hearing, and the post-conviction judge set forth several factors, independent of the allegedly tainted testimony, for his refusal to re-

duce the sentences. *Young v. State*, 115 Idaho 52, 764 P.2d 129 (Ct. App. 1988).

A judge's findings in a forfeiture case were not disturbed on appeal where the testimony was in conflict, framing a credibility issue, and where the judge expressly referred to credibility in making his findings. *Tucek v. Huff*, 115 Idaho 905, 771 P.2d 923 (Ct. App. 1989).

When a district court sits without a jury and issues specific findings of fact, appellate court's review of the findings of fact below is limited. The court will not set aside the lower court's findings unless they are clearly erroneous, it will not weigh the evidence, nor substitute its view of the facts for the view of the trial judge, and it defers especially to the district court's opportunity to judge the credibility of witnesses appearing personally before it. *Christensen v. Nelson*, 125 Idaho 663, 873 P.2d 917 (Ct. App. 1994).

District court's order of final dissolution did not constitute clear error, because the record showed that the district court's distribution of assets and liabilities was supported by substantial and competent evidence, when the district court entered findings of fact after examining the receiver's report, the limited liability company's balance sheet, and the appropriate statutory law and conducted a hearing with the parties. *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008).

Trial court erred in finding that statute of frauds was satisfied in a contract dispute for the sale of real property because the property description within the contract was insufficient. *Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174 (2009).

Where appellants paid to use water from the city's pipeline, they were not entitled to claim ownership of water rights after the pipeline was cut and capped by the city; property held by a municipality in trust for public use could not be acquired by adverse possession or prescription; in accordance with Idaho R. Civ. P. 52(a), the district court adopted the special master's summary judgment recommendation to deny appellants' claimed water rights. *Bedke v. City of Oakley (In re SRBA)*, 148 Idaho 738, 228 P.3d 1005 (2010).

Findings of Fact.

Findings of fact by a trial court will not be disturbed on appeal unless they are clearly erroneous; clear error, in turn, will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence. *Rasmussen v. Martin*, 104 Idaho 401, 659 P.2d 155 (Ct. App. 1983).

If the evidence is so inconclusive that the judge cannot find the facts, he should identify particularly the dispositive issue and the

party who had the burden of persuasion on that issue. *Kulczyk v. Kehle*, 108 Idaho 640, 701 P.2d 260 (Ct. App. 1985).

In the event the findings of fact are lacking for purposes of appeal, the reviewing court may disregard the inadequacy only if the record is clear and yields an obvious answer to the relevant factual question. *Sherry v. Sherry*, 108 Idaho 645, 701 P.2d 265 (Ct. App. 1985).

Findings of fact are not required for dismissal of a complaint under subdivision (6) of I.R.C.P. 12(b). *Bissett v. State*, 111 Idaho 865, 727 P.2d 1293 (Ct. App. 1986).

The Idaho Supreme Court will not set aside a district court's finding of fact unless it is clearly erroneous, i.e., unless it is not supported by substantial competent evidence. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

The task of weighing evidence and finding facts is within the province of the trial court. Appellate court will not set aside findings unless they are clearly erroneous, will give due regard to the opportunity of the trial judge to weigh conflicting testimony and to judge credibility of witnesses, and will accept the trial court's findings of fact if they are supported by substantial, competent though conflicting evidence. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

Because the shareholder was not a shareholder in the corporation at the time of the shareholder meeting, he was not entitled to assert dissenters' rights; therefore, the judgment of the district court, including the order awarding costs and attorney fees, was in error and had to be reversed, and the shareholder's amended complaint dismissed. *Gilman v. Davis*, 138 Idaho 599, 67 P.3d 78 (2003).

The trial court's findings concerning the amount of lost wages awarded to a terminated employee were not clearly erroneous where evidence included testimony at trial and numerous earning statements from both the former employer and the company with which the employee became employed after his termination. *Smith v. Mitton*, 140 Idaho 893, 104 P.3d 367 (2004).

—Summary Judgment.

When a judge exercises the power to choose inferences on summary judgment, findings of fact should be made; otherwise, the reviewing court cannot identify the judge's choices of evidence or of inferences, in order to determine whether they were clearly erroneous. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

Findings of Hearing Committee.

The disciplinary process by which a hearing

committee makes findings and submits recommendations to the State Bar Disciplinary Board, and the board in turn to the court, is more properly compared with a procedure by which a referee or master might make findings and recommendations and forward such to a court, and while great weight should be accorded the findings and recommendations made below, both the board and the court are empowered to reach independent judgment on the record before it. *In re Lutz*, 100 Idaho 45, 592 P.2d 1362 (1979).

Findings of Law.

Unlike review of the district court's findings of fact, the state supreme court exercises free review over the district court's conclusions of law. As a result, the supreme court may substitute its view for that of the district court on a legal issue. *Marshall v. Blair*, 130 Idaho 675, 946 P.2d 975 (1997).

The supreme court reviews factual findings made after a trial without a jury for clear error and exercises free review of the district court's conclusions of law. *Coward v. Hadley*, — Idaho —, 246 P.3d 391, 2010 Ida. LEXIS 220 (2010).

Findings Not Supported by Evidence.

The finding of the trial court that a road was a public easement was unsupported by any evidence and therefore was clearly erroneous, where the road had been paved and maintained by the city since 1973, but the action was commenced in May of 1977. *Aztec Ltd. v. Creekside Inv. Co.*, 100 Idaho 566, 602 P.2d 64 (1979).

Where judge's memorandum contained factual inconsistencies and testimony indicated that creditor had only agreed to allow debtor to retain harvesting equipment for one week rather than into the harvesting season, it was error for trial judge to determine that repossession violated agreement of parties to allow debtor to retain equipment into harvesting season. *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980).

Evidence establishing mother's epilepsy, which was controlled to a degree through medication, her need for nine to ten hours of sleep per night, her migraine headaches and her post-seizure lack of energy, did not sufficiently support court's finding that it was in the best interest of the children to vest custody in the father, and custody award was an abuse of discretion. *Moye v. Moye*, 102 Idaho 170, 627 P.2d 799 (1981).

Where the record in a divorce proceeding was inadequate as to what ultimately happened to a sailboat that was repossessed by a bank during the divorce proceeding, the magistrate erred in awarding the boat to the

husband and charging its full market value against him in the division of community property, because the actual value of the boat to the community could not be ascertained until the sale or other disposition of the boat in proceedings commenced by the bank. *Stockdale v. Stockdale*, 102 Idaho 870, 643 P.2d 82 (Ct. App. 1982).

Where husband traced funds used to purchase household items to his checking account and wife did not show that the status of such property was community property, the magistrate's finding that the household items were community property was clearly erroneous and would be set aside, despite the fact that wife's name also appeared on the checking account. *Lang v. Lang*, 109 Idaho 802, 711 P.2d 1322 (Ct. App. 1985).

Where plaintiff purchaser of real property sought precise perimeters of easement across lands of defendants and appealed district court's finding that the parties were jointly bound by the terms of their purported settlement articulated on the record in July, 1989, the Court of Appeals held that under this section, the district court's finding that the parties intended the settlement terms which were recited on the record to be their final agreement was not supported by the evidence. *Conley v. Whittlesey*, 126 Idaho 630, 888 P.2d 804 (Ct. App. 1995).

Findings Supported by Evidence.

Where grantor of warranty deed testified that she intended to except from the deed a disputed 60-foot strip of property but by mistake excepted only a 60-inch strip, the trial court's ruling denying grantor's request for reformation of warranty deed was not disturbed on appeal, for the ruling was supported by grantee's testimony that grantor had informed him that she intended to except five feet. *Flynn v. Allison*, 97 Idaho 618, 549 P.2d 1065 (1976).

Factual findings made by a trial court will not be disturbed on appeal when they are supported by substantial, competent, although conflicting, evidence. *Skelton v. Spencer*, 98 Idaho 417, 565 P.2d 1374 (1977), cert. denied, 434 U.S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978).

Where there was substantial, competent evidence to support the trial court's conclusion that a settlement agreement was assented to by all parties and that no fraud, duress or coercion had been used in the negotiations leading to and the execution of the settlement agreements, the decision of the trial court granting specific performance of the agreement would be affirmed. *Skelton v. Spencer*, 98 Idaho 417, 565 P.2d 1374 (1977),

cert. denied, 434 U.S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978).

Where the evidence supported the trial court's finding that an estuary was navigable, the finding was not clearly erroneous and would be upheld on appeal. *Ritter v. Standal*, 98 Idaho 446, 566 P.2d 769 (1977).

Where the evidence in an action to determine ownership of property was sharply conflicting but all the material findings of the trial court were supported by testimony of the parties or other witnesses, by documentation or by reasonable inferences from such evidence, the findings would not be set aside on appeal. *Furness v. Park*, 98 Idaho 617, 570 P.2d 854 (1977).

Where there was substantial and competent, although conflicting, evidence to sustain a finding that an assault and battery was committed, the appellate court would not disturb such finding. *Stecklein v. Montgomery*, 98 Idaho 671, 570 P.2d 1359 (1977).

Though the evidence was conflicting, the trial court's finding concerning the loss of value to a landowner caused by flooding and erosion was supported by substantial evidence. *Bradford v. Simpson*, 98 Idaho 830, 573 P.2d 149 (1978).

Where § 50-602 required the mayor of a city to enforce the city ordinances, where specified terms of appointment were required by city ordinance and where the former police chief testified he had been hired for a fixed term, there was substantial evidence to support a finding he had been appointed for such a set term. *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979).

Where defendants individually contracted to convey a suburban lot which was owned by corporate defendant, and individually contracted to sell and repurchase a temporary home owned by defendant-corporation in which plaintiffs were to reside while custom home was built on the first lot for them, the finding of the trial court that the individual defendants treated the corporate defendant as their alter ego was supported by substantial evidence and would not be disturbed on appeal. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979).

Where the record indicated that counsel for the plaintiff renters had conceded in argument before the trial court that the renters did not have a sales contract with the defendant owners of the property, the trial court properly denied plaintiffs' motion to amend their claim in order to prove an oral agreement for sale of the property since the evidence supported the trial court's finding that the parties in fact reached no meeting of the minds. *Haskin v. Glass*, 102 Idaho 785, 640 P.2d 1186 (Ct. App. 1982).

Where the evidence showed that the owners of the servient beach premises constructed a retaining wall, erected fences around their property and planted grass and flowers within the easement, the trial court's finding that the improvements by the servient owners were inconsistent with the express purposes of boating, bathing, driving and parking set forth in the grant of easement was supported by substantial and competent evidence and thus permitted the court's judgment extinguishing that portion of the easement which had been enclosed and improved. *Shelton v. Boydstun Beach Ass'n*, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982).

A finding is not clearly erroneous if it is supported by substantial and competent, though conflicting, evidence; thus, where the testimony and exhibits revealed a wheat field heavily infested with weeds, and one or more of several causes, all supported by the record, could have brought the weeds to the field including farm equipment, wild animals, other livestock, and plaintiff's own farming practices, and testimony at trial indicated that factors other than the weeds, such as the late harvest, contributed to the reduced yield, the trial court's findings that plaintiff's field was in poor condition before the cattle trespass and that other factors could have caused the weed infestation was not clearly erroneous. *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).

Where the adopted findings and conclusions contained those findings and conclusions which were essential to the trial court's ruling on the issue of whether plaintiff unreasonably withheld his consent in matter of assignment and were sufficient and supported by the evidence, while they may have been somewhat overbroad, the trial court did not commit reversible error in adopting them. *Cheney v. Jemmett*, 107 Idaho 829, 693 P.2d 1031 (1984).

Findings which are supported by substantial and competent, though conflicting, evidence will not be disturbed on appeal. *Price v. Aztec Ltd.*, 108 Idaho 674, 701 P.2d 294 (Ct. App. 1985).

Clear error will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence. *Martsch v. Nelson*, 109 Idaho 95, 705 P.2d 1050 (Ct. App. 1985).

Clear error will not be found where the judge's findings are supported by substantial and competent, though conflicting, evidence. *Butte County Bank v. Hobley*, 109 Idaho 402, 707 P.2d 513 (Ct. App. 1985).

Where court's findings of fact are fully sup-

ported by the evidence in the record they will not be disturbed on appeal. *Quintana v. Quintana*, 119 Idaho 1, 802 P.2d 488 (Ct. App. 1990).

Where plaintiff, who had violated the terms of his probation several times, was at the hearing to relinquish jurisdiction, where plaintiff agreed to, and signed a new probationary agreement which included a probationary period of five years, and where plaintiff testified at the post-conviction hearing that he knew the five-year probation was in lieu of having his suspended sentence executed, there was competent and substantial evidence that plaintiff was informed of and agreed to the change in his probation. *Rodriguez v. State*, 123 Idaho 28, 843 P.2d 677 (Ct. App. 1992).

Where a factual finding is supported by substantial though conflicting evidence, the finding will not be set aside. *Jensen v. Jensen*, 124 Idaho 162, 857 P.2d 641 (1993).

Where district court revoked defendant's probation and denied his motion for reconsideration of the revocation, the district court's factual finding that the probation violation had been proven was upheld on appeal as there was substantial evidence in the record to support it and such factual findings are reviewed under a clearly erroneous standard under this rule. *State v. Egersdorf*, 126 Idaho 684, 889 P.2d 118 (Ct. App. 1995).

Defendant's contention that he was induced or coerced by police conduct sufficiently to require suppression of his statements made incident to his arrest for cocaine possession was not supported by the record and district court's finding that defendant's admissions were voluntary was proper. *State v. Johnson*, 126 Idaho 859, 893 P.2d 806 (Ct. App. 1995).

The trial court's findings of fact were more than sufficient where the court examined all the evidence, both testimonial and documentary, made reasonable inferences from that evidence and then, after reviewing both parties' proposed findings and conclusion, drafted detailed findings of fact and conclusions of law based on the evidence. *Browning v. Ringel*, 134 Idaho 6, 995 P.2d 351 (2000).

The district court did not err in concluding that the plaintiff, injured in an accident, did not need housekeeping services and should not need them indefinitely in the future where there was no specific testimony regarding the number of hours worked by the plaintiff's children or details as to the type of work performed, where there was also no specific testimony regarding the need for any such services in the future, including no testimony or evidence from a physician, and where the evidence showed that to the extent the plain-

tiff might be unable to perform a particular housekeeping chore, she was at least as much restricted in that regard from her pre-existing conditions as from any injuries sustained in the accident. *Browning v. Ringel*, 134 Idaho 6, 995 P.2d 351 (2000).

District court's findings of fact were not clearly erroneous where the corporation's complaint for inverse condemnation was timely filed because the highway district did not substantially complete construction of the road until May 1993; the district failed to prove its affirmative defense of quasi estoppel and the corporation, as the prevailing party, was entitled to an award of attorney fees and costs on appeal. *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003).

In dispute between the property owners and their neighbors, the trial court's decision that an easement did not place a burden on the servient estate was supported by substantial evidence. *Walker v. Boozer*, 140 Idaho 451, 95 P.3d 69 (2004).

—Adoption of Party's Findings of Fact.

To adopt verbatim a party's proposed findings of fact and conclusions of law is not the best practice, even if both sides have submitted proposals; however, it is not reversible error where those findings and conclusions essential to the decision reached are sufficient and are supported by the evidence. *Cheney v. Jemmett*, 107 Idaho 829, 693 P.2d 1031 (1984).

Habeas Corpus Proceedings.

Written findings and conclusion should be prepared in habeas corpus proceedings. *Jacobsen v. State*, 99 Idaho 45, 577 P.2d 24 (1978).

In light of the realty's history of ownership, the mailing of the deed to the grantee and the testimony of the grantee, there was sufficiently clear and convincing evidence to support the trial court's finding of delivery of the deed to the grantee with the requisite intent. *In re Estate of Courtright*, 99 Idaho 575, 586 P.2d 265 (1978).

The trial court's finding of decedent's intent to create a joint savings account with right of survivorship was supported by substantial and competent evidence and thus was not clearly erroneous, where the circumstances of the account's creation and use by the surviving depositor and decedent during the years were consistent with such an intent. *In re Estate of Courtright*, 99 Idaho 575, 586 P.2d 265 (1978).

Inadequate Findings.

Where the district court merely stated that

the facts presented do not establish excusable neglect on the part of defendant and where the only reason given by the court was that defendant was aware of the pending action and failed to appear or offer any defense, since this can be said of almost every party whose default has been taken, this reason failed to provide an adequate basis for the district court's ruling. *Nickels v. Durbano*, 118 Idaho 198, 795 P.2d 903 (Ct. App. 1990).

Where the magistrate court failed to make sufficient factual findings with regard to the valuation of the property at issue, and the record did not provide a clear and obvious explanation, because the record did not provide a basis for review of the magistrate's decision, the judgment and decree were vacated and the cause remanded for further proceedings. *Huerta v. Huerta*, 122 Idaho 278, 833 P.2d 911 (1992).

Industrial Commission Decisions.

Supreme Court's review of decisions of the Industrial Commission is limited to questions of law; accordingly, factual determinations made by the Commission will not be overturned when supported by substantial and competent, though conflicting, evidence; the substantial and competent evidence standard is consistent with the clearly erroneous standard of this rule. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Material Factual Issues.

Although not every disputed factual issue was addressed by the lower court's findings of fact, they did address the material factual issues of whether son had authority to bind parents, whether agreement to sell premises was ever reached, and whether tenants/alleged purchasers were in possession as owners or as tenants and therefore complied with this rule. *Hinkle v. Winey*, 126 Idaho 993, 895 P.2d 594 (Ct. App. 1995).

Misapplication of Law.

Trial court's determination that a partner committed an anticipatory breach of the partnership agreement and the calculation of damages resulting from the breach was vacated and the case remanded so that the district court could first wind up the partnership and perform an accounting as required under Title 53 and then consider the merits, if any, of the breach of contract claim. *Mays v. Davis*, 132 Idaho 73, 967 P.2d 275 (1998).

Necessity of Findings.

Findings of fact are not necessary to support decisions of summary judgment motions under I.R.C.P., Rule 56, or to support a decision relating to any other motion, except with respect to motions for involuntary dismissal

under I.R.C.P., Rule 41(b). *Bank of Idaho v. Nesselth*, 104 Idaho 842, 664 P.2d 270 (1983).

When a district court grants a party's motion for involuntary dismissal of an opposing party's claim, the judgment which the court renders is on the merits and the court must make the findings of fact and conclusions of law required by this rule. *Schneider v. Curry*, 106 Idaho 264, 678 P.2d 56 (Ct. App. 1984).

Where objections are raised to an accounting and report in the administration of a decedent's estate and a contested hearing is held concerning those objections, the court must, under this rule, make findings of fact and enter conclusions of law in respect to the objections and the account. *Spencer v. Idaho First Nat'l Bank (In re Estate of Spencer)*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

In all actions tried in a court without a jury, the trial court is required to make specific findings of fact and conclusions of law which support its decision; the purpose of this rule is to provide the appellate court with a clear understanding of the trial court's decision so that it may determine whether the trial court applied the proper law in reaching its ultimate decision. *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 936 P.2d 1309 (1997).

Post-Conviction Relief.

In hearing for post-conviction relief, the petitioner's credibility, the weight to be given to his testimony and the inferences to be drawn from the evidence all were matters solely within the province of the trial court. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988); *Bradley v. State*, — Idaho —, 262 P.3d 272 (Ct. App. 2011).

Where an inmate alleged that trial attorney failed to communicate and failed to communicate a plea offer, the inmate was not entitled to post-conviction relief, because there was evidence that the inmate's attorney met with the inmate on multiple occasions and the inmate's testimony regarding an alleged plea offer was not credible. *Piro v. State*, 146 Idaho 86, 190 P.3d 905 (2008).

Proceedings to Which Not Applicable.

Since a motion for directed verdict in a jury trial presents the trial judge with a pure question of law, there is no need for him to enter his own findings of fact in such circumstances, and the entry of findings, though superfluous, does not constitute reversible error. *Gmeiner v. Yacte*, 100 Idaho 1, 592 P.2d 57 (1979).

Role of Counsel.

While the trial court may avail itself of assistance of counsel, it must not delegate its fact-finding processes to counsel. *Compton v. Gilmore*, 98 Idaho 190, 560 P.2d 861 (1977).

Where a trial judge entered no memorandum decision but merely notified winning counsel of his conclusion and directed him to prepare findings of fact and conclusions of law in support thereof, he failed to comply with this rule. *Matheson v. Harris*, 98 Idaho 758, 572 P.2d 861 (1977).

The best procedure to follow if assistance of counsel is sought in drafting of findings of fact and conclusions of law is to request proposed findings and conclusions from both sides and to utilize these in the drafting of the court's findings and conclusions, and the request should be made prior to the trial judge making a decision. *Pline v. Asgrow Seed Co.*, 102 Idaho 827, 642 P.2d 64 (Ct. App. 1982).

To adopt verbatim a party's proposed findings of fact and conclusions of law is not the best practice, even if both sides have submitted proposals; however, it is not reversible error where those findings and conclusions essential to the decision reached are sufficient and are supported by the evidence. *Pline v. Asgrow Seed Co.*, 102 Idaho 827, 642 P.2d 64 (Ct. App. 1982).

The practice of directing the prevailing party's counsel to prepare findings and conclusions, and of adopting them without change is disfavored; however, this practice does not constitute reversible error per se. Findings of fact supported by the evidence and conclusions of law correctly applying legal principles to the facts found will be sustained on appeal regardless of their source. *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 702 P.2d 917 (Ct. App. 1985).

Specificity.

The specificity of the trial court's findings required by this rule is not that every factual dispute between the parties must be resolved but, rather, the court's findings need address only those factual issues that are material to the resolution of the claims. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

Standard of Review.

As a fact finder, performing a quasi-judicial function, the Parole Commission is charged by the legislature to make its finding of parole violation based upon sufficient evidence. The proper standard of review that the magistrate should apply in reviewing the Parole Commission's finding is "substantial evidence." *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Supreme Court's review of findings of fact is limited. It does not weigh the evidence as the district court did; instead it inquires whether the findings of fact are supported by substantial and competent evidence and therefore not clearly erroneous. In reviewing the record the

court is mindful that the district court possesses the unique opportunity to assess the credibility of the witnesses appearing before it. *Viebrock v. Gill*, 125 Idaho 948, 877 P.2d 919 (1994).

Cited in: *Southside Water & Sewer Dist. v. Murphy*, 97 Idaho 881, 555 P.2d 1148 (1976); *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976); *Lynch v. Cheney*, 98 Idaho 238, 561 P.2d 380 (1977); *Estate of Morrison v. Idaho State Tax Comm'n*, 98 Idaho 766, 572 P.2d 869 (1977); *Aldape v. State*, 98 Idaho 912, 575 P.2d 891 (1978); *Lester v. Lester*, 99 Idaho 250, 580 P.2d 853 (1978); *Ramey v. City of Blackfoot*, 99 Idaho 264, 580 P.2d 1289 (1978); *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *Lomas & Nettleton Co. v. Tiger Enters., Inc.*, 99 Idaho 539, 585 P.2d 949 (1978); *Beal v. Mars Larsen Ranch Corp.*, 99 Idaho 662, 586 P.2d 1378 (1978); *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978); *Heckman Ranches, Inc. v. State*, 99 Idaho 793, 589 P.2d 540 (1979); *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979); *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979); *McKinley v. Fanning*, 100 Idaho 189, 595 P.2d 1084 (1979); *Industrial Inv. Corp. v. Rocca*, 100 Idaho 228, 596 P.2d 100 (1979); *Consolidated Concrete Co. v. Empire W. Constr. Co.*, 100 Idaho 234, 596 P.2d 106 (1979); *Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979); *State v. Christensen*, 100 Idaho 631, 603 P.2d 586 (1979); *Higginson v. Westergard*, 100 Idaho 687, 604 P.2d 51 (1979); *Rosecrans v. Intermountain Soap & Chem. Co.*, 100 Idaho 785, 605 P.2d 963 (1980); *Torix v. Allred*, 100 Idaho 905, 606 P.2d 1334 (1980); *Javernick v. Smith*, 101 Idaho 104, 609 P.2d 171 (1980); *Silver Syndicate, Inc. v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979); *Rutter v. McLaughlin*, 101 Idaho 292, 612 P.2d 135 (1980); *Elder v. Northwest Timber Co.*, 101 Idaho 356, 613 P.2d 367 (1980); *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 619 P.2d 1116 (1980); *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Dalton v. South Fork of Coeur d'Alene River Sewer Dist.*, 101 Idaho 833, 623 P.2d 141 (1980); *Ventures, Inc. v. Jones*, 101 Idaho 837, 623 P.2d 145 (1981); *Pugmire v. Sandy*, 102 Idaho 346, 630 P.2d 138 (1981); *International Eng'g Co. v. Daum Indus., Inc.*, 102 Idaho 363, 630 P.2d 155 (1981); *State v. Christensen*, 102 Idaho 487, 632 P.2d 676 (1981); *Simmons v. Board of Trustees*, 102 Idaho 552, 633 P.2d 1130 (1980); *Nicholls v. Blaser*, 102 Idaho 559, 633 P.2d 1137 (1981); *Green v. Young*, 102 Idaho 735, 639 P.2d 433 (1981); *Tappen v. State, Dep't of Health & Welfare*, 102 Idaho 807, 641 P.2d

994 (1982); *Hoppe v. McDonald*, 103 Idaho 33, 644 P.2d 355 (1982); *Palmer v. Idaho Peterbilt, Inc.*, 102 Idaho 800, 641 P.2d 346 (Ct. App. 1982); *Lawyers Title Co. v. Jacobs*, 102 Idaho 804, 641 P.2d 350 (Ct. App. 1982); *Mercantile Stores Co. v. Idaho First Nat'l Bank*, 102 Idaho 820, 641 P.2d 1007 (Ct. App. 1982); *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982); *Trunnell v. Gentry*, 102 Idaho 848, 642 P.2d 563 (Ct. App. 1982); *J.E.T. Dev. v. Dorsey Constr. Co.*, 102 Idaho 863, 642 P.2d 954 (Ct. App. 1982); *Gemkist Farms, Inc. v. Bolen*, 102 Idaho 906, 643 P.2d 1076 (Ct. App. 1982); *Bastian v. Albertson's, Inc.*, 102 Idaho 909, 643 P.2d 1079 (Ct. App. 1982); *Century 21 Quality Properties, Inc. v. Chandler*, 103 Idaho 193, 646 P.2d 435 (Ct. App. 1982); *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982); *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982); *Owens v. Idaho First Nat'l Bank*, 103 Idaho 465, 649 P.2d 1221 (Ct. App. 1982); *D.R. Curtis Co. v. Mason*, 103 Idaho 476, 649 P.2d 1232 (Ct. App. 1982); *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982); *D.R. Curtis Co. v. Mathews*, 103 Idaho 776, 653 P.2d 1188 (Ct. App. 1982); *Webster v. Board of Trustees*, 104 Idaho 342, 659 P.2d 96 (1983); *Briscoe v. Nishitani*, 105 Idaho 175, 667 P.2d 278 (Ct. App. 1983); *Reeves v. State*, 105 Idaho 844, 673 P.2d 444 (Ct. App. 1983); *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074 (Ct. App. 1983); *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983); *Glenn v. Gotzinger*, 106 Idaho 109, 675 P.2d 824 (1984); *Davis v. Gage*, 106 Idaho 735, 682 P.2d 1282 (Ct. App. 1984); *Ziegler v. Ziegler*, 107 Idaho 527, 691 P.2d 773 (Ct. App. 1984); *Lorang v. Hunt*, 107 Idaho 802, 693 P.2d 448 (1984); *Lockhart Co. v. Naef*, 107 Idaho 888, 693 P.2d 1090 (Ct. App. 1984); *Newman v. Associated Sys.*, 107 Idaho 922, 693 P.2d 1124 (Ct. App. 1985); *Cline v. Hoyle & Assocs. Ins.*, 108 Idaho 162, 697 P.2d 1176 (1985); *Miller Constr. Co. v. Stresstek*, 108 Idaho 187, 697 P.2d 1201 (Ct. App. 1985); *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985); *Young v. Scott*, 108 Idaho 506, 700 P.2d 128 (Ct. App. 1985); *McFarland v. Joint Sch. Dist. No. 365*, 108 Idaho 519, 700 P.2d 141 (Ct. App. 1985); *Nelson v. Wagner*, 108 Idaho 570, 700 P.2d 973 (Ct. App. 1985); *MacNeil v. Minidoka Mem. Hosp.*, 108 Idaho 588, 701 P.2d 208 (1985); *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Ct. App. 1985); *Hawkes v. Sparks*, 108 Idaho 917, 702 P.2d 1377 (Ct. App. 1985); *Merrill v. Penrod*, 109 Idaho 46, 704 P.2d 950 (Ct. App. 1985); *McDonald v. Barlow*, 109 Idaho 101, 705 P.2d 1056 (Ct. App. 1985);

Clampitt v. A.M.R. Corp., 109 Idaho 145, 706 P.2d 34 (1985); Centers v. Yehezkely, 109 Idaho 216, 706 P.2d 105 (Ct. App. 1985); Klein v. Shaw, 109 Idaho 237, 706 P.2d 1348 (Ct. App. 1985); Eagle Sewer Dist. v. Hormaechea, 109 Idaho 418, 707 P.2d 1057 (Ct. App. 1985); Southern Idaho Prod. Credit Ass'n v. Gneiting, 109 Idaho 493, 708 P.2d 898 (1985); Kadoch v. Jenkins, 109 Idaho 499, 708 P.2d 904 (Ct. App. 1985); Shipley v. Cook, 109 Idaho 537, 708 P.2d 942 (Ct. App. 1985); Brown's Tie & Lumber Co. v. Kirk, 109 Idaho 589, 710 P.2d 18 (Ct. App. 1985); Krepcik v. Tippet, 109 Idaho 696, 710 P.2d 606 (Ct. App. 1985); Nordstrom v. Diamond Int'l Corp., 109 Idaho 718, 710 P.2d 628 (Ct. App. 1985); Idaho Lumber, Inc. v. Buck, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985); DeBaca v. McAfee, 109 Idaho 800, 711 P.2d 1320 (Ct. App. 1985); Davis v. Gage, 109 Idaho 1029, 712 P.2d 730 (Ct. App. 1985); Lewiston Pre-Mix Concrete, Inc. v. Rohde, 110 Idaho 640, 718 P.2d 551 (Ct. App. 1985); Idaho Dep't of Health & Welfare v. Syme, 110 Idaho 44, 714 P.2d 13 (1986); Golder v. Golder, 110 Idaho 57, 714 P.2d 26 (1986); Lee v. Peterson, 110 Idaho 601, 716 P.2d 1373 (Ct. App. 1986); Olsen v. Country Club Sports, Inc., 110 Idaho 789, 718 P.2d 1227 (Ct. App. 1986); Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986); Costello v. Watson, 111 Idaho 68, 720 P.2d 1033 (Ct. App. 1986); Farber v. Howell, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986); Sherry v. Sherry, 111 Idaho 185, 722 P.2d 494 (Ct. App. 1986); Allen v. Boydstun, 111 Idaho 188, 722 P.2d 497 (Ct. App. 1986); Brown v. Yacht Club of Coeur d'Alene, Ltd., 111 Idaho 195, 722 P.2d 1062 (Ct. App. 1986); Insurance Assocs. Corp. v. Hansen, 111 Idaho 206, 723 P.2d 190 (Ct. App. 1986); In re Steve B.D., 111 Idaho 285, 723 P.2d 829 (1986); Airstream, Inc. v. CIT Fin. Servs., Inc., 111 Idaho 307, 723 P.2d 851 (1986); Evans v. Sawtooth Partners, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986); Murgoitio v. Murgoitio, 111 Idaho 573, 726 P.2d 685 (1986); Carter v. Rich, 111 Idaho 684, 726 P.2d 1135 (1986); Gissel v. State, 111 Idaho 725, 727 P.2d 1153 (1986); Carson v. Elliott, 111 Idaho 889, 728 P.2d 778 (Ct. App. 1986); Crosby v. Rowand Mach. Co., 111 Idaho 939, 729 P.2d 414 (Ct. App. 1986); Farrell v. Brown, 111 Idaho 1027, 729 P.2d 1090 (Ct. App. 1986); Keller v. Rogstad, 112 Idaho 484, 733 P.2d 705 (1987); Crawford v. Pacific Car & Foundry Co., 112 Idaho 820, 736 P.2d 872 (Ct. App. 1987); Jones v. Whiteley, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987); State v. Schaffer, 112 Idaho 1024, 739 P.2d 323 (1987); First Sec. Bank, N.A. v. Mountain View Equip. Co., 112 Idaho 1078, 739 P.2d 377 (1987); Golden Condor v. Bell, 112 Idaho 1086, 739 P.2d 385

(1987); Bingham Mem. Hosp. v. Idaho Dep't of Health & Welfare, 112 Idaho 1094, 739 P.2d 393 (1987); Modern Mills, Inc. v. Havens, 112 Idaho 1101, 739 P.2d 400 (Ct. App. 1987); Erickson v. Amoth, 112 Idaho 1122, 739 P.2d 421 (Ct. App. 1987); Suchan v. Suchan, 113 Idaho 102, 741 P.2d 1289 (1986); State v. Roy, 113 Idaho 388, 744 P.2d 116 (Ct. App. 1987); McAtee v. Faulkner Land & Livestock, Inc., 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); State v. Sensenig, 113 Idaho 403, 744 P.2d 131 (Ct. App. 1987); Ortiz v. State, Dep't of Health & Welfare, 113 Idaho 682, 747 P.2d 91 (Ct. App. 1987); Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987); Daniels v. Anderson, 113 Idaho 838, 748 P.2d 829 (Ct. App. 1987); R.T. Nahas Co. v. Hulet, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988); Burrup v. Stanger, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988); Northwest Roofers & Employers Health & Sec. Trust Fund v. Bullis, 114 Idaho 56, 753 P.2d 267 (Ct. App. 1988); Cardenas v. Kurpujuweit, 114 Idaho 79, 753 P.2d 290 (Ct. App. 1988); Vanoski v. Thomson, 114 Idaho 381, 757 P.2d 244 (Ct. App. 1988); Mellinger v. Idaho Dep't of Cors., 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988); Krebs v. Krebs, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988); Smallwood v. Dick, 114 Idaho 860, 761 P.2d 1212 (1988); Christensen v. Rice, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988); Pilcher v. Dattel, 115 Idaho 79, 764 P.2d 446 (Ct. App. 1988); George W. Watkins Family v. Messenger, 115 Idaho 386, 766 P.2d 1267 (Ct. App. 1988); Excel Leasing Co. v. Christensen, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989); Jensen v. Westberg, 115 Idaho 1021, 772 P.2d 228 (Ct. App. 1988); Gilbert v. Tony Russell Constr., 115 Idaho 1035, 772 P.2d 242 (Ct. App. 1989); Hudson v. Cobbs, 115 Idaho 1128, 772 P.2d 1222 (1989); Bonaparte v. Neff, 116 Idaho 60, 773 P.2d 1147 (Ct. App. 1989); Flemmer v. Tammany Elementary Sch. Dist. No. 343, 116 Idaho 204, 774 P.2d 914 (Ct. App. 1989); Milliron v. Milliron, 116 Idaho 253, 775 P.2d 145 (Ct. App. 1989); Chen v. Conway, 116 Idaho 901, 781 P.2d 238 (Ct. App. 1989); Roberts v. Swim, 117 Idaho 9, 784 P.2d 339 (Ct. App. 1989); Gee v. State, 117 Idaho 107, 785 P.2d 671 (Ct. App. 1990); Pocatello R.R. Employees Fed. Credit Union v. Galloway, 117 Idaho 739, 791 P.2d 1318 (Ct. App. 1990); Meldco, Inc. v. Hollytex Carpet Mills, Inc., 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990); State v. Barton, 119 Idaho 114, 803 P.2d 1020 (Ct. App. 1991); Justice v. State (In re Justice), 119 Idaho 158, 804 P.2d 331 (Ct. App. 1990); Abbott v. Nampa Sch. Dist. No. 131, 119 Idaho 544, 808 P.2d 1289 (1991); State v. Rodgers, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990); Alumet v. Bear Lake Grazing Co., 119

Idaho 946, 812 P.2d 253 (1991); *Burnett v. Jayo*, 119 Idaho 1009, 812 P.2d 316 (Ct. App. 1991); *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991); *Idaho State Bar v. Jenkins*, 120 Idaho 379, 816 P.2d 335 (1991); *Weaver v. Millard*, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991); *Cozzetto v. Wisman*, 120 Idaho 721, 819 P.2d 575 (Ct. App. 1991); *Hoff Cos. v. Danner*, 121 Idaho 39, 822 P.2d 558 (Ct. App. 1991); *Dante v. Golas*, 121 Idaho 149, 823 P.2d 183 (Ct. App. 1992); *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991); *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d 493 (1992); *Mundell v. Stellmon*, 121 Idaho 413, 825 P.2d 510 (Ct. App. 1992); *Rice v. Hill City Stock Yards Co.*, 121 Idaho 576, 826 P.2d 1288 (1992); *PFC, Inc. v. Rockland Tel. Co.*, 121 Idaho 1036, 829 P.2d 1385 (Ct. App. 1992); *Levin v. Levin*, 122 Idaho 583, 836 P.2d 529 (1992); *State, Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992); *McCandless v. Carpenter*, 123 Idaho 386, 848 P.2d 444 (Ct. App. 1993); *Saint Alphonsus Regional Medical Ctr., Inc. v. Krueger*, 124 Idaho 501, 861 P.2d 71 (Ct. App. 1993); *Hoffman v. State*, 124 Idaho 281, 858 P.2d 820 (Ct. App. 1993); *Gabourie v. State*, 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994); *Hausam v. Schnabl*, 126 Idaho 569, 887 P.2d 1076 (Ct. App. 1994); *Tugmon v. State*, 127 Idaho 16, 896 P.2d 342 (Ct. App. 1995); *Crown v. Hawkins Co.*, 128 Idaho 114, 910 P.2d 786 (Ct. App. 1996); *Tolman v. State*, 128 Idaho 643, 917 P.2d 800 (Ct. App. 1996); *Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996); *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997); *Dennett v. Kuenzli*, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997); *Freeman & Co. v. Bolt*,

132 Idaho 152, 968 P.2d 247 (Ct. App. 1998); *Williamson v. City of McCall*, 135 Idaho 452, 19 P.3d 766 (2001); *Beard v. George*, 135 Idaho 685, 23 P.3d 147 (2001); *Nampa & Meridian Irrigation Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001); *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002); *King v. King*, 137 Idaho 438, 50 P.3d 453 (2002); *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 50 P.3d 975 (2002); *Doe v. Doe*, 138 Idaho 893, 71 P.3d 1040 (2003); *State Dep't of Health & Welfare v. Roe (In the Interest of Doe)*, 139 Idaho 18, 72 P.3d 858 (2003); *Nampa & Meridian Irrigation Dist. v. Mussell*, 139 Idaho 28, 72 P.3d 868 (2003); *Laughlin v. State*, 139 Idaho 726, 85 P.3d 1125 (Ct. App. 2003); *Lovitt v. Robideaux*, 139 Idaho 322, 78 P.3d 389 (2003); *Murphy v. Mid-West Nat'l Life Ins. Co.*, 139 Idaho 330, 78 P.3d 766 (2003); *Bream v. Benscotter*, 139 Idaho 364, 79 P.3d 723 (2003); *Miller v. St. Alphonsus Reg'l Med. Ctr., Inc.*, 139 Idaho 825, 87 P.3d 934 (2004); *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004); *Wilson v. Gladish*, 140 Idaho 861, 103 P.3d 474 (Ct. App. 2004); *Argosy Trust v. Wininger*, 141 Idaho 570, 114 P.3d 128 (2005); *Loveland v. State*, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005); *Woodward v. State*, 142 Idaho 98, 123 P.3d 1254 (Ct. App. 2005); *Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 152 P.3d 604 (2007); *Griffin v. Anderson*, 144 Idaho 376, 162 P.3d 755 (2007); *Benninger v. Derifield*, 145 Idaho 373, 179 P.3d 336 (2008); *Kraly v. Kraly*, 147 Idaho 299, 208 P.3d 281 (2009); *Losee v. Idaho Co.*, 220 P.3d 575, 2009 Ida. LEXIS 189 (Oct. 20, 2009); *Barcella v. State*, 224 P.3d 536, 2009 Ida. App. LEXIS 110 (Nov. 13, 2009); *Mendiola v. State*, 150 Idaho 345, 247 P.3d 210 (2010); *Booth v. State*, — Idaho —, 262 P.3d 255 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Absence of Findings.
 Amendment of Findings.
 Appeals.
 Conclusions of Law.
 Conflicting Evidence.
 Contents of Findings.
 Credibility of Witnesses.
 "Decision" Defined.
 Discretion of Trial Court.
 Effect of Findings.
 Findings of Court.
 Findings Supported by Evidence.
 Form.
 Necessity of Findings.
 Prerequisite to Judgment.

Presumption of Regularity.
 Presumption of Waiver.
 Proceedings to Which Applicable.
 Proceedings to Which Not Applicable.
 Purpose.
 Referee's Findings.
 Reviewing Court.
 Signature of Judge.
 Successor Judge.
 Sufficiency of Findings.
 Support of Judgment.
 Time of Filing Findings.
 Ultimate Facts.
 Waiver of Findings.

Absence of Findings.

Where, in an action on a bail bond, the issue

of the rearrest of principal obligor is raised by pleadings and evidence, failure of court to find on that issue is reversible error. *State v. Baird*, 13 Idaho 126, 89 P. 298 (1907).

Where an action is brought to foreclose a mortgage, and a counterclaim or set-off and a claim for damages because of failure of warranty is set up as a defense, and the question of whether there is anything due the plaintiff under the issues made by the pleadings is submitted to a jury on the evidence and under the instructions of the court, and then the jury finds for the defendants in the sum of \$1, upon which the court enters a judgment, the failure of the court to make further findings of fact is not reversible error. *Edmundson v. Taylor*, 17 Idaho 618, 106 P. 991 (1910).

Failure of court to make findings of facts and conclusions of law in an action to foreclose a mechanics' lien is ground for reversal. *Jensen v. Bumgarner*, 25 Idaho 355, 137 P. 529 (1913).

On application for modification of a divorce decree in respect to the custody of a minor child, the court's failure to make and enter findings of fact and conclusions of law was error, since the trial of a question of fact was involved, and the statute requires the decision in such cases to be given in writing. *Cheesbrough v. Jensen*, 62 Idaho 255, 109 P.2d 889 (1941).

The absence of findings may be disregarded by the appellate court if the record is so clear that the court does not need their aid for a complete understanding of the issues. *Merrill v. Merrill*, 83 Idaho 306, 362 P.2d 887 (1961).

It was error for the trial court to dismiss the plaintiff's complaint without making any findings of fact and conclusions of law and, on appeal, the cause was remanded with instructions to the court to make such findings and conclusions. *Paullus v. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968).

Where no finding of fact was made in regard to representations concerning the quantity of land in the sale of a motel, the judgment in an action for misrepresentation of the land area was reversed. *King v. H.J. McNeel, Inc.*, 94 Idaho 444, 489 P.2d 1324 (1971).

The absence of findings required by this rule and Rule 65(d) may be harmless error on appeal if Supreme Court does not need their aid for complete understanding of the issues. *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

The trial court did not commit error in refusing to amend or supplement its findings of fact and conclusions of law to make them more explicit in view of the fact that the absence of such findings may be disregarded by the Appellate Court if the court does not

need their aid for a complete understanding of the issues. *Shepard v. Shepard*, 94 Idaho 734, 497 P.2d 321 (1972).

The omission of findings of fact and conclusions of law on an issue of pivotal importance at trial should be corrected. *Robinson v. Williamsen Idaho Equip. Co.*, 94 Idaho 819, 498 P.2d 1292 (1972).

The district court erred in affirming magistrate's decision where magistrate ignored portions of testimony and failed to make specific findings of fact in arriving at his order. In re *Estate of Stibor*, 96 Idaho 162, 525 P.2d 357 (1974).

Amendment of Findings.

It is not error for the court to amend its findings of fact and conclusions of law after they are filed and before entering judgment, or to vacate an order directing judgment to be entered for a certain amount and thereafter render judgment for a different amount, when the findings of fact warrant it. *Curtis v. Walling*, 2 Idaho 416, 18 P. 54 (1888).

Appeals.

Findings should be made on an appeal tried by the court from an order of the county commissioners fixing the salaries of county officers. *Reynolds v. Board of County Comm'rs*, 6 Idaho 787, 59 P. 730 (1899).

Findings of fact and conclusions of law cannot be considered as a final judgment upon which an appeal will lie. *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734 (1933).

Conclusions of Law.

Finding to effect that plaintiff failed to prove defendant owed plaintiff for legal services must be disregarded as conclusion of law. *Bentley v. Kasiska*, 49 Idaho 416, 288 P. 897 (1930).

Conflicting Evidence.

The trial judge is the arbiter of conflicting evidence; his determination of the weight, credibility, inference, and implications thereof will not be supplanted by Supreme Court's impressions or conclusions from the written record. *Boise Junior College Dist. v. Mattefs Constr. Co.*, 92 Idaho 757, 450 P.2d 604 (1969).

The trial court must weigh the credibility of conflicting testimony. *Robinson v. Williamsen Idaho Equip. Co.*, 94 Idaho 819, 498 P.2d 1292 (1972).

Contents of Findings.

There must be a finding upon every material issue whether raised upon the complaint or upon an affirmative defense alleged in the answer, and failure to find upon all material issues is ground for reversal unless the find-

ing thereon either for or against the successful party would not affect the judgment entered. The rule applies to issues raised by affirmative defenses. *Wood v. Broderson*, 12 Idaho 190, 85 P. 490 (1906).

Trial judge, finding plaintiff has not sustained allegations on issue, must specify ultimate alleged facts found not sustained by evidence. *Bentley v. Kasiska*, 49 Idaho 416, 288 P. 897 (1930).

A comparison of the court's findings of fact and its judgment with the evidence as outlined showed that while the evidence was meager, it was substantial though conflicting in its support of the court's findings of fact and judgment, therefore such findings would not be disturbed on appeal. *Shellhorn v. Shellhorn*, 80 Idaho 79, 326 P.2d 64 (1958).

Whatever may have been the tendency under the practice prior to the adoption of this rule, it is clear that under this rule there is no necessity for over-elaboration of detail or particularization of facts. *Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962).

Credibility of Witnesses.

Credibility of witnesses and inferences to be drawn from evidence are for the trial judge and his findings of fact will not be set aside on appeal unless clearly erroneous. *Johnson v. Sweeney*, 91 Idaho 805, 430 P.2d 883 (1967).

In reviewing findings of fact to determine whether they are clearly erroneous, regard must be given to the special opportunity of the trial court to judge the credibility of those witnesses who appear personally before it. *Resource Eng'g, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972).

"Decision" Defined.

Decision means the findings of fact and conclusions of law made by the court and not the judgment. *Caldwell v. Wells*, 16 Idaho 459, 101 P. 812 (1909), modified on other grounds, *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967); *Roberts v. Roberts*, 68 Idaho 535, 201 P.2d 91 (1948), modified on other grounds, *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967).

The decision of a court consists of findings of fact and conclusions of law, which must be in writing and filed with the clerk. An oral opinion announced from the bench prior to making of findings of fact and conclusions of law, or a written opinion addressed to counsel which is not in the nature of findings and conclusions, is not the decision of the court. *Stewart Mining Co. v. Ontario Mining Co.*, 23 Idaho 724, 132 P. 787 (1913), aff'd, 237 U.S. 350, 35 S. Ct. 610, 59 L. Ed. 989 (1915); *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915).

Discretion of Trial Court.

Unless discretion of trial judge clearly appears to have been unwisely exercised or to have been manifestly abused, it will not be disturbed upon appeal. *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969).

Where there was competent and substantial evidence to support the trial court's finding that plaintiff was a fit and proper person to have the care, custody and control of her child, the denial of defendants' motion to amend the court's findings of facts being within the sound discretion of the trial court will not be disturbed on appeal. *McGregor v. Phillips*, 96 Idaho 779, 537 P.2d 59 (1975).

Effect of Findings.

Findings of a court on questions of fact have force and effect of a verdict of a jury. *Eastwood v. Schultz*, 42 Idaho 118, 243 P. 653 (1926).

Findings of Court.

The findings of fact and conclusions of law required by this rule constitute the trial court's decision as to what are the ultimate facts established by the evidence and the conclusions of law resulting therefrom upon which a judgment may be entered accordingly. *Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962).

Findings Supported by Evidence.

A comparison of the court's findings of fact and its judgment with the evidence as outlined showed that while the evidence was meager, it was substantial though conflicting in its support of the court's findings of fact and judgment, therefore such findings would not be disturbed on appeal. *Shellhorn v. Shellhorn*, 80 Idaho 79, 326 P.2d 64 (1958).

The court's finding in a divorce case that plaintiff's allegations of cruel and inhuman treatment are true will not be set aside if there is evidence to support such finding even though defendant, in her testimony, denies many of plaintiff's charges. *Ferguson v. Ferguson*, 91 Idaho 33, 415 P.2d 676 (1966).

Evidence is sufficient to support the court's finding that a defendant's truck clearance lights were off at the time of the collision of a following car with the truck, with part of the witnesses testifying that the lights were burning and part that they were not. *Lindhartsen v. Myler*, 91 Idaho 269, 420 P.2d 259 (1966).

Where there was substantial and competent, though disputed, evidence of a husband's abnormal sexual habits to support the divorce court's finding that the husband was an unfit party to have the custody of his minor children, such finding would not be disturbed on appeal. *Meredith v. Meredith*, 91 Idaho 898, 434 P.2d 116 (1967).

The court's findings of fact, when supported by competent and substantial evidence, will not be disturbed on appeal. *Saviers v. Saviers*, 92 Idaho 117, 438 P.2d 268 (1968). See also *Tolman v. Tolman*, 92 Idaho 108, 437 P.2d 624 (1968).

A decree quieting title in claimant by adverse possession will not be disturbed where supported by evidence that claimant had maintained a fence about the disputed land, enclosing it with land conceded to belong to him, had been assessed for and paid taxes on it, and had been generally reputed to be the owner in the community, even though such evidence was disputed in part. *White v. Boydston*, 91 Idaho 615, 428 P.2d 747 (1967); *Rockford Equip. Co. v. J.R. Simplot Co.*, 92 Idaho 218, 440 P.2d 338 (1968).

Where the findings of the trial court are supported by substantial and competent, though conflicting evidence, such findings will not be disturbed on appeal. *Boise Junior College Dist. v. Mattefs Constr. Co.*, 92 Idaho 757, 450 P.2d 604 (1969); *Jones v. Big Lost River Irrigation Dist.*, 93 Idaho 227, 459 P.2d 1009 (1969); *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969); *Heckman v. Boise Valley Livestock Comm'n Co.*, 92 Idaho 862, 452 P.2d 359 (1969); *McPheters v. Hapke*, 94 Idaho 744, 497 P.2d 1045 (1972); *Deer Creek, Inc. v. Hibbard*, 94 Idaho 533, 493 P.2d 392 (1972).

Where the findings of the trial court are supported by substantial and competent, though conflicting evidence, such findings will not be disturbed on appeal. *Thompson v. Fairchild*, 93 Idaho 584, 468 P.2d 316 (1970); *Smith v. Daniels*, 93 Idaho 716, 471 P.2d 571 (1970).

Where finding of fact was supported by competent evidence and was only attacked by conjunctural arguments, it was not to be upheld. *Darrar v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 94 Idaho 772, 497 P.2d 1399 (1972).

Findings of the trial court supported by substantial and competent evidence will not be disturbed on appeal. *Hyde v. Lawson*, 94 Idaho 886, 499 P.2d 1242 (1972), overruled on other grounds, *Nesbitt v. Wolkriel*, 100 Idaho 396, 598 P.2d 1046 (1979) and *Trappett v. Davis*, 102 Idaho 527, 633 P.2d 592 (1981).

Findings of fact made by the trial court will not be set aside unless they are clearly erroneous, and such findings of fact are not clearly erroneous if supported by substantial competent evidence. *Craig H. Hisaw, Inc. v. Bishop*, 95 Idaho 145, 504 P.2d 818 (1972); *Sundowner, Inc. v. King*, 95 Idaho 367, 509 P.2d 785 (1973); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

Where the award of the district court in judgment for plaintiff represented an implicit

finding that plaintiff had performed in accordance with what was promised and there was no breach by plaintiff, and such factual determination found substantial support in the evidence and was not clearly erroneous the determination was not disturbed on appeal. *Ross v. Olson*, 95 Idaho 915, 523 P.2d 518 (1974).

Where testimony concerning the rental value of the ranch was conflicting but the trial court's finding was supported by evidence, factual findings will not be disturbed on appeal when they are supported by substantial, though conflicting evidence and they will not be set aside unless clearly erroneous. *Enders v. Wesley W. Hubbard & Sons*, 95 Idaho 908, 523 P.2d 40 (1974).

Where parties trying to establish the value of disputed property offered varying testimony by expert witnesses on comparable sales of property, the fact the district court gave greater weight to certain portions of the testimony was permissible and the valuation, supported by substantial and competent, although conflicting, evidence was not clearly erroneous and will not be disturbed. *Parker v. Parker*, 95 Idaho 876, 522 P.2d 788 (1974).

In an action brought by the sellers of a motel against the buyers to obtain reimbursement for a sales tax levied as a result of the transaction, evidence that sellers had committed themselves to a position of not requiring buyers to pay the sales tax was sufficient to sustain the trial court's finding that sellers were estopped to obtain reimbursement for the sales tax from buyers. *Evans v. Idaho State Tax Comm'n*, 97 Idaho 148, 540 P.2d 810 (1975).

Where a mother, who violated the original divorce decree, chose employment that prevented her from spending time with her children and the former husband had remarried and could provide the children with an adequate home, the trial court's finding that the substantial change in circumstances materially affected the children's welfare and thereby justified modification of the initial custody award was grounded on substantial competent evidence. *Prescott v. Prescott*, 97 Idaho 257, 542 P.2d 1176 (1975).

In action to admit alleged will to probate where proponent asserted that handwritten message contained in greeting card sent to her by decedent prior to death was executed with testamentary intent by which decedent intended to devise all his real property to proponent upon his death, but where decedent's widow presented testimony of friends and relatives that on several occasions decedent had said that he did not have a will and that everything was to go to his wife, the

district court did not err in denying the greeting card probate as a holographic will because decedent did not write the card with testamentary intent. *In re Estate of Webber*, 97 Idaho 703, 551 P.2d 1339 (1976).

Form.

Decision of court should not contain a statement of the case and the reason for the decision but should contain only the ultimate facts established by the evidence and the conclusions of law resulting therefrom; an opinion of the lower court is not a decision within the meaning of this section, and when made should be separate from the findings of fact and conclusions of law. *Hamilton v. Spokane & P. Ry.*, 3 Idaho 164, 28 P. 408 (1891).

The practice of referring to extraneous matters, such as maps and plats, in the findings and judgment for any matter which should be incorporated in the findings and judgment, should be discouraged, but indulgence therein is not of itself ground for a reversal of the judgment. *Murry v. Nixon*, 10 Idaho 608, 79 P. 643 (1905).

The judgment and findings are not required to be on separate pieces of paper; all that is required is to state the findings and conclusions separately, and to follow them by a judgment based thereon. *Dukes v. Board of County Comm'rs*, 17 Idaho 736, 107 P. 491 (1910).

In the decision, the facts found and the conclusions of law must be separately stated and such decision must be in writing and filed with the clerk. *Page v. Noland*, 85 Idaho 369, 379 P.2d 661 (1963).

The setting forth of the court's findings of fact and conclusions of law in separately numbered paragraphs, with the factual findings and the legal conclusions separately stated complies with this rule. *County of Bonner v. Dyer*, 92 Idaho 699, 448 P.2d 986 (1968).

Necessity of Findings.

In a proceeding to remove a public officer from office, the fact that the court does not find as a fact that the wrongful acts of the officer were committed fraudulently, wilfully, or corruptly, is not ground for reversal of judgment for removal where such facts are found under conclusions of law. *Miller v. Smith*, 7 Idaho 204, 61 P. 824 (1900).

There must be a finding upon every material issue whether raised on the complaint or upon an affirmative defense alleged in the answer, and failure to find upon all material issues is ground for reversal unless a finding thereon either for or against the successful party would not affect the judgment entered. The rule applies to issues raised by affirma-

tive defenses. *Wood v. Broderson*, 12 Idaho 190, 85 P. 490 (1906).

Where all of the facts are stipulated, no findings of fact or formal conclusions of law are necessary; but where only part of the facts are stipulated, findings are required. *McKune v. Continental Cas. Co.*, 28 Idaho 22, 154 P. 990 (1915).

Findings of fact and conclusions of law are not necessary where verdict is directed. *Farm Credit Corp. v. Rigby Nat'l Bank*, 49 Idaho 444, 290 P. 211 (1930).

If no waiver by parties where court made no finding of fact and conclusion of law in entering order of dismissal, it was a non-suit and not a dismissal on the merits. *Quinn v. Hartford Accident & Indem. Co.*, 71 Idaho 449, 232 P.2d 965 (1951), overruled on other grounds, *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977).

Where the district court modified a divorce decree with respect to custody of the children in a proceeding where the evidence was conflicting, without written findings of fact and conclusions of law, the order was reversed and the district court directed to retry the case, make appropriate findings of fact and conclusions of law, and enter an order based thereon. *Clark v. Clark*, 89 Idaho 91, 403 P.2d 570 (1965).

Findings of fact are necessary when the court grants an involuntary dismissal under this rule but not when the court grants a directed verdict in a jury case. *Bauscher Grain v. National Sur. Corp.*, 92 Idaho 229, 440 P.2d 349 (1968).

Prerequisite to Judgment.

The decision of the court, findings of fact unless waived, and conclusions of law, must be given in writing and filed with the clerk, and until such is done there is no authority for entering a judgment. *Stewart Whsle. Co. v. District Judge*, 41 Idaho 572, 240 P. 597 (1925).

Presumption of Regularity.

In the absence of findings from the record it will be presumed that such findings were made and are not included in the record, or that they were waived, unless some showing is made to the contrary. *Bunnell & Eno Inv. Co. v. Curtis*, 5 Idaho 652, 51 P. 767 (1897); *McCormick v. Friedman*, 7 Idaho 686, 65 P. 440 (1901).

Presumption of Waiver.

Where record does not show affirmatively that findings of fact were not waived, it will be presumed that they were waived. *Squier v. Lowenberg*, 1 Idaho 785 (1880); *Parker v. Beagle*, 4 Idaho 453, 40 P. 61 (1895); *McCor-*

nick v. Friedman, 7 Idaho 686, 65 P. 440 (1901).

Proceedings to Which Applicable.

District court on appeal from reclamation commissioner's order permitting change in point of diversion and place of use of water should make and file fact findings and conclusions of law. In re Johnson, 50 Idaho 573, 300 P. 492 (1931).

The former similar rule applied to a proceeding for modification of a child custody order in a divorce proceeding. Clark v. Clark, 89 Idaho 91, 403 P.2d 570 (1965).

Proceedings to Which Not Applicable.

Findings by the court are not required when a cause is tried by a jury. The verdict of the jury is the finding upon which judgment should be rendered. Findings are made by the court only upon the trial of questions of fact by the court. Jenkins v. Commercial Nat'l Bank, 19 Idaho 290, 113 P. 463 (1911).

In summary judgment cases, findings of fact are not required at all. D & M Dev. Co. v. Sherwood & Roberts, Inc., 93 Idaho 200, 457 P.2d 439 (1969).

Purpose.

The purpose of requiring findings of fact and conclusions of law is to aid the appellate court by affording it a clear understanding of the basis of the decision of the trial court. Merrill v. Merrill, 83 Idaho 306, 362 P.2d 887 (1961).

Referee's Findings.

Court cannot set aside findings of referee and substitute findings on its own motion, in absence of any exceptions to referee's findings, or appropriate motion attacking same. Walker v. Campbell, 3 Idaho 13, 26 P. 123 (1891).

Reviewing Court.

Under the mandate of this rule, a reviewing court is to accept a trial court's findings of facts unless clearly erroneous and if conflicting inferences may be drawn from the established facts, it is not within the purview of the appellate court to substitute its judgment for that of the trial court. Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788 (1962).

Signature of Judge.

The judge is not required to sign the findings of fact and conclusions of law, but it is customary to do so. Shurtliff v. Extension Ditch Co., 14 Idaho 416, 94 P. 574 (1908).

Successor Judge.

It is clear that if the trial judge has rendered a decision in the form of findings and conclusions, his successor has the power to

render judgment thereon without a trial de novo. Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788 (1962).

Sufficiency of Findings.

A finding that all the issues of fact raised by the pleadings are hereby found and decided in favor of defendant and against the plaintiff is indefinite and insufficient. Stoneburner v. Stoneburner, 11 Idaho 603, 83 P. 938 (1905).

A finding that damages sought to be recovered accrued within the period covered by the statute of limitations immediately prior to the commencement of the action, when such statute is made a defense, is a sufficient finding on such defense and negatives it. Shurtliff v. Extension Ditch Co., 14 Idaho 416, 94 P. 574 (1908).

A general finding that all the material allegations of the answer were supported by the evidence and were true, and that all the material allegations of plaintiff's complaint in conflict with the foregoing findings were unsupported by the evidence and were untrue, is not sufficient. Sterrett v. Sweeney, 15 Idaho 416, 98 P. 418 (1908).

Where all of the findings of fact made by the cross-complaint alleging a resulting trust are that court finds "that there is no competent evidence to sustain the facts as stated in the allegation," it is not a sufficient finding of fact. Pittock v. Pittock, 15 Idaho 426, 98 P. 719 (1908).

Support of Judgment.

Where a case is submitted to the court upon agreed stipulation of facts and the trial court makes findings, a part of which are not fully supported by the stipulated facts, the case will not be reversed and sent back for further findings where the law applicable to the agreed state of facts warrants and supports the judgment. McKune v. Continental Cas. Co., 28 Idaho 22, 154 P. 990 (1915).

This court has repeatedly held that findings of fact will be liberally construed in favor of the judgment and on appeal this court is entitled to draw the necessary inferences from the trial court's express findings to support the judgment. Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788 (1962).

Time of Filing Findings.

Findings of fact and conclusions of law should ordinarily be filed preceding or contemporaneously with the judgment based thereon. Roberts v. Roberts, 68 Idaho 535, 201 P.2d 91 (1948), modified on other grounds, Knudson v. Bank of Idaho, 91 Idaho 923, 435 P.2d 348 (1967).

Where the findings of fact and conclusions of law were made and entered after the entry

of the court’s ruling on a motion for modification of custody and support, in the absence of prejudice shown, such findings and conclusions, though filed later, were properly filed. *Montgomery v. Montgomery*, 89 Idaho 319, 404 P.2d 610 (1965).

Ultimate Facts.

Ultimate facts and not probative facts are

required to be found. *Ryan v. Rogers*, 14 Idaho 309, 94 P. 427 (1908).

Waiver of Findings.

Guardian ad litem of insane person could waive findings of fact and conclusions of law. *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931).

RESEARCH REFERENCES

A.L.R. Power of trial court, on remand for further proceedings, to change prior fact findings as to matter not passed upon by appellate court, without receiving further evidence. 19 A.L.R.3d 502.

Application of “clearly erroneous” test by Rule 52(a) of Federal Rules of Civil Procedure to trial court’s findings of fact based on documentary evidence. 11 A.L.R. Fed. 212.

Rule 52(b). Amendment of findings of court.

A motion to amend findings or conclusions or to make additional findings or conclusions shall be served not later than fourteen (14) days after entry of the judgment, and if granted the court may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment. No party may assign as error the lack of findings unless the party raised such issue to the trial court by an appropriate motion. (Amended February 10, 1993, effective July 1, 1993; amended effective July 1, 2004.)

STATUTORY NOTES

Cross References. Enlargement of time, Rule 6(b).

New trials, amendment of judgments, Rule 59(a).

Stay on motion for amendment of findings, Rule 62(b).

JUDICIAL DECISIONS

ANALYSIS

Appellate Review.
Discretion of Trial Court.

Appellate Review.

The motion to void the settlement agreement reached by the parties in open court, as to which certain documents had not yet been executed, upon the grounds that the defendant movant was legally incompetent to enter into a settlement, in effect was asking the court to amend its findings of fact, which is permitted by this rule, and where there was substantial competent evidence to support

the district court’s findings that the movant possessed sufficient mind to reasonably understand the nature, extent, character, and effect of the settlement in question, and sufficient evidence was produced at the hearing to demonstrate this, the district court’s denial of the motion would not be disturbed. *Johnson v. Edwards*, 113 Idaho 660, 747 P.2d 69 (1987).

Because a property owner did not raise to the district court the alleged lack of findings regarding maintenance practices, by an adjoining owner, on a water pipeline located on the first owner’s property, that owner was not entitled to assign the trial court’s lack of

findings on that issue as error on appeal. *Bedke v. Pickett Ranch & Sheep Co.*, 143 Idaho 36, 137 P.3d 423 (2006).

Discretion of Trial Court.

Where the trial court's findings of fact and conclusions of law covered the essential facts and propositions of law introduced in an action brought by a former tenant against purchasers of leased property, denial of the purchasers' motion to amend the findings or to make additional findings was not an abuse of discretion. *Bair v. Barron*, 97 Idaho 26, 539 P.2d 578 (1975).

Cited in: *Sines v. Blaser*, 98 Idaho 435, 566

P.2d 758 (1977); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Tanner v. Estate of Cobb*, 101 Idaho 444, 614 P.2d 984 (1980); *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981); *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987); *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987); *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d 493 (1992); *Saint Alphonsus Regional Medical Ctr., Inc. v. Krueger*, 124 Idaho 501, 861 P.2d 71 (Ct. App. 1993); *Hausam v. Schnabl*, 126 Idaho 569, 887 P.2d 1076 (Ct. App. 1994); *PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 200 P.3d 1180 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Amendment After Appeal Perfected.
Motion to Amend.

Amendment After Appeal Perfected.

The perfecting of an appeal divested the trial court of further jurisdiction and it could not entertain a motion to amend and alter the findings of fact and conclusions of law and vacate the judgment filed thereafter although filed within the time limit of the former similar rule. *Dolbeer v. Harten*, 91 Idaho 141, 417 P.2d 407 (1965).

Motion to Amend.

Where, without knowing that findings had already been signed by district judge, defendant's counsel filed "Objection to Proposed Findings", such document is to be regarded as a motion to make additional findings; therefore, appeal taken within 60 days from hearing on motion, but more than 60 days after the entry of judgment, was timely. *Kelson v. Ahlborn*, 87 Idaho 519, 393 P.2d 578 (1964).

RESEARCH REFERENCES

A.L.R. Power of successor or substituted Judge, in civil case, to render decision or enter

judgment on testimony heard by predecessor. 84 A.L.R.5th 399.

Rule 53(a)(1). Masters — Appointment and compensation.

The court in which any action is pending may appoint a special master therein. Except where these rules are inconsistent with the law, the word "master" includes a referee, a commissioner, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court as the court may direct. The master shall not retain the report as security for compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party. (Amended March 9, 1999, effective July 1, 1999.)

STATUTORY NOTES

Cross References. Draft report, Rule 53(e)(5).

Findings of master, extent of adoption by court, Rule 52(a).

Powers, Rule 53(c).
 Proceedings and meetings, Rule 53(d)(1).
 Reference, Rule 53(b).
 Report, contents and filing, Rule 53(e)(1).
 Report in jury actions, Rule 53(e)(3).

Report in nonjury actions, Rule 53(e)(2).
 Statement of accounts, Rule 53(d)(3).
 Stipulation as to findings, Rule 53(e)(4).
 Witnesses, Rule 53(d)(2).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appointment After Appeal.
 Discretion of Trial Court.
 Preservation of Remedies After Dismissal.
 Reference Against Objection of Parties.

Appointment After Appeal.

Neglect to execute certain conveyances directed in carrying out judgment of lower court will warrant appointment of referee even after appeal has been taken in case. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923).

Discretion of Trial Court.

District court judge was acting within his discretion in ordering a survey of the lands in question to assist him in the preparation of judgment, findings of fact and conclusions of law. *Felton v. Prather*, 95 Idaho 280, 506 P.2d 1353 (1973).

State was not entitled to a writ of prohibition to enjoin a district court from assessing fees for a special master against the State

because the appointment of special masters and the assessment of special master costs were matters within the discretion of the district courts. Clear statutory authority existed for the award of such fees, as well direction as to how costs awarded against the State were to be paid. *State v. District Court*, 143 Idaho 695, 152 P.3d 566 (2007).

Preservation of Remedies After Dismissal.

This rule did not require that a master give notice to the court that he had not been paid in order to preserve his remedies after dismissal. *Inland Group of Cos. v. Obendorff*, 131 Idaho 473, 959 P.2d 454 (1998).

Reference Against Objection of Parties.

In an action at law parties are entitled as of right to a trial by jury, and court cannot refer the case against objection of parties even though it requires the examination of a long account. *Russell v. Alt*, 12 Idaho 789, 88 P. 416 (1907).

RESEARCH REFERENCES

A.L.R. "Final submission," submission to referee as, within statute permitting plaintiff

to take voluntary dismissal without prejudice before final submission. 31 A.L.R.3d 449.

Rule 53(a)(2). Disqualification of master.

Any person appointed as a master in a trial of an action shall be disqualified upon the finding of the existence of a relation or a condition of such person which would be grounds for disqualification of a judge for cause as prescribed by statute or these rules.

Rule 53(a)(3). Motion and notice for disqualification.

At any time within fourteen (14) days from receipt of notice of the appointment of a master in an action, any party thereto may object to the qualification of such masters by filing a motion to disqualify the master and stating the grounds in support thereof. Such motion may be supported by affidavit and shall be noticed for hearing and determined by the court in the same manner as other motions under these rules. The court, in its discretion, may hear testimony on such motion or may determine the same upon the record including affidavits and counter-affidavits filed by the parties or the master. (Amended June 15, 1987, effective November 1, 1987.)

Rule 53(b). Reference to a master.

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appointment After Appeal.
Discretion of Court.
Reference Against Objection.
Validity of Order.
Water Rights in a Stream.

Appointment After Appeal.

Neglect to execute certain conveyances directed in carrying out judgment of lower court will warrant appointment of referee even after appeal has been taken in case. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923).

Discretion of Court.

Trial court did not abuse its discretion in denying motion to appoint referees to ascertain highwater mark in proceeding to determine littoral rights of adjoining lake property owners where motion was not introduced until after all of the evidence had been introduced, and after the court had inspected the properties involved. *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951).

Reference Against Objection.

In an action at law parties are entitled as of

right to a trial by jury, and court cannot refer the case against objection of parties even though it requires the examination of a long account. *Russell v. Alt*, 12 Idaho 789, 88 P. 416 (1907).

Validity of Order.

Part of order appointing referee, which directs referee to report his conclusions of fact and law to court, is not binding on court but is only for its information and does not in any way invalidate order. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

Water Rights in a Stream.

Statutory provisions authorize the appointment of a referee in suit to adjudicate water rights in a stream where parties are numerous and the convenience of witnesses and ends of justice would be promoted thereby. It does not contemplate that referee will be appointed, thus increasing cost of suit, unless it is necessary to do so. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

RESEARCH REFERENCES

A.L.R. What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b). 1 A.L.R. Fed. 922.

Rule 53(c). Powers of master.

The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The master may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule

upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 103 of the Idaho Rules of Evidence. (Amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Cross References. Reference to, to determine account or amount of damages in default judgment, Rule 55(b)(2).

Rules of evidence, application to masters proceedings, I.R.E., Rule 101.

Rulings on evidence, I.R.E., Rule 103.

JUDICIAL DECISIONS

Limitation on Powers.

The power of the master is determined by his order of reference, and he possesses no power to hear controversies or perform acts outside the scope of the order. *Olson v. Idaho Dep't of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983).

Special master in water rights dispute who was empowered to hear objections to the department of water resources' proposed find-

ings of water rights and to make findings of fact and conclusions of law on those objections, was not empowered to resolve a contract dispute between the parties concerning the enforceability of an oral stipulation; in doing so, the special master was acting in excess of his authority, and the district court erred in accepting the special master's report. *Olson v. Idaho Dep't of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adjudication of Water Rights.

Binding Effect of Order.

Record.

Source of Referee's Power or Authority.

Adjudication of Water Rights.

Statutory provisions authorized the appointment of a referee in suit to adjudicate water rights of a stream where parties are numerous and the convenience of witnesses and ends of justice would be promoted thereby. It does not contemplate that referee will be appointed, thus increasing cost of suit, unless it is necessary to do so. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

Binding Effect of Order.

Part of order appointing referee, which di-

rects referee to report his conclusions of fact and law to court, is not binding on court but is only for its information and does not in any way invalidate order. *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904).

Record.

The only record under which a referee can act is the one duly made and entered of record before he enters upon his duties. *Taylor v. Peterson*, 1 Idaho 513 (1866).

Source of Referee's Power or Authority.

The power and authority of the referee is determined by the order of reference or stipulation of the parties, and the referee does not possess any power or authority not found therein. *Idaho Placer Mining Co. v. Green*, 14 Idaho 294, 94 P. 161 (1908).

RESEARCH REFERENCES

A.L.R. Power of successor or substituted master or referee to render decision or enter

judgment on testimony heard by predecessor. 70 A.L.R.3d 1079.

Rule 53(d)(1). Proceedings — Meetings.

When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

Rule 53(d)(2). Witnesses.

The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

STATUTORY NOTES

Cross References. Contempt for failure to comply with order, Rule 37(b)(1).

Contempt for failure to obey subpoena, Rule 45(f).

Rule 53(d)(3). Statement of accounts.

When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

DECISIONS UNDER PRIOR RULE OR STATUTE**Reference Against Objection.**

In an action at law parties are entitled as of right to a trial by jury, and court cannot refer the case against objection of parties even

though it requires the examination of a long account. *Russell v. Alt*, 12 Idaho 789, 88 P. 416 (1907).

Rule 53(e)(1). Master's report — Contents and filing.

The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report, separately

stated. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

STATUTORY NOTES

Cross References. Judgments, report of a master not contained in, Rule 54(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Remand of Case to Referee.
Sufficiency to Sustain Judgment.

Remand of Case to Referee.

Where a referee is called to examine all evidence in case and to report a judgment subject to approval of court on all the issues, but fails in his report to find upon all the issues of fact, court may remand case to the referee to bring in further findings covering the omitted issues without any further consent of parties. Robinson v. Nelson, 4 Idaho 567, 43 P. 64 (1895).

Sufficiency to Sustain Judgment.

Where a referee, in an action to recover

compensation for services rendered, found that it was an oral contract for the performance of certain services supplemented by other oral conversations and understandings, such finding though uncertain and indefinite was a positive ascertainment that the plaintiff had performed services for the defendant at the latter's instance and request, rendering a more specific finding unnecessary and opening the field to quantum meruit save where, in particular instance, some items may have rested in special agreement. Sarvis v. Childs Bond & Mtg. Co., 49 Idaho 79, 286 P. 914 (1930).

Rule 53(e)(2). Master's findings in nonjury actions.

In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within fourteen (14) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. (Amended June 15, 1987, effective November 1, 1987.)

STATUTORY NOTES

Compiler's Notes. Rule 6(d), referred to at the end of the third sentence, was repealed by a court order dated April 22, 2004, effective

July 1, 2004. For present comparable provisions, see Rule 7(b)(3).

JUDICIAL DECISIONS

ANALYSIS

Adequate Review of Findings.

Adoption.

Effect of Master's Findings.

Master's Conclusions of Law.

Timeliness of Appeal

Adequate Review of Findings.

Where the court indicated that it reviewed documents, affidavits and other papers prior to accepting the findings of fact, heard objections to the findings and made a number of corrections and changes to the master's report, there was ample evidence that the court performed an adequate and careful review prior to accepting the master's findings of fact. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

Adoption.

The appointment of a master does not displace the district court's role as the ultimate trier of fact. Under this rule, the district court is mandated to accept the master's findings of fact unless clearly erroneous; consequently, the trial court must independently review the evidence to determine whether the findings were supported by substantial evidence. The master's conclusions of law, however, carry no weight with the trial court. Therefore, this Rule 53(e)(2) permits the court to adopt the master's report, modify it, supplement it with further evidence, recommit it to the master with instructions, or reject it in whole or in part. *Secombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989).

While this rule requires the court to carefully consider any objections by the parties to the master's report, there is nothing in Rule 53 which precludes the court from adopting the master's factual findings verbatim if not clearly erroneous. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

Effect of Master's Findings.

The procedures for considering the findings of a master pursuant to this rule do not control an action for summary supplemental adjudication of water rights; the effect of the report of the director of water resources is not the same as the effect of the findings of a

master, as the director's report is only one of the pleadings in a supplemental adjudication, and only if there is no objection is a portion of the report considered to be admitted. *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990).

Master's Conclusions of Law.

Unlike the master's findings of fact, this rule does not require the court to adopt the master's proposed conclusions of law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

While the master's proposed conclusions of law are not binding on the district court, they are intended to be persuasive, and a court is free to adopt the master's proposed conclusions of law if they correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

Purchaser of foreclosed property was not entitled to receive attorney fees under I.C. § 11-402 because the purchaser was not a judgment creditor, and there was no provision for recovering other expenses and improvements either. A district court was not required to accept a contrary determination by a special master because the special master's decision on such was merely persuasive since it concerned questions of law. *Riley v. W. R. Holdings, LLC*, 143 Idaho 116, 138 P.3d 316 (2006).

Timeliness of Appeal

Where appellants paid to use water from the city's pipeline, they were not entitled to claim ownership of water rights after the pipeline was cut and capped by the city; property held by a municipality in trust for public use could not be acquired by adverse possession or prescription; when the district court adopted the special master's summary judgment recommendation to deny appellants' claimed water rights, appellants' motion to challenge the special master's decision was not timely filed within 14 days in accordance with Idaho R. Civ. P. 53(e)(2); the district court did not abuse its discretion by denying appellants' motion to deem their challenge as timely filed under Idaho R. Civ. P. 6(b). *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 237 P.3d 1 (2010).

Cited in: *Higley v. Woodard*, 124 Idaho 531, 861 P.2d 101 (Ct. App. 1993).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adoptions As Findings of Court.
 Authority Exceeded.
 Findings As Special Verdict.
 Objection to Appointment.
 Setting Aside Findings.

Adoptions As Findings of Court.

Where the complaint and answer pray for the appointment of a referee to take an account and report findings to the court and such report of findings is made, the court may then adopt the same as the findings of the court. *McElroy v. Whitney*, 12 Idaho 512, 88 P. 349 (1906).

Authority Exceeded.

Objection that referee has exceeded his authority in making certain findings must be made in trial court and comes too late when first suggested on appeal. *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

Special master in water rights dispute who was empowered to hear objections to the department of water resources' proposed findings of water rights and to make findings of fact and conclusions of law on those objections, was not empowered to resolve a contract dispute between the parties concerning the enforceability of an oral stipulation; in

doing so, the special master was acting in excess of his authority, and the district court erred in accepting the special master's report. *Olson v. Idaho Dep't of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983).

Findings As Special Verdict.

Findings of referee having effect of special verdict are to be governed by statute regarding special verdicts. *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

Objection to Appointment.

Where in an action to regain possession of a farm that was leased to the defendant and for an accounting of all sales of crops and livestock raised on the premises, neither party objected to the appointment of a special master to perform the accounting task, the question of whether the master's appointment or his findings was proper was waived. *Gemkist Farms, Inc. v. Bolen*, 102 Idaho 906, 643 P.2d 1076 (Ct. App. 1982).

Setting Aside Findings.

Court cannot set aside findings of referee and substitute findings on its own motion in absence of any exceptions to referee's findings, or appropriate motion attacking same. *Walker v. Campbell*, 3 Idaho 13, 26 P. 123 (1891).

Rule 53(e)(3). Master's report in jury actions.

In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Authority of Referee.
 Setting Aside Findings.

Authority of Referee.

The power and authority of the referee is determined by the order of reference or stipulation of the parties, and the referee does not possess any power or authority not found therein. *Idaho Placer Mining Co. v. Green*, 14 Idaho 294, 94 P. 161 (1908).

Objection that referee has exceeded his

authority in making certain findings must be made in trial court and comes too late when first suggested on appeal. *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

Setting Aside Findings.

Court cannot set aside findings of referee and substitute findings on its own motion, in absence of any exceptions to referee's findings, or appropriate motion attacking same. *Walker v. Campbell*, 3 Idaho 13, 26 P. 123 (1891).

Rule 53(e)(4). Stipulation as to findings of master.

The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Authority of Referee.
Effect of Stipulation.

Authority of Referee.

The power and authority of the referee is determined by the order of reference or stipulation of the parties, and the referee does not possess any power or authority not found therein. *Idaho Placer Mining Co. v. Green*, 14 Idaho 294, 94 P. 161 (1908).

Effect of Stipulation.

In action for accounting as to partnership affairs, the parties having stipulated that they would be bound by referee's report, assignments of error challenging the completeness of the report submitted to the court, not being directed to questions of law, are not meritorious. *Wahlen v. Siaperas*, 93 Idaho 265, 460 P.2d 400 (1969).

Rule 53(e)(5). Draft report of master.

Before filing a report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

JUDICIAL DECISIONS

Cited in: *Wahlen v. Siaperas*, 93 Idaho 265, 460 P.2d 400 (1969).

Rule 54(a). Judgments — Definition — Form.

"Judgment" as used in these rules means a separate document entitled "Judgment" or "Decree". A judgment shall state the relief to which a party is entitled on one or more claims for relief in the action. Such relief can include dismissal with or without prejudice. A judgment shall not contain a recital of pleadings, the report of a master, the record of prior proceedings, the court's legal reasoning, findings of fact, or conclusions of law. A judgment is final if either it has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action. (Amended March 29, 2010, effective July 1, 2010.)

STATUTORY NOTES

Cross References. Amendment of judgments, grounds, Rule 59(a).
Costs, Rule 54(d).
Declaratory judgments, Rule 57.
Default judgment, entry, Rule 55(b)(1).
Default judgments, Rule 55(a)-55(e).
Demand for judgment, Rule 54(c).
Grounds for motion for relief from judgment, Rule 60(b).

Harmless error not ground for setting aside, Rule 61.

Judgment notwithstanding the verdict, motion for, Rule 50(b).

Motion to alter or amend judgment, Rule 59(e).

Multiple claims, judgment upon, Rule 54(b).

Offer of judgment, Rule 68.

Pleading a judgment, Rule 9(e).

Stay on proceedings to enforce judgment,
Rule 62(b).

Summary judgments, Rules 56(a)-56(g).

Vesting title by judgment, Rule 70.

JUDICIAL DECISIONS

ANALYSIS

Attorney's Fees.

—Memorandum of Costs.

Factors Considered.

Finality of Judgment.

Prevailing Party.

Summary Judgment.

Attorney's Fees.

The legislature enacted a set of guidelines for the judge to consider in awarding attorney's fees but failure to specifically address each separate factor does not, by itself constitute a "clear manifest abuse of discretion." *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 766 P.2d 1227 (1988).

Separate certification of finality was not required for the order awarding attorney fees to be appealable when entered. *Wilsey v. Fielding*, 115 Idaho 437, 767 P.2d 280 (Ct. App. 1989).

Because lessees' appeal of judgment against them for breach of farmland lease agreement simply disputed the district court's factual findings, which were supported by substantial although conflicting evidence, and an appeal should do more than invite the appellate court to second-guess the trial court on conflicting evidence, the appeal was frivolous; attorney fees and costs were awarded on appeal to lessors. *Zanotti v. Cook*, 129 Idaho 151, 922 P.2d 1077 (Ct. App. 1996).

In an action arising from a breach of a contract to design and construct a cabin, a wholesale supplier who prevailed on summary judgment was properly awarded costs and attorney fees, and pursuant to I.R.C.P. 54(e), the district court did not abuse its discretion in limiting the amount of attorney fees because the wholesale supplier's defense was not complicated. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

—Memorandum of Costs.

A magistrate's determination to award fees to defendant constituted an "order from which an appeal lies," within the definition of a judgment as described in this rule, and as that term is therefore used in I.R.C.P. 54(d)(5) regulating the filing of a memorandum of costs; therefore, where defendant's memorandum of costs was not filed within fourteen days after the magistrate court entered its decision entitling him to the award, by the

express provision of I.R.C.P. 54(d)(5), the right to recover that award was waived. *Harney v. Weatherby*, 116 Idaho 904, 781 P.2d 241 (Ct. App. 1989).

Factors Considered.

It does not follow that just because the trial court only wrote on the contingent fee element, it failed to consider the other factors enumerated in this rule. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 766 P.2d 1227 (1988).

Finality of Judgment.

Because a partial judgment, certified under I.R.C.P. 54(b)(1) as final for appeal in an easement dispute, was "final" as provided in this rule, the district court had discretion under I.R.C.P. 54(d)(1)(B) to award costs and fees; and it acted within its discretion when it found that there was no prevailing party. *Caldwell v. Cometto*, — Idaho —, 253 P.3d 708 (2011).

Prevailing Party.

In a medical malpractice suit, a district court awarded two anesthesiologists costs because the anesthesiologists prevailed on their motions for summary judgment; however, the award was vacated when the summary judgment was vacated. *Foster v. Traul*, 145 Idaho 24, 175 P.3d 186 (2007).

Summary Judgment.

Where the county issued a permit to allow the owners to build a cabin according to certain plan specifications that were approved by the county building inspector, neither the county nor the building inspector was liable for negligence when it was later determined that the cabin structure did not meet snow load requirements, and as the prevailing parties upon summary judgment, the district court properly awarded the county and the building inspector costs pursuant to I.R.C.P. 54. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Cited in: *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986); *Murr v. Odmark*, 112 Idaho 606, 733 P.2d 827 (Ct. App. 1987); *Southern Idaho Prod. Credit Ass'n v. Astorquia*, 113 Idaho 526, 746 P.2d 985 (1987); *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988); *Black v. Fireman's Fund Am. Ins. Co.*, 115 Idaho 449, 767 P.2d 824 (Ct. App. 1989); *Doe I v. Doe II*, 128 Idaho 144, 911 P.2d 140 (Ct. App. 1996);

Powder Basin Psychiatric Assocs. v. Ullrich, 129 Idaho 658, 931 P.2d 652 (Ct. App. 1996); Andrea v. City of Coeur d'Alene, 132 Idaho 188, 968 P.2d 1097 (Ct. App. 1998); D.A.R., Inc. v. Sheffer, 134 Idaho 141, 997 P.2d 602 (2000); Simons v. Simons, 134 Idaho 824, 11 P.3d 20 (2000); Stanley v. McDaniel, 134 Idaho 630, 7 P.3d 1107 (2000); Boel v. Stewart Title Guar. Co., 137 Idaho 9, 43 P.3d 768 (2002); Sainsbury Constr. Co. v. Quinn, 137 Idaho 269, 47 P.3d 772 (Ct. App. 2002); Covington v. Jefferson County, 137 Idaho 777, 53

P.3d 828 (2002); Silsby v. Kepner, 140 Idaho 412, 95 P.3d 30 (Ct. App. 2003); Garner v. Bartschi, 139 Idaho 430, 80 P.3d 1031 (2003); Twin Falls County v. Coates, 139 Idaho 442, 80 P.3d 1043 (2003); KEB Enters., L.P. v. Smedley, 140 Idaho 746, 101 P.3d 690 (2004); McCorkle v. Northwestern Mut. Life Ins. Co., 141 Idaho 550, 112 P.3d 838 (Ct. App. 2005); McDewitt v. Sportsman's Warehouse, Inc., — Idaho —, 255 P.3d 1166 (2011); Nava v. Toro, — Idaho —, 264 P.3d 960 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Dismissal Orders.
Intervention.
"Judgment" Defined.
Partial Summary Judgment.
Quiet Title Proceeding.
Settlement of Account.

Dismissal Orders.

Order dismissing action with costs is final determination of rights of parties in that particular action and is, therefore, judgment. Swinehart v. Turner, 36 Idaho 450, 211 P. 558 (1922).

Order dismissing one of two separate causes of action is not final as to any of the parties. Salchert v. Rice, 47 Idaho 422, 276 P. 305 (1929).

Order granting nonsuit and dismissing action is final judgment. Miller v. Gooding Hwy. Dist., 54 Idaho 154, 30 P.2d 1074 (1934).

Order dismissing intervenor's complaint is a final judgment. Walker Bank & Trust Co. v. Steely, 54 Idaho 591, 34 P.2d 56 (1934).

An order dismissing an appeal in a criminal case on defendant's motion was a final determination of the rights of the parties, and was a "judgment" within the terms of the statute authorizing an appeal by the state from an order "made after judgment." State v. McNichols, 62 Idaho 616, 115 P.2d 104 (1941).

A court order that, unless a petitioner for post-conviction relief presented new and additional grounds for such relief within twenty days, his petition would be dismissed was not a final judgment. Pulver v. State, 92 Idaho 627, 448 P.2d 241 (1968).

Intervention.

Order denying application to file complaint in intervention is final judgment within such definition. A decision conclusive of any question is final as to that question. Poage v. Cooperative Publishing Co., 57 Idaho 561, 66 P.2d 1119, 110 A.L.R. 1322 (1937).

"Judgment" Defined.

Whether a document expressing the action

of a court is a "court order" or a "judgment" is determined not by its title, but by its contents. State v. McNichols, 62 Idaho 616, 115 P.2d 104 (1941).

A "judgment" is a final determination of the rights of the parties in an action or proceeding. State v. McNichols, 62 Idaho 616, 115 P.2d 104 (1941).

Partial Summary Judgment.

A partial summary judgment which leaves certain issues for trial is not an appealable final judgment under I.C., § 13-201, which requires a final determination of the rights of the parties, and thus is an intermediate order or decision subject to review under I.C., § 13-219 (repealed). Viani v. Aetna Ins. Co., 95 Idaho 22, 501 P.2d 706 (1972), overruled on other grounds, Slovianek v. Estate of Puckett, 98 Idaho 371, 565 P.2d 564 (1977).

In plaintiff's action to impose joint and several liability against five defendants, a partial summary judgment rendered in favor of three of the defendants, not being a final determination of the rights of all parties, was not a "final judgment" and thus was not appealable. Southland Produce Co. v. Belson, 96 Idaho 776, 536 P.2d 1126 (1975).

Quiet Title Proceeding.

An order by the court in a proceeding to quiet title to a right of way and for use of a road over defendant's property which approved stipulations entered into by counsel for the parties for the construction and repair of the road and which finally disposed of the proceeding except for retention of jurisdiction to see that road was repaired was a final judgment. Howell v. Reimann, 77 Idaho 84, 288 P.2d 649 (1955).

Settlement of Account.

Order settling the final account of an executor, administrator, or guardian is a "judgment in rem," and a "final judgment" conclusive against all the world after the time for appeal has expired. Horn v. Cornwall, 65 Idaho 115, 139 P.2d 757 (1943).

RESEARCH REFERENCES

A.L.R. Propriety and effect of trial court's adoption of findings prepared by prevailing party. 54 A.L.R.3d 868.

Rule 54(b). Judgment upon multiple claims or involving multiple parties.

(1) **Certificate of Final Judgment.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the actions as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. If any parties to an action are entitled to judgments against each other such as on a claim and counterclaim, or upon cross-claims, such judgments shall be offset against each other and a single judgment for the difference between the entitlements shall be entered in favor of the party entitled to the larger judgment. In the event the trial court determines that a judgment should be certified as final under this Rule 54(b), the court shall execute a certificate which shall immediately follow the court's signature on the judgment and be in substantially the following form:

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this _____ day of _____, 20____.

(Signature — District Judge)

(2) **Jurisdiction if Appealed After Rule 54(b) Certificate.** If a Rule 54(b) Certificate is issued on a partial judgment and an appeal is filed, the trial court shall lose all jurisdiction over the entire action, except as provided in Rule 13 of the Idaho Appellate Rules. (Amended December 19, 1975, effective January 1, 1976; amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective May 1, 1979; amended March 27, 1989, effective July 1, 1989.)

STATUTORY NOTES

Cross References. Counterclaim or cross-claim, Rule 13(i).

Entry of judgment, Rule 58.
Writs of review, when granted, § 7-202.

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion.
Appeal from Summary Judgment.
Applicability.
Attorney Fees.
Contempt Order.
Discretion of Court.
Divorce Action.
Failure to Request Certification.
Failure to Satisfy Requirements.
Finality of Judgment.
Fund Judgment.
Issue Not Ripe for Review.
Jurisdiction.
Limitations on Vacating Certificate.
Motion for Reconsideration.
No Reason for Delay.
Orders of Partial Summary Judgment.
Partial Judgment.
Penal Judgment.
Pending Counterclaim.
Premature Appeal.
Prevailing Party.
Purpose.
Revision of Partial Decree.
Uncertified Dismissal.

Abuse of Discretion.

Where propane stove exploded in one defendant's trailer, injuring plaintiff, and plaintiff sued the trailer's owner, vendor, and manufacturer alleging *res ipsa loquitur*, it was improvident and an abuse of discretion for the trial court to issue a final order of summary judgment against plaintiff in his action against the trailer owner, since such an order barred plaintiff from pursuing his case in any manner against the owner, even though it was possible the evidence might rule out other possible causes for the explosion and place an inference of negligence upon the owner. *Christensen v. Potratz*, 100 Idaho 352, 597 P.2d 595 (1979).

A Rule 54(b) certificate of finality will only be set aside where its entry by the trial court amounts to an abuse of discretion. Where all issues between the parties had been resolved on summary judgment five years earlier, and the defendants' third-party claim had been severed for separate trial, there was error by the trial court in certifying the judgments for appeal. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984).

Where attorney misconduct resulted in a grant of a new trial, it was premature to determine whether the party obtaining the new trial should be allowed attorney fees and costs incurred during the first trial without waiting for a new trial to determine who ultimately prevails, and where the district court appropriately declined to award costs and fees, but at plaintiffs' request issued a certificate of finality under this rule so that the order could be appealed, the certificate was improvidently granted and the granting of such constituted an abuse of that court's discretion. *Robertson v. Richards*, 118 Idaho 791, 800 P.2d 678 (1990).

Appeal from Summary Judgment.

The district court's summary judgment granted in favor of the plaintiff in its action to foreclose a mechanic's lien was final and appealable where the judgment resolved all substantive issues, awarded a money judgment, awarded interest and attorney fees, and the court issued a stay of execution and vacated a trial setting for the resolution of the issues raised by the defendant's counterclaim against the plaintiff and the defendant's third-party complaint pending the resolution of the appeal from the summary judgment. *Loomis, Inc. v. Cudahy*, 101 Idaho 459, 615 P.2d 128 (1980).

An uncertified partial summary judgment, not being final or appealable, will not support a writ of execution; only a partial summary judgment which has been properly certified as final under this rule will support a writ of execution. Furthermore, it is not sufficient for a trial court merely to enter an order that it will certify a partial summary judgment as final; before any such order is effective it must have appended to the summary judgment a certificate which complies with this rule. *CIT Fin. Servs. v. Herb's Indoor RV Ctr.*, 108 Idaho 820, 702 P.2d 858 (Ct. App. 1985).

Although an appeal from a partial summary judgment could have been dismissed as having been prematurely taken where the judgment had been entered as to two counts but was not certified as final, the summary judgment became final for the purpose of appeal when the other two remaining counts in the complaint were dismissed with prejudice. *Wilson v. Hambleton*, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985).

A grant of partial summary judgment may be certified by the district court as a final judgment, and thus appealable, when the trial judge makes the determination that there is no just reason for delay. *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987).

The decision to grant certification of final judgment under this rule is reviewed for an abuse of discretion. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

Because appellate jurisdiction over an appeal from an interlocutory decision under this rule is limited to the rulings or orders certified by the district court, the appellate court may not consider, in an appeal from a partial summary judgment dismissing several causes of action, whether the remaining causes of action should be dismissed. *Taylor v. AIA Servs. Corp.*, — Idaho —, 261 P.3d 829 (2011).

Applicability.

Where the plaintiff has but a single cause of action against multiple party defendants who do not sever and defend independently of each other, this rule is not applicable. *Twin Falls County v. Knievel*, 98 Idaho 321, 563 P.2d 45 (1977).

Attorney Fees.

Where attorney fees award was made to third party defendants after dismissal of third party complaint, but there was no resolution of the other claims in the multiple claim and multiple party action and where third party plaintiff had not obtained certification under this rule for an appeal, appeal from award of attorney fees was dismissed. *City of Ketchum v. Curtis*, 102 Idaho 200, 628 P.2d 231 (1981).

An award of attorney fees to an attorney for his work after he was disqualified from a case is an abuse of discretion. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

Contempt Order.

It was proper for the district court to entertain the attorney's appeal of the contempt order, even though the judgment against him was not certified, where at the time the contempt order was entered, he no longer had any involvement with the suit whatsoever. *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

If a contempt order is properly certified to be final, the party who seeks review of the order must appeal, rather than pursuing a writ of review; however, if a party wishes only to challenge the jurisdiction of the court to issue the contempt order, and if the order has not been properly certified as final pursuant

to this rule, the party may pursue a writ of review. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

A contempt order of a magistrate judge that is certified by the magistrate judge to be final as provided by this rule is appealable to the district judge. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

Where plaintiff purchaser of real property, who sought precise perimeters of easement across lands of defendant, originally asserted that the district court erred in imposing a fine pursuant to § 7-610 as a penalty for contempt, and in issuing an order of contempt against him for his disobedience of the district court's order mandating his signature on a redraft agreement, and where plaintiff purchaser's attempted appeal of the order with a Rule 54(b) certificate was denied by the district court, on appeal, the court held that even though the finding of contempt was predicated on an order, later found by the Court of Appeals to be erroneous, the finding of contempt for disobedience of the order was appropriate. *Conley v. Whittlesey*, 126 Idaho 630, 888 P.2d 804 (Ct. App. 1995).

Discretion of Court.

The trial court judge has discretion in whether to issue a Rule 54(b) certificate. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

The decision to certify a partial summary judgment as a final order for appeal purposes rests in the trial court's discretion; such a decision will not be set aside unless an abuse of discretion is shown. Abuse of discretion may exist where no hardship, injustice or other compelling reason is shown for certification. *Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc.*, 114 Idaho 453, 757 P.2d 716 (Ct. App. 1988).

Divorce Action.

An uncertified partial summary judgment is not final in a divorce action. *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987).

The magistrate court erred by offsetting the portion of husband's military retirement pay by the same amount of child support which wife was ordered to pay husband because where the situation involves payments into the future, which can vary and change, the court will continue to be involved on a constant basis. *Walborn v. Walborn*, 120 Idaho 494, 817 P.2d 160 (1991).

The magistrate employed Rule 54(b) to expedite the resolution of the case, and where the triable issues in this case concerned the distribution of the community assets, not the dissolution of the marriage, there was no abuse of discretion in issuing the Rule 54(b)

certification deeming the partial divorce decree final and leaving the remaining issues of property distribution to trial at a later date. *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 21 P.3d 918 (2001).

Failure to Request Certification.

Where defendant did not request certification of the magistrate judge's finding of contempt and order pursuant to this rule, defendant did not have the right to appeal, but only to challenge, by means of a writ of review, the magistrate judge's jurisdiction to issue a contempt order. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

Failure to Satisfy Requirements.

While it is not clear whether this rule applies to both multiple claim and multiple party situations, it is clear that in such a case an appeal would not lie when none of the requirements of the rule are satisfied. *Farber v. State*, 98 Idaho 928, 576 P.2d 209 (1978).

The district court was correct in declining to issue a Rule 54(b) certificate until a request and an appropriate showing of necessity was made. *Bowen v. Heth*, 120 Idaho 452, 816 P.2d 1009 (Ct. App. 1991).

Where the plaintiff-respondent brought an action for foreclosure of a mortgage and the district court then bifurcated the liability aspect from the deficiency judgment aspect of the action, although the liability and deficiency aspects of the action may be discrete elements of the case, there was nevertheless a single issue: foreclosure of a mortgage. Thus, the district court, in issuing the certificate under this rule, violated the language of the rule requiring "more than one claim" as a predicate to its operation. *Thorn Creek Cattle Ass'n v. Bonz*, 122 Idaho 42, 830 P.2d 1180 (1992).

Delay to moving party is not sufficient justification for certification of final judgment under this rule. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

Finality of Judgment.

Where state department of water resources had filed a cross-complaint against the United States through the United States Forest Service in action brought by property owners to adjudicate water rights in three creeks, and where the district court entered a decree that the United States was entitled to nonconsumptive use of the entire natural flow of the three streams based upon the reservation doctrine, the district court judgment did not decree the rights of the other parties to the action and thereby was not a final judgment from which an appeal could be taken. *Soder-*

man v. Kackley, 97 Idaho 850, 555 P.2d 390 (1976).

In an action involving five separate claims and 16 parties, an order granting cross-defendant's motion to dismiss a cross-complaint was not a final judgment from which an appeal could be taken, where the trial court did not direct entry of judgment and where there was no express determination finding no just reason for delaying entry of judgment. *Merchants, Inc. v. Intermountain Indus., Inc.*, 97 Idaho 890, 556 P.2d 366 (1976).

Where partial summary judgment was granted on the claim of repossession in seller's action against purchaser who was in default on purchase contract for farm machinery, but where additional remedies and purchaser's third-party action were reserved, the partial summary judgment was not appealable in the absence of an express determination that there was no just reason for delay. *John Deere Co. v. Kunzler*, 97 Idaho 921, 557 P.2d 199 (1976).

In an action brought by original owner of property against purchaser at sheriff's sale to vacate the sale and quiet title to the property in original owner, where purchaser had counterclaimed for damages for malicious prosecution, summary judgment granted against original owner did not concern purchaser's counterclaim and thus did not adjudicate all claims for relief presented in the action. *Dawson v. Mead*, 98 Idaho 1, 557 P.2d 595 (1976).

Where the district court entered a judgment of dismissal as to one of two defendants, such judgment alone was not appealable since the district court retained jurisdiction to enter an order of certification and to review its own order of dismissal under this rule. *Rogers v. State*, 98 Idaho 742, 572 P.2d 176 (1977).

Where the district court's orders of partial summary judgment left some aspect of three claims outstanding against one or more defendants, there was no proper basis for certifying dispositions of those claims against one defendant and the district court was without power to certify those dispositions as final, appealable orders. *Pichon v. L.J. Broeke-meier, Inc.*, 99 Idaho 598, 586 P.2d 1042 (1978).

Where the judgment provided, among other things, both a finding of no just reason for delay and an order that the judgment be entered, this language satisfied the requirements of this rule, and consequently was a final appealable judgment as defined by Rule 11(a)(2). *I.A.R. Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979).

A judgment was final, as required for appealability under I.A.R. 11, although the judgment adjudicated less than all claims as-

serted in the lawsuit, it disposed of all remaining claims, leaving none pending; therefore, it was of no consequence that the judgment was not certified as final under this rule. *M & H Rentals, Inc. v. Sales*, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985).

While summary judgment for one defendant appeared to have been proper based on the record extant at the time the motion was argued, that judgment should not have been made final by certification pursuant to this rule, where further investigation by experts might have raised an inference of fault on defendant's part, as might further examination of numerous depositions, a number of which were filed only days before the motion for summary judgment was argued and the district court issued its decision, and where defendant demonstrated no hardship or injustice. *Milbank Mut. Ins. Co. v. Carrier Corp.*, 112 Idaho 27, 730 P.2d 947 (1986).

Although a district court's order upon remand which dismissed one defendant in a two-defendant case ordinarily would have required a certificate of finality for appellate review of the dismissal, the Supreme Court deemed the district court's order as functionally equivalent to a certificate of finality because appellate jurisdiction was fully vested when the appeal was initially filed and the court perceived no just reason to delay consideration on appeal of the dismissal order. *Madson v. Idaho Dep't of Health & Welfare*, 116 Idaho 758, 779 P.2d 433 (Ct. App. 1989).

Where, in landlord-tenant dispute the district judge did not issue a certificate pursuant to this rule upon entry of a consent judgment against defendant's co-tenant, the judgment was not final. *Melton v. Lehmann*, 118 Idaho 61, 794 P.2d 650 (Ct. App. 1990).

Until a judgment had been entered or a certificate granted by the trial court pursuant to this rule, the order dismissing a counterclaim was not final and appealable. Therefore, trial court should have considered new facts upon motion for reconsideration of order. *Idaho First Nat'l Bank v. David Steed & Assocs., Inc.*, 121 Idaho 356, 825 P.2d 79 (1992).

A decision, order, judgment or decree, that concludes only one of two or more consolidated actions, constitutes a "judgment" to which the time limit of I.R.C.P. 54(d)(5) will attach and for which a Rule 54(b) certification will be entered, as a prerequisite to the finality of a judgment in consolidated cases. *Doe I v. Doe II*, 128 Idaho 144, 911 P.2d 140 (Ct. App. 1996).

Plaintiffs' appeal was dismissed where the district court's Idaho R. Civ. P. 54(b) certificate was issued in error because the orders

denying plaintiffs' two motions to amend were not final, appealable judgments; the court order did not reach the merits of plaintiffs' negligence claim or the claims sought to be added, but instead simply denied the addition of those claims to the cause of action. *Goldman v. Graham*, 139 Idaho 945, 88 P.3d 764 (2004).

There is no provision in the civil or appellate rules making the refusal to issue a Rule 54(b) certificate immediately appealable; it is not a final order. *Callaghan v. Callaghan*, 142 Idaho 185, 125 P.3d 1061 (2005).

Because a partial judgment, certified under paragraph (b)(1) of this rule as final for appeal in an easement dispute, was "final" as provided in Idaho R. Civ. P. 52(a), the district court had discretion under Idaho R. Civ. P. 54(d)(1)(B) to award costs and fees; and it acted within its discretion when it found that there was no prevailing party. *Caldwell v. Cometto*, — Idaho —, 253 P.3d 708 (2011).

Fund Judgment.

Where the claim for past-due lease payments and a request for damages were separate claims, as opposed to being incident to a declaratory judgment, the certification of final judgment pursuant to this section was proper. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992).

Issue Not Ripe for Review.

Where determination of the issues framed by the pleadings was separated into two trials, one to determine the rights of the respective parties, and a second to determine the issue of damages and appeal was taken from the judgment entered following the first trial in accordance with this rule, but it was clear that the district court did not intend to certify for appeal any question concerning damages, the issue of what, if any, damages were appropriate was not ripe for review and would not be considered on appeal. *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983).

Until the magistrate approves the administration, distribution and closing of the estate, the approval of accountings by the magistrate is not ripe for review; however, there is no impediment to special review of interlocutory orders approving interim accountings by certification under this rule, concerning the appeal from the magistrate division to the district court. *Spencer v. Idaho First Nat'l Bank (In re Estate of Spencer)*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984).

Jurisdiction.

The Court of Appeals lacked jurisdiction where the default judgment did not resolve all

claims asserted by the plaintiffs; it resolved none of the claims against one defendant and it contained no definitive ruling on either defendant's liability for damages, the judgment was not certified, and claims not resolved by the judgment were still pending in the district court. *Wilson v. Bivins*, 113 Idaho 865, 749 P.2d 4 (Ct. App. 1988).

A district court had no jurisdiction to enter a final summary judgment in a case after the plaintiff had appealed an order for partial summary judgment which the district court certified as a final judgment under this rule. *Diamond v. Sandpoint Title Ins., Inc.*, 132 Idaho 145, 968 P.2d 240 (1998).

Limitations on Vacating Certificate.

A district court may vacate a Rule 54(b) certificate, but under normal circumstances, a trial court cannot vacate the certificate after the expiration of the 42-day appeal period under I.A.R. 14 nor after a timely appeal has been taken in reliance on that certificate. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Where the plaintiff filed the motion to vacate the Rule 54(b) certificate on the fortieth day of the appeal period, but the judge granted the motion to vacate the certificate after the end of the 42-day appeal period under I.A.R. 14, the motion to vacate was still timely; as with other post-judgment motions, the applicant need only file the motion during the stated period following the judgment. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Motion for Reconsideration.

Owners not only had an opportunity to present additional evidence to the district court, they did so, and the district court simply erroneously refused to consider it; that error did not show an abuse of discretion in granting the Rule 54(b) certification where the owners' argument on appeal was based upon their own misunderstanding of I.R.C.P. 11(a)(2)(B), and their misunderstanding as to that Rule did not show that the district court abused its discretion in certifying the partial judgment as final. *PHH Mortg. Servs. Corp. v. Ferreira*, 146 Idaho 631, 200 P.3d 1180 (2009).

No Reason for Delay.

In a multicclaim suit which began as a quiet title action, the trial court's finding, in its order granting summary judgment in favor of the plaintiff on the issue of the immediate removal of improvement, that there was no reason for the requested removal of the encroachments to await ascertainment of the actual damage between plaintiff and defendants or to await ascertainment as between

defendants and the third-party defendant as to who would bear the financial loss, was sufficiently clear and definite to satisfy the requirement that the court expressly determine that there be no just reason for delay. *Athletic Round Table, Inc. v. Merrill*, 98 Idaho 852, 574 P.2d 540 (1978).

Except where an injustice would result from denial of an immediate appeal, this rule was not intended to abrogate the general rule against piecemeal appeals. *Pichon v. L.J. Broekemeier, Inc.*, 99 Idaho 598, 586 P.2d 1042 (1978).

The trial court's determination that there is no just reason for delay is not, however, binding on the appellate court when it appears the lower court abused its discretion in so finding. *Pichon v. L.J. Broekemeier, Inc.*, 99 Idaho 598, 586 P.2d 1042 (1978).

The district court's determination that there was no just reason for delay and that the judgment was appealable is not binding on the Supreme Court, when it appears the lower court abused its discretion in so finding. *Smith v. Whittier*, 107 Idaho 1106, 695 P.2d 1245 (1985).

Delay itself cannot constitute a hardship for purposes of this rule, since this rule contemplates such delay absent a showing of "no just reason for delay" in order to fairly adjudicate liability and avoid piecemeal appeals. *Milbank Mut. Ins. Co. v. Carrier Corp.*, 112 Idaho 27, 730 P.2d 947 (1986).

Appellate court vacated the district court's Idaho R. Civ. P. 54(b) certificate where there was nothing in the record indicating any hardship, injustice, or compelling reason why the partial summary judgment granted to the sellers on their complaint should be final before the buyers' counterclaims were determined; the district court abused its discretion in determining that there was no just reason for delay and that a final judgment had to be entered. *Watson v. Weick*, 141 Idaho 500, 112 P.3d 788 (2005).

Orders of Partial Summary Judgment.

Where the record did not reflect any hardship or injustice that would be suffered if a Rule 54(b) certification were not made, and where it appeared the orders of partial summary judgment were entered so that the trial court could streamline the case by eliminating the equitable claims so that the remaining legal claims could be tried by a jury, the orders were not susceptible of certification. *Pichon v. L.J. Broekemeier, Inc.*, 99 Idaho 598, 586 P.2d 1042 (1978).

Where partial summary judgment has been granted, such judgment was not appealable in the absence of an express determination that

there was no just reason for delay. *Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979).

A partial summary judgment is final and thus appealable when the trial court makes the determination that there is no just reason for delay and requires only such language in the summary judgment as to show that the trial court was aware this rule required a finding that there is no just reason for delay and that it made such a determination. *Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979).

Where the plaintiff wife initially sought the divorce and argued that a divorce should be granted to her, and the entry of the partial summary judgment decree granting the divorce but reserving additional issues for a later trial enabled the defendant husband to remarry, as he did, and the plaintiff took advantage of the favorable provisions of the decree of divorce, it was unconscionable for her to subsequently maintain an inconsistent position, and therefore, she was estopped from denying the validity of the decree of divorce. *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982), superseded on other grounds, *Stephens v. Stephens*, 138 Idaho 195, 61 P.3d 63 (Ct. App. 2002).

The fact that a district court certified a partial summary judgment as final and appealable under this rule does not restrict the Supreme Court's right to review the matter to determine that the judgment is final and appealable. *Glacier Gen. Assurance Co. v. Hisaw*, 103 Idaho 605, 651 P.2d 539 (1982).

Where in a declaratory judgment action brought by a fire insurer, the district court entered a partial summary judgment in favor of the insured, but the partial summary judgment fell short of fully adjudicating even one claim for relief requested under the insured's counterclaim, the partial summary judgment was an interlocutory and nonappealable order. *Glacier Gen. Assurance Co. v. Hisaw*, 103 Idaho 605, 651 P.2d 539 (1982).

Where first summary judgment did not resolve all substantive issues, it was interlocutory and not immediately appealable; the time for appealing it did not start to run until second summary judgment resolving remaining issues was entered. *IBM Corp. v. Lawhorn*, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984).

Partial summary judgment ruling that wrongful eviction had occurred disposed of less than all claims of the parties and was not certified as final under this rule; therefore, it was interlocutory and arguably subject to later revision. *Galindo v. Hibbard*, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984).

Partial summary judgment on two counts of a complaint was not precluded simply be-

cause of an outstanding dispute over another count in the same complaint. *Wilson v. Hambleton*, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985).

Where a district court grants partial summary judgment as to less than all the claims in a multiple claim, multiple party suit, the district court may not direct the entry of final judgment on the claim(s), except in that infrequent case in which the interests of justice served by an immediate appeal outweigh the policy against piecemeal appeals. *Bishop v. Capital Fin. Servs.*, 109 Idaho 866, 712 P.2d 567 (1985).

Where case involved a total of five claims against a total of six parties and the district court granted partial summary judgment upon but one claim against but one party, the record did not provide any reason to believe that postponing the appeal of the partial summary judgment until final adjudication of all the claims below would cause injustice to any party, and determination of the remaining issues below did not require the Supreme Court's determination of the issues appealed, the interest in avoiding trial delays caused by piecemeal appeals outweighed any risk of injustice to the parties. *Bishop v. Capital Fin. Servs.*, 109 Idaho 866, 712 P.2d 567 (1985).

The trial court did not abuse its discretion in certifying its partial summary judgment as final for appeal purposes where the court had found that a lender had an unlimited priority lien over a prior deed of trust under a subordination agreement; all issues between the lender and the vendors, purchasers and developer had been resolved, only the cross-claims between the defendants remained unadjudicated, these would turn on the outcome of the plaintiff lender's claims, and a delay in finalizing the judgment would have lessened the lender's chances of maximum recovery of the value of its security. *Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc.*, 114 Idaho 453, 757 P.2d 716 (Ct. App. 1988).

Although the denial of a motion for summary judgment is ordinarily both nonappealable, under I.A.R. 11(a), and nonreviewable, a partial summary judgment certified by the trial court to be final as provided by this rule, such as the partial summary judgment qualifies as an appealable order under I.A.R. 11(a)(3); therefore district court's partial summary judgment, including its findings of: (1) the formation of an agreement; and (2) a material issue of fact precluding summary judgment on defendant's motion, was properly reviewable. *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Ct. App. 1995).

Where injured party's counsel made offer of settlement to driver responsible for the acci-

dent, which offer was renewed by phone, action of driver's insurer in sending settlement check and release to injured party was an acceptance of the offer to settle extended by injured party's counsel and thus court's finding that the offer and acceptance constituted a settlement and partially granting summary judgment was not error. *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Ct. App. 1995).

Court of Appeals of Idaho affirmed a decision of the district court granting partial summary judgment in favor of recording parties; the subsequent purchaser of land had constructive notice of the covenants, conditions and restrictions (CC&R's), and the county officials improperly recorded the CC&R's under the name of a ranch instead of the individual names of the recording parties. *Miller v. Simonson*, 140 Idaho 287, 92 P.3d 537 (Ct. App. 2004).

Partial Judgment.

In order for a partial judgment to be certified as final and appealable under this rule, the order granting partial judgment must finally resolve one or more of the claims between some or all of the parties; if it does not, then it is error for a trial court to certify any interlocutory order as final under this rule. *Toney v. Coeur d'Alene Sch. Dist.* No. 271, 117 Idaho 785, 792 P.2d 350 (1990).

In order for a partial summary judgment to be certified as final and appealable under this Rule, the order granting partial judgment must finally remove one or more of the claims between some or all of the parties. *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999).

District court did not abuse its discretion when it granted the I.R.C.P. 54(b) certificate where the appeal was appropriate pursuant to § 7-919(a)(3) because the district court denied confirmation of the arbitrator's award, and the district court resolved the bad faith claim in its entirety and determined the validity of the offset provision. *Am. Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 94 P.3d 699 (2004).

Penal Judgment.

Where the denial of the motion to dismiss did not dispose of any claim, it was not proper for the trial court to certify the denial pursuant to this Rule as a penal judgment. *Thornton v. Estate of Thornton*, 126 Idaho 474, 886 P.2d 779 (1994).

Pending Counterclaim.

Where trial court entered judgment for indebtedness of \$2,500 and allowed attorney's fees of \$1,500 while the defendant's counter-

claim for \$40,000 was still pending, final judgment under this rule was improvident since there was no showing that this was a harsh case where injustice would result from plaintiff having to await collection of its judgment until disposition of the counterclaim, and the award of attorney's fees was premature since the validity of the counterclaim had not yet been judicially determined. *Joyce Livestock Co. v. Hulet*, 102 Idaho 129, 627 P.2d 308 (1981).

Premature Appeal.

Notice of appeal was premature where it was from a judgment rendered under this rule, governing multiple parties and claims, and judgment was not certified as appealable under the rule; however, the subsequent filing of two formal judgments which disposed of the remaining claims cured the defect as of that date. *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n*, 105 Idaho 509, 670 P.2d 1294 (1983).

Prevailing Party.

District court conducted the appropriate inquiry regarding prevailing party status for attorney fee purposes, and made the discretionary call that neither party had prevailed.. *Jorgensen v. Coppedge*, 148 Idaho 536, 224 P.3d 1125 (2010).

Purpose.

The purpose of the rule is to avoid piecemeal litigation and appeals, and in the absence of certification an appeal cannot be taken. *Long v. Goodyear Tire & Rubber Co.*, 100 Idaho 183, 595 P.2d 717 (1979).

The purpose of this rule is to avoid piecemeal litigation and appeals. *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

Except where an injustice would result from denial of an immediate appeal, this rule was not intended to abrogate the general rule against piecemeal appeals. *Robertson v. Richards*, 118 Idaho 791, 800 P.2d 678 (1990).

Revision of Partial Decree.

Where a suit involved not only division of real property, but also issues of rental and distribution of personal property, the trial judge was entitled under this rule to vacate a partial decree as to the division of property and substitute the findings of a previous judge, despite the lapse of over a year between the filing of the partial decree and the motion to vacate, since the court in such a case is free to revise its work until the entry of a final judgment. *Baker v. Pendry*, 98 Idaho 745, 572 P.2d 179 (1977).

After the district court vacated the Rule 54(b) certificate declaring a partial summary

judgment appealable, the summary judgment could not be appealed until there was a final order or judgment on all the issues of the case. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Because in a landlord-tenant dispute the judgment entered against defendant's co-tenant was provisional and subject to revision by the court at any time prior to entry of a final judgment, *res judicata* did not apply and defendant's merger argument failed. *Melton v. Lehmann*, 118 Idaho 61, 794 P.2d 650 (Ct. App. 1990).

Uncertified Dismissal.

Where, in an action involving multiple claims and parties, the action against the state was dismissed for failure to file timely notice of the claim and the dismissal was not certified as required by this rule, it was not an appealable judgment. *Farber v. State*, 98 Idaho 928, 576 P.2d 209 (1978).

Where plaintiff sued three defendants, only one of which moved for and was granted summary judgment under this rule, but certification of the decision as final was withheld, the Supreme Court was without jurisdiction to hear the appeal. *Kifer v. School Dist. No. 394*, 100 Idaho 411, 599 P.2d 302 (1979).

Cited in: *Silver Sage Ranch, Inc. v. Lawson*, 98 Idaho 707, 571 P.2d 768 (1977); *Hutcherson v. Amen*, 98 Idaho 776, 572 P.2d 879 (1977); *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978); *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978); *Owyhee County v. Rife*, 100 Idaho 91, 593 P.2d 995 (1979); *Consolidated Concrete Co. v. Empire W. Constr. Co.*, 100 Idaho 234, 596 P.2d 106 (1979); *Hatfield v. Max Rouse & Sons N.W.*, 100 Idaho 840, 606 P.2d 944 (1980); *Hogan v. Hermann*, 101 Idaho 893, 623 P.2d 900 (1980); *Washington Carriers, Inc. v. Beckley Trucking, Inc.*, 102 Idaho 38, 624 P.2d 946 (1981); *Farber v. State*, 102 Idaho 398, 630 P.2d 685 (1981); *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982); *Millers Mut. Fire Ins. Co. v. Ed Bailey, Inc.*, 103 Idaho 377, 647 P.2d 1249 (1982); *Acoustic Specialties, Inc. v. Wright*, 103 Idaho 595, 651 P.2d 529 (1982); *Terrell, Inc. v. Robert DeShazo Bldrs., Inc.*, 104 Idaho 518, 661 P.2d 303 (1983); *Coeur d'Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai County*, 104 Idaho 590, 661 P.2d 756 (1983); *Gillingham v. Swan Falls Land & Cattle Co.*, 106 Idaho 859, 683 P.2d 895 (Ct. App. 1984); *Earth Resources Co. v. Mountain States Mineral Enters., Inc.*, 106

Idaho 864, 683 P.2d 900 (Ct. App. 1984); *Barrows v. State*, 106 Idaho 901, 684 P.2d 303 (1984); *Fischer v. Sears, Roebuck & Co.*, 107 Idaho 197, 687 P.2d 587 (Ct. App. 1984); *Aldape v. Lubcke*, 107 Idaho 316, 688 P.2d 1221 (Ct. App. 1984); *Kerr Land & Livestock, Inc. v. Glaus*, 107 Idaho 767, 692 P.2d 1199 (1984); *Schiess v. Bates*, 107 Idaho 794, 693 P.2d 440 (1984); *Sinclair Mktg., Inc. v. Siepert*, 107 Idaho 1000, 695 P.2d 385 (1985); *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276 (Ct. App. 1985); *Boise Car & Truck Rental Co. v. WACO, Inc.*, 108 Idaho 780, 702 P.2d 818 (1985); *Burgess Farms v. New Hampshire Ins. Group*, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985); *State ex rel. Moore v. Scroggie*, 109 Idaho 32, 704 P.2d 364 (Ct. App. 1985); *Streib v. Veigel*, 109 Idaho 174, 706 P.2d 63 (1985); *Eimco Div. v. United Pac. Ins. Co.*, 109 Idaho 762, 710 P.2d 672 (Ct. App. 1985); *Keeven v. Wakley (In re Estate of Keeven)*, 110 Idaho 452, 716 P.2d 1224 (1986); *First Bank & Trust v. Jones*, 111 Idaho 481, 725 P.2d 186 (Ct. App. 1986); *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986); *MacCaskill v. Ebbert*, 112 Idaho 1115, 739 P.2d 414 (Ct. App. 1987); *Merritt v. State*, 113 Idaho 142, 742 P.2d 397 (1986); *Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988); *O'Neil v. Vasseur*, 113 Idaho 886, 749 P.2d 1011 (Ct. App. 1988); *NBC Leasing Co. v. R & T Farms, Inc.*, 114 Idaho 141, 754 P.2d 454 (Ct. App. 1988); *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988); *Jacobsen v. Schroder*, 117 Idaho 442, 788 P.2d 843 (1990); *Slade v. Smith's Mgt. Corp.*, 119 Idaho 482, 808 P.2d 401 (1991); *Freeman v. Juker*, 119 Idaho 555, 808 P.2d 1300 (1991); *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991); *Feld v. Idaho Crop Imp. Ass'n*, 126 Idaho 1014, 895 P.2d 1207 (1995); *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995); *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 908 P.2d 1228 (1995); *Ward v. Puregro Co.*, 128 Idaho 366, 913 P.2d 582 (1996); *Ratliff v. Ratliff*, 129 Idaho 422, 925 P.2d 1121 (1996); *State Farm Mut. Auto. Ins. Co. v. Robinson*, 129 Idaho 447, 926 P.2d 631 (1996); *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997); *Dunlap v. Cassia Mem. Hosp. & Med. Ctr.*, 134 Idaho 233, 999 P.2d 888 (2000); *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004); *Watson v. Watson*, 144 Idaho 214, 159 P.3d 851 (2007); *J-U-B Eng'rs, Inc. v. Sec. Ins. Co.*, 146 Idaho 311, 193 P.3d 858 (2008); *Harris, Inc. v. Foxhollow Constr. & Trucking*, — Idaho —, 264 P.3d 400 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Finality of Judgment.

Liability of Insurer.

Multiple Claims.

Multiple Parties.

—Joint Tortfeasors.

—Modifying Judgment.

—Partners.

—Separate Judgments.

Purpose of Rule.

Finality of Judgment.

Where trial court failed to make a specific finding that there was no just reason for delay and did not expressly direct entry of judgment, such failure to observe the rule precludes the judgment from being final. *Gerry v. Johnston*, 85 Idaho 226, 378 P.2d 198 (1963).

Where a counterclaim had been interposed by defendant to plaintiff's claim for damages due to crop loss, but the district judge, pursuant to former rule, made an express determination that there was no reason for delay in entering judgment upon plaintiff's claim regardless of outcome of defendant's counterclaim, judge's dismissal of plaintiff's claim was properly appealable to Supreme Court pursuant to I.C., § 13-201. *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 465 P.2d 107 (1970).

Partial summary judgment, which was in effect a pre-trial order resolving questions about which there was no factual dispute and noting what specific issues remained for trial, was not a final judgment where all of the plaintiff's requested relief was not disposed of by the court. *Viani v. Aetna Ins. Co.*, 95 Idaho 22, 501 P.2d 706 (1972), overruled on other grounds, *Sloviaczek v. Estate of Puckett*, 98 Idaho 371, 565 P.2d 564 (1977).

In order to make a particular decision a final judgment where one defendant has cross-claimed against another defendant, the court must expressly determine there is no just reason for delay and expressly direct entry of judgment; absence such determination, the order for partial summary judgment shall not terminate the action as to any of the claims. *Viani v. Aetna Ins. Co.*, 95 Idaho 22, 501 P.2d 706 (1972), overruled on other grounds, *Sloviaczek v. Estate of Puckett*, 98 Idaho 371, 565 P.2d 564 (1977).

In plaintiff's action to impose joint and several liability against five defendants resulting from a sale of potatoes, a partial summary judgment rendered in favor of three of the defendants, not being a final determination of the rights of all parties, was not a "final judgment" and thus was not appealable.

Southland Produce Co. v. Belson, 96 Idaho 776, 536 P.2d 1126 (1975).

Liability of Insurer.

Where the insurer acts with reasonable promptness in filing a cross-claim so that the injured insured and injured third parties are not prejudiced, the insurer is entitled to have the question of the validity of its policy and its liability thereunder determined prior to the trial of an action against the insurer upon a liability alleged to be covered by the policy so that the insurer may know whether it is obligated to defend the insurer as provided by the policy. *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 365 P.2d 824 (1961).

Multiple Claims.

All conflicting claims should be finally settled when parties are in court and should be applied in compensation of each other, judgment being rendered in favor of party proving largest claim. *First Nat'l Bank v. Bews*, 3 Idaho 486, 31 P. 816 (1892).

Reciprocal demand, when properly pleaded, entitles defendant to judgment for any excess over plaintiff's claim. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

Multiple Parties.

Former similar rule permitted partial summary judgments in a multiple claims situation but not in a multiple party situation. *Southland Produce Co. v. Belson*, 96 Idaho 776, 536 P.2d 1126 (1975).

—Joint Tortfeasors.

Judgment may be entered against one of two joint tortfeasors. *Zilka v. Graham*, 26 Idaho 163, 141 P. 639 (1914).

—Modifying Judgment.

The court may modify a verdict in judgment against joint defendants by setting the same aside as to one defendant against whom no liability is shown. *Gaffney v. Hoyt*, 2 Idaho 199, 10 P. 34 (1886).

—Partners.

In suit against individual partners for alleged breach of contract where suit was dismissed against two of the partners, a judgment could not be entered against the remaining partner since by dismissal against two of the partners no joint judgment could be taken. *Balley v. Davis*, 75 Idaho 73, 267 P.2d 631 (1954).

—Separate Judgments.

Where plaintiff establishes a cause of action against one or more of the defendants, he is

entitled to a judgment, as a general rule, against those as to whom he establishes his right without regard to the number who have been sued. *Bloomingtondale v. B.M. DuRell & Co.*, 1 Idaho 33 (1866).

Where damages to real or personal property are sought to be recovered from two defendants and it is alleged in complaint that such damages were caused by the wrongful and wilful acts of the defendants in the joint operation and management of a canal system and reservoir, and the evidence shows that one of the defendants is the owner and has operated, managed, and controlled such canal and reservoir, and that the other defendant had no title or interest therein, and that such defendant did not manage or control or join in the management and control of such system, and the judgment is entered as to both defen-

dants, the judgment will be set aside and a new trial granted as to both defendants. *Verheyen v. Dewey*, 27 Idaho 1, 146 P. 1116 (1915).

Judgment may be entered for or against one of two parties sued as jointly liable on a contract. *Parrott v. Twin Falls Salmon River Land & Water Co.*, 32 Idaho 759, 188 P. 451 (1920).

Purpose of Rule.

The purpose of the former similar rule was to enable the district court to separate claims and counterclaims and allow them to be pursued to final judgment individually if there is no just reason for delay. *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 465 P.2d 107 (1970).

RESEARCH REFERENCES

A.L.R. Proceeding for summary judgment as affected by presentation of counterclaim. 8 A.L.R.3d 1361.

Modern states of state court rules governing entry of judgment on multiple claims. 80 A.L.R.4th 707.

Necessity of statement of reasons underlying

ing District Court's decision to grant certification under Rule 54(b) of Federal Rules of Civil Procedure. 32 A.L.R. Fed. 772.

Modern states of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims. 89 A.L.R. Fed. 514.

Rule 54(c). Demand for judgment.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

STATUTORY NOTES

Cross References. General rules for pleading, claims for relief, Rule 8(a).

JUDICIAL DECISIONS

ANALYSIS

- Application.
- Attorney Fees on Appeal.
- Award in Excess of Demand.
- Constitutional Issues.
- Default Inappropriate.
- Divorce Decree Rendered on Default.
- Effect of Rule Violation.
- Final Judgment.
- In General.
- Injunctive Relief.
- Relief Not Limited to Prayer.
- Untried Issues.

Application.

The court of appeals properly ruled that the prohibition in this rule — against entering judgment by default different in kind from or exceeding the amount prayed for in a demand for judgment — was inapplicable where the facts indicated that the judgment was not based upon a default order, but was based upon admissible evidence presented at trial of which defendant had notice and of which defendant had full opportunity to appear and to contest the claims against him. *Harter v. Products Mgt. Corp.*, 117 Idaho 121, 785 P.2d 685 (Ct. App. 1990).

- Attorney Fees on Appeal.

Because of a mixed result in an easement dispute alleging trespass, neither party was entitled to recover attorney's fees on appeal. There was no basis for finding that the appeal was frivolous or unreasonable. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 152 P.3d 2 (2006).

Award in Excess of Demand.

Where complaint concerning sales contract dispute specifically alleged entitlement to \$19,285.41 as compensatory damages, where this demand in the complaint clearly included \$10,000 which plaintiff paid on the purchase price when the sales contract was signed, yet where nevertheless, inexplicably, the court found that in addition to the \$10,000 plaintiff had sustained damages of \$16,877.64, this award exceeded the demand of the complaint by \$7,592.23, and the judgment as to this amount was void. *Nickels v. Durbano*, 118 Idaho 198, 795 P.2d 903 (Ct. App. 1990).

The portion of the default divorce decree pertaining to the division of the marital property exceeded the amount prayed for in contravention of this rule and was void as a matter of law. *Meyer v. Meyer*, 135 Idaho 460, 19 P.3d 774 (Ct. App. 2001).

Constitutional Issues.

If the constitutionality of a statute can be determined without an evidentiary proceeding, the trial court must consider the issue of constitutionality at any stage of the proceedings in a nonjury trial. *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976).

Default Inappropriate.

Inasmuch as water rights are real property which may be protected by injunction, mandamus or prohibition when threatened, lessor's complaint, which alleged that as a result of lessees' failure to use water rights they were in danger of being lost, stated a claim for equitable relief and should not have been dismissed. *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

Divorce Decree Rendered on Default.

Where divorce decree, which was entered following wife's default, did not dispose of securities and bank accounts in husband's possession, wife was not subsequently barred by *res judicata* or collateral estoppel from seeking an equitable distribution of the securities and bank accounts. *Berle v. Berle*, 97 Idaho 452, 546 P.2d 407 (1976).

Effect of Rule Violation.

Where the prayer for relief in a divorce action inadvertently omitted the mention of certain insurance policies, but such policies

were mentioned in the body of the complaint as community property and were the subject of extensive testimony during the hearing, the technical violation of this rule did not render void a divorce decree specifying that the couple's children must be maintained as beneficiaries of the policy. *Johnson v. Hartford Ins. Group*, 99 Idaho 134, 578 P.2d 676 (1978).

While it is true that a violation of this rule generally results in a judgment which is void, such is not the case where the nonconformance of the decree to the prayer of the complaint arose from oversight or omission; to hold otherwise would be to lose sight of the policy reasons which underlie the default judgment section of the provisions. *Johnson v. Hartford Ins. Group*, 99 Idaho 134, 578 P.2d 676 (1978).

Final Judgment.

An order awarding costs and fees following the confirmation of an arbitration award purported to be a judgment, but it did not comply with Idaho R. Civ. P. 54(c) because it did not state what relief was granted in the underlying insurance bad faith lawsuit; thus, it was not properly entered, and was not appealable. *Harrison v. Certain Underwriters at Lloyd's*, 149 Idaho 201, 233 P.3d 132 (2010).

In General.

The default judgment provisions of this rule embody "the essentials of due process and of fair play." *Johnson v. Hartford Ins. Group*, 99 Idaho 134, 578 P.2d 676 (1978).

Injunctive Relief.

Even if a county's contract with a construction company is not absolutely void as between the parties to it, the lowest responsible bidder may nevertheless be entitled to injunctive relief against the company's continued performance without a public works contractor's license, and the lowest responsible bidder should be awarded reasonable attorney fees for the original proceedings in the trial court and on appeal. *McKay Constr. Co. v. Ada County Bd. of County Comm'rs*, 99 Idaho 235, 580 P.2d 412 (1978).

Relief Not Limited to Prayer.

Where seller and buyer of business litigated issues of breach of warranty of title to certain assets and fraudulent nondisclosure of security interest in certain other assets, and the parties also at least implicitly tried, the issue of rescission of the contract of sale, the trial court did not err in granting rescission to buyer where evidence indicated that party was entitled to relief, even if it had not specifically requested it. *Cady v. Pitts*, 102 Idaho 86, 625 P.2d 1089 (1981).

When an answer is filed, court may grant

any relief consistent with case made by the complaint and embraced within the issue made whether such relief is prayed for or not. *Burke Land & Livestock Co. v. Wells, Fargo & Co.*, 7 Idaho 42, 60 P. 87 (1900); *Dover Lumber Co. v. Case*, 31 Idaho 276, 170 P. 108 (1918), overruled on other grounds, *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

District court has the power to grant rescission as equitable relief regardless of whether it was specifically plead by either party. *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 188 P.3d 846 (2008).

Untried Issues.

Although I.R.C.P. 15(b) specifies that where

a theory of recovery is tried fully by the parties, the court may base its decision on that theory and deem the pleadings amended accordingly, an issue not tried by either express or implied consent cannot be the basis for a decision. *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980).

Cited in: *Jensen v. Jensen*, 97 Idaho 922, 557 P.2d 200 (1976); *Estate of Thompson v. Turner*, 107 Idaho 470, 690 P.2d 925 (1984); *Hawkes v. Sparks*, 108 Idaho 917, 702 P.2d 1377 (Ct. App. 1985); *Child v. Blaser*, 111 Idaho 702, 727 P.2d 893 (Ct. App. 1986); *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090 (Ct. App. 1986); *McBride v. McBride*, 112 Idaho 959, 739 P.2d 258 (1987).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Amended Prayer.

Attorney Fees.

Clerical Error.

Constitutional Issues.

Default.

Deficiency Judgment.

Injunctions.

Interest.

Jurisdiction of Court.

Lack of Hearing and Order on Motion to Amend.

Quo Warranto Proceeding.

Relief Limited to Allegations.

Relief Not Limited to Prayer.

Scope of Relief.

Amended Prayer.

After answer denying allegations of complaint and allowance of amendment correcting typographical error in amount prayed for, rendering judgment for amount asked in the amended prayer was proper. *Berg v. Aumock*, 56 Idaho 798, 59 P.2d 726 (1936).

Attorney Fees.

Court cannot grant an attorney fee greater than that demanded in the prayer, pursuant to complaint containing specific allegation of reasonable value of attorney's fees. *United States Bldg. & Loan Ass'n v. Lanzarotti*, 47 Idaho 287, 274 P. 630 (1929).

Clerical Error.

Although a district court is without jurisdiction to enter a default judgment which differs in kind from or exceeds in amount that demanded in the prayer of the complaint, where through clerical error, oversight, or omission, a default judgment exceeds the demand of the complaint, no part of the judg-

ment is void and the judgment is subject to correction under I.R.C.P. rule 60(a) pertaining to clerical mistakes. *Hayes v. Towles*, 95 Idaho 208, 506 P.2d 105 (1973).

Constitutional Issues.

Constitutional issues may be considered for the first time on appeal if necessary for subsequent proceedings in the case. *Messmer v. Ker*, 96 Idaho 75, 524 P.2d 536 (1974).

Default.

In action to restrain sale of property at an assessment sale where no answer is filed and where the relief prayed for is a perpetual injunction, and such other and further relief as may be equitable, granting of a permanent injunction is the only relief that can be granted, and the prayer for general relief will not warrant a judgment or decree removing any cloud that said sale might cast upon the title to the property, nor can said sale be set aside under such prayer. *Dunn v. Stufflebeam*, 17 Idaho 559, 106 P. 1129 (1910).

In case the defendant fails to answer, trial court is without power to grant relief not demanded in complaint, and if there be no prayer accompanying the complaint and no relief demanded, no judgment can be entered in favor of the plaintiff. *Washington County Land & Dev. Co. v. Weiser Nat'l Bank*, 26 Idaho 717, 146 P. 116 (1915).

In default cases particularly, judgment must be supported by allegations which fairly tend to apprise defendant of claims made against him and relief sought by plaintiff. *Angel v. Mellen*, 48 Idaho 750, 285 P. 461 (1930).

When no answer is found, plaintiff is limited to allegations of his complaint although it contains a prayer for general relief. *Angel v. Mellen*, 48 Idaho 750, 285 P. 461 (1930).

Where complaint did not contain prayers for foreclosure of mechanics' liens, for sale of land nor for deficiency judgments but prayed that plaintiff be adjudged to have a lien of equal ranks with others and defendants defaulted, judgment decreeing foreclosure of the liens and sale of the property was in excess of the relief prayed for and sale thereunder would be void. *Sonleitner v. McLaren*, 52 Idaho 791, 20 P.2d 1014 (1933).

Only that portion of decree attempting to grant relief not prayed for is void, and that only as against the defaulting defendant. *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087 (1936), cert. denied, 299 U.S. 615, 57 S. Ct. 319, 81 L. Ed. 453 (1937).

If no answer by defendant is made, allegations of complaint determine extent of relief, even though complaint contains a prayer for general relief. *Cobb v. Cobb*, 71 Idaho 388, 233 P.2d 423 (1951).

Plaintiff was not entitled to default decree setting aside settlement on community property, where complaint did not allege or set forth any matter concerning community property. *Cobb v. Cobb*, 71 Idaho 388, 233 P.2d 423 (1951).

Deficiency Judgment.

Prayer for deficiency judgment against defendants personally liable warrants such judgment against defendants alleged to be personally answerable and no other. *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928).

Injunctions.

In actions in which the demand for an injunction is only incidental and not the main purpose or object of the suit, the suit would not abate and die in case of circumstances arising which would make the granting of the injunction unnecessary. *Wilson v. City of Boise City*, 7 Idaho 69, 60 P. 84 (1900).

Interest.

Failure of plaintiff to demand interest in prayer, and failure of court to give instruction on interest, did prevent plaintiff from obtaining interest on verdict. *Black v. Darrah*, 71 Idaho 404, 233 P.2d 415 (1951).

Jurisdiction of Court.

Where the board of an irrigation district erroneously denied a petition for exclusion of nonirrigable land from the district because its contract with the U. S. Department of the Interior prohibited changes in the district boundaries without the consent of the Secretary of the Interior, the district court had jurisdiction, on appeal, to order the board to seek such consent even though such relief was

not prayed for in plaintiff's petition. *Lodge v. Miller*, 91 Idaho 662, 429 P.2d 394 (1967).

Lack of Hearing and Order on Motion to Amend.

Although no hearing was held on defendant's motion to amend to conform to the evidence and no order was entered allowing amendment, the inference by plaintiff that the motion was disallowed was improper. *Perry Plumbing Co. v. Schuler*, 96 Idaho 494, 531 P.2d 584 (1975).

Quo Warranto Proceeding.

Where a village located in one county passed an ordinance annexing territory in another county, the prosecuting attorney of the county in which the land sought to be annexed was located, who filed an action for a declaratory judgment to determine validity of ordinance was entitled to maintain same as a quo warranto proceeding, though quo warranto was not the exclusive remedy for testing validity of annexation. *Potvin v. Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955).

Relief Limited to Allegations.

In the mortgage foreclosure action the plaintiff therein could obtain a judgment no broader than prayed for in his complaint; in a default action a plaintiff is limited to allegations of his complaint although it contains a prayer for general relief. *Intermountain Food Equip. Co. v. Waller*, 86 Idaho 94, 383 P.2d 612 (1963).

Relief Not Limited to Prayer.

Where complaint alleges that plaintiff is owner and holder of bonds in certain amount and evidence shows he is owner to less extent, court may grant any relief consistent with case made by complaint and within issues. *Dennis v. Cooperative Publishing Co.*, 46 Idaho 534, 269 P. 82 (1928).

Complaint to specifically enforce oral gift of land authorized an award of compensation for improvements in judgment denying specific performance. *Barker v. McKellar*, 50 Idaho 226, 296 P. 196 (1930).

When answer is filed court may grant any relief consistent with the case made by complaint. *Schlieff v. Bistline*, 52 Idaho 353, 15 P.2d 726 (1932).

There was no error in granting relief in excess of that specified in the complaint when both answer and counterclaim were filed. *Swanstrom v. Bell*, 67 Idaho 554, 186 P.2d 876 (1947).

Where it was agreed that an accounting should be had, and the court retained jurisdiction of the matter of an accounting and thereafter a supplemental complaint for an accounting was filed, the court could grant

any relief consistent with the case made by the supplemental complaint and embraced within the issues. *Gerkin v. Davidson Grocery Co.*, 57 Idaho 670, 69 P.2d 122 (1949).

If an answer is filed and case is tried on merits the court is entitled to grant any relief consistent with the proof and embraced within the issue. *Vanek v. Foster*, 74 Idaho 532, 263 P.2d 997 (1953).

It is only in default cases where no answer is filed that the relief granted the plaintiff cannot exceed that demanded in his complaint but in any other case the court may grant relief consistent with the case made by the complaint embraced within the issue, the issue having been made up by the pleadings and the case having proceeded to finality by entry of a decree. *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959).

Relief will be granted in any case where the pleadings and proof entitle plaintiff to any relief, legal or equitable. *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348 (1960).

Relief will be granted in any case where the pleading and the proof entitle the plaintiff to any relief whether legal or equitable and whether the particular relief be prayed for or not. *Fort Hall Indian Stockmen's Ass'n v. Thorpe*, 82 Idaho 458, 354 P.2d 516 (1960).

Although the complaint alleged fraud in the sale of real estate, relief could be granted for breach of warranty of fitness where evidence on both sides on the issue of fraud was also competent, relevant, and material to the issue of warranty of fitness. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

A party who pleads and proves facts justifying reformation of a contract, is entitled thereto despite the absence of a prayer for such relief in the pleadings. *Nab v. Hills*, 92 Idaho 877, 452 P.2d 981 (1969).

Court may grant all proper relief consistent with the proof and embraced with the issues framed, whether or not that particular relief is prayed for. *Rowe v. Burrup*, 95 Idaho 747, 518 P.2d 1386 (1974).

Use of the remedy of reformation by the court was not improper, even though not in the pleadings, if the party was entitled to such a remedy. *Collins v. Parkinson*, 96 Idaho 294, 527 P.2d 1252 (1974).

Scope of Relief.

Where an answer is filed to a complaint which prays specifically for an injunction restraining a defendant from filling plaintiff's ditch with debris, from running same onto his land and for damages, the court, under further prayer for general relief, may settle an issue raised by the complaint as to plaintiff's right to certain waters of a creek. *Stocker v. Kirtley*, 6 Idaho 795, 59 P. 891 (1900).

Where plaintiff filed an action against a corporation attacking sale of his stock for delinquent assessment on ground that corporation had not followed the statute relative to sale of stock for delinquent assessment, decree ordering defendant to reinstate stock was proper where defendant had sufficient shares of stock to replace stock sold. *Stivers v. Sidney Mining Co.*, 69 Idaho 403, 208 P.2d 795 (1948).

RESEARCH REFERENCES

A.L.R. Scope of relief which may be granted, under Rule 54 (c) of Federal Rules of Civil Procedure, except in cases of default

judgment, even though party in whose favor judgment is rendered has not demanded such relief. 16 A.L.R. Fed. 748.

Rule 54(d)(1). Costs — Items allowed.

(A) **Parties Entitled to Costs.** Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

(B) **Prevailing Party.** In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

(C) **Costs as a Matter of Right.** When costs are awarded to a party, such party shall be entitled to the following costs, actually paid, as a matter of right:

1. Court filing fees.
2. Actual fees for service of any pleading or document in the action whether served by a public officer or other person.
3. Witness fees of \$20.00 per day for each day in which a witness, other than a party or expert, testifies at a deposition or in the trial of an action.
4. Travel expenses of witnesses who travel by private transportation, other than a party, who testify in the trial of an action, computed at the rate of \$.30 per mile, one way, from the place of residence, whether it be within or without the state of Idaho; travel expenses of witnesses who travel other than by private transportation, other than a party, computed as the actual travel expenses of the witness not to exceed \$.30 per mile, one way, from the place of residence of the witness, whether it be within or without the state of Idaho.
5. Expenses or charges of certified copies of documents admitted as evidence in a hearing or the trial of an action.
6. Reasonable costs of the preparation of models, maps, pictures, photographs, or other exhibits admitted in evidence as exhibits in a hearing or trial of an action, but not to exceed the sum of \$500 for all of such exhibits of each party.
7. Cost of all bond premiums.
8. Reasonable expert witness fees for an expert who testifies at a deposition or at a trial of an action not to exceed the sum of \$2,000 for each expert witness for all appearances.
9. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action.
10. Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action.

Notwithstanding the determination that a particular party is entitled to costs as a matter of right under this subparagraph (C) in an action, the trial court in its sound discretion may, upon proper objection, disallow any of the above described costs upon a finding that said costs were not reasonably incurred; were incurred for the purpose of harassment; were incurred in bad faith; or were incurred for the purpose of increasing the costs to any other party. The mere fact that a deposition is not used in the trial of an action, either as evidence read into the record or for the purposes of impeachment, shall not indicate that the taking of such deposition was not reasonable, or that a copy of a deposition was not reasonably obtained, or that the cost of the deposition should otherwise be disallowed, so long as its taking was reasonable in the preparation for trial in the action.

(D) **Discretionary Costs.** Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs

reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

(E) **Costs Incurred by the Court.** The Court may assess and apportion as costs between and among the parties to the action, in the sound discretion of the court, all fees and expenses of masters, receivers or expert witnesses appointed by the court in the action.

(F) **Costs and Attorney Fees — Fees on Execution of Judgment — Added to Judgment.** — All costs and attorney fees approved by the court and fees for the service of the writ of execution upon a judgment shall be deemed automatically added to the judgment as costs and collected by the sheriff in addition to the amount of the judgment and other allowed costs. In the event the return of the sheriff upon a writ of execution indicates that the service costs were not obtained through the service of the writ, the clerk of the court shall automatically add the uncollected service fees to the judgment as additional costs. (Adopted July 2, 1976, effective October 1, 1976; amended March 23, 1983, effective July 1, 1983; amended March 28, 1986, effective July 1, 1986; amended March 22, 2002, effective July 1, 2002; amended effective July 1, 2004.)

STATUTORY NOTES

Compiler’s Notes. Former Rule 54(d)(1) (adopted effective January 1, 1975) was rescinded by Supreme Court order of January 2, 1976 effective October 1, 1976.

Cross References. Affidavits made in bad faith, Rule 56(g).

District court witnesses’ fees, § 9-1601.
Expenses, payment on refusal to admit, Rule 37(c).
Previously dismissed action, costs, Rule 41(d).
Manner of awarding costs, § 12-101.

JUDICIAL DECISIONS

ANALYSIS

Apportionment.
Attorney’s Fees.
Construction with Statutes.
Costs Incurred After Rejected Offer.
Depositions.
Discretion of Court.
Discretionary Costs.
—Required Findings.
Disputing Award of Costs.
Environmental Protection and Health Act.
“Exceptional” Defined.
Execution of Judgment.
Expert Witness Fee.
Failure to Object.

Findings of Costs.
—Disallowable.
Foreclosure of Lien.
In General.
Legal Malpractice Suit.
Memorandum of Costs.
—Amendment.
—Court to Fix.
Necessary and Exceptional Expense.
Nonprevailing Party.
Partial Summary Judgment.
Photocopy and Photography Expenses.
Pleading.
Prevailing Party.
Reasonable and Justified Costs.
— Failure to Explain.

Research Expenses.
 Separability of Claims.
 Special Masters.
 Subsequent Settlement Offers.
 Time Limitations.
 Waiver.

Apportionment.

The trial judge may apportion attorney fees and costs in relation to parties' recoveries or by any other equitable standard. *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989).

In an action for breach of a contract to assemble a specialty car engine, the district court erred by awarding the parties all attorney fees incurred in the litigation. Under paragraph (B) of this rule, the court had a duty to apportion to each party only the attorney fees related to the claims upon which each party prevailed. *Schroeder v. Partin*, — Idaho —, 259 P.3d 617 (2011).

Attorney's Fees.

Where the jury returned a verdict finding against plaintiffs on their complaint, and against defendants on the balance of their counterclaim, neither party prevailed, and it would be an abuse of discretion to allow attorney's fees. *Hutchison v. Kelton*, 99 Idaho 866, 590 P.2d 1012 (1979).

An award of reasonable attorneys' fees to the condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion and, as in other areas of the law, such award will be overturned only upon a showing of abuse; the condemnee's costs may be awarded under subsections (C) or (D) of this rule. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

Attorneys' fees and costs are allowable, in eminent domain proceedings under this rule, however such fees and costs are not mandatory as being within the definition of just compensation. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

Objections to the memorandum of costs must be made within ten days of its service under I.R.C.P. 54(d)(6); a failure to timely object, however, does not automatically entitle the prevailing party to the attorney fees requested. An award of attorney fees under § 12-121 is discretionary with the trial court; lack of an objection does not preclude the court from exercising its discretion in deciding whether to award attorney fees under subparagraph (D) of this rule. *Long v. Hendricks*, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985).

Where the recovery of the defendants in a

condemnation action, although exceeding the pre-trial offers from plaintiff, was substantially lower than the claims and demands of the defendants and the jury obviously rejected the claimed highest and best use proposed by defendants, the District Court did not abuse its discretion in denying attorney fees. *State ex rel. Ohman v. Talbot Family Trust*, 120 Idaho 825, 820 P.2d 695 (1991).

Where the supreme court affirmed the lower court on the contractual issues in a case involving a lease, holding that the lease did not exempt the defendant from liability for fires it negligently caused, the plaintiff was entitled to an award of costs and attorney fees pursuant to the terms of the lease. *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.*, 132 Idaho 295, 971 P.2d 1119 (1993).

Where the district court granted the defendant's summary judgment motion for lack of subject matter jurisdiction, but also granted the plaintiff's motion on its counterclaim for the same reason, the court did not err in denying the defendant's request for discretionary costs and attorney fees. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

Where the most significant issue in the case was whether the plaintiff was entitled to the market price for rejectable potatoes, and where the plaintiff prevailed on that issue both below and on appeal, the plaintiff was entitled to fees below and fees and costs on appeal. *Licklyey v. Max Herbold, Inc.*, 133 Idaho 209, 984 P.2d 697 (1999).

Applying the factors from *Sun Valley Shopping Ctr. Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991), with the exception of the inaccurate calculation of the amounts attributable to the pre-judgment interest and the previously awarded attorney fees, there was no abuse of discretion in the award of attorney fees. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

What constitutes a reasonable fee under Rule 54 (d)(1) is a discretionary determination for the trial court that is to be guided by the criteria of this rule. *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000).

District court was within its discretion to award attorney fees in an amount equivalent to the prevailing party's contingent fee arrangement. *Lake v. Purnell*, 143 Idaho 818, 153 P.3d 1164 (2007).

Where there was a genuine issue as to whether a driver had operated insured vehicle with the owner's permission, and where the existence of that permission governed the insurers' obligation, attorney fees were not awarded to respondent insurer, despite the

fact that respondent prevailed on appeal. *Or. Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 148 Idaho 47, 218 P.3d 391 (2009).

Shareholders made the decision to seek affirmative relief in the form of counterclaims rather than simply asserting defenses to the owner's claim; this rule expressly requires the district court to consider the multiple claims between the parties. *Jorgensen v. Coppedge*, 148 Idaho 536, 224 P.3d 1125 (2010).

Construction with Statutes.

Although the language of I.C. § 44-1704(2) is broader than the language of I.R.C.P. 54(d)(1), the rule is the proper measure for costs under this statutory section, since without specific language to the contrary in the statute, the rules of civil procedure provide the correct basis by which to measure an award of costs in such an action. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

Idaho R. Civ. P. 54(d)(1) mandates an award of certain costs to a prevailing party as a matter of right; neither that rule nor any other rule or statute of which the appellate court is aware makes an exception for lawsuits brought by guardians or other fiduciaries for or on behalf of a minor child or incompetent person. *Gillihan v. Gump*, 140 Idaho 693, 99 P.3d 1083 (Ct. App. 2003).

Costs Incurred After Rejected Offer.

A party who has made an offer of judgment under Rule 68 is entitled to recover its costs, as allowable under this rule, incurred after the making of the offer, if the judgment finally obtained by the offeree is not more favorable than the offer. *Mountain Restaurant Corp. v. Parkcenter Mall Assocs.*, 122 Idaho 261, 833 P.2d 119 (Ct. App. 1992).

Depositions.

In a dispute over a land sale contract, a district court did not err by awarding a seller the cost of reporting and transcribing depositions. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 159 P.3d 870 (2007).

Discretion of Court.

In action claiming breach of a contract providing for sale of two partners' shares in corporation to remaining partner and dissolving the partnership, wherein plaintiff sellers prevailed with respect to payment of profit sharing funds but defendant buyer prevailed on other claims arising out of the contract, the trial judge's decision not to award attorney fees to either side was a proper exercise of his discretion. *Burnham v. Bray*, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

The determination of who is a prevailing

party, for the purpose of receiving an award of attorney fees, is committed to the sound discretion of the trial court; that determination will not be disturbed unless an abuse of discretion has occurred. Where the trial court has exercised its discretion after a careful consideration of the relevant factual circumstances and principles of law, and without arbitrary disregard for those facts and principles of justice, that exercise of discretion has not been abused and will not be disturbed. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

In action by homeowners against seller of hydronic heating systems, the trial court did not abuse the discretion vested in it under subsection (B) of this rule in refusing to apportion the fees on the basis of affirmative recovery on the various claims. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

Where the trial court found that each party had prevailed on some issues and each was at fault on some issues and that each party was about equally justified in bringing suit, the trial court did not abuse its discretion by declining to award attorney fees or costs to either side since both parties had partially prevailed. *Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 682 P.2d 1289 (Ct. App. 1984).

The determination of who is the prevailing party is committed to the trial court's sound discretion. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

The court abused its discretion in holding a defendant equally liable with codefendant for costs and fees in a quiet title action where plaintiff named defendant as a defendant without alleging any acts of wrongdoing on her part and the plaintiff had stipulated to dismissal of the defendant prior to trial without making any claim against her for costs or fees. *Platt v. Brown*, 120 Idaho 41, 813 P.2d 380 (Ct. App. 1991).

No clear abuse of discretion was shown in district court's decision not to award attorney fees and costs to shopping mall landlord in a lease agreement dispute; tenant established a breach of contract but did not prove materiality and landlord was awarded relief as to rent payments only during time tenant occupied mall space, thus, court ruled that each party prevailed in part and did not prevail in part. *Mountain Restaurant Corp. v. Parkcenter Mall Assocs.*, 122 Idaho 261, 833 P.2d 119 (Ct. App. 1992).

An award of costs under this Rule is committed to the sound discretion of the district court. The burden is on the party opposing the award to demonstrate an abuse of the district court's discretion, and, absent an abuse of

discretion, the district court's award of costs will be upheld. *Zimmerman v. Volkswagen of Am., Inc.*, 128 Idaho 851, 920 P.2d 67 (1996), cert. denied, 520 U.S. 1115, 117 S. Ct. 1245, 137 L. Ed. 2d 327 (1997).

The determination as to the prevailing party in an action is a matter committed to the sound discretion of the trial court, and the trial court's determination will not be disturbed absent an abuse of that discretion. *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 130 Idaho 255, 939 P.2d 574 (1997).

An award of reasonable attorneys' fees to a condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion and such award will be overturned only upon a showing of abuse. *State ex rel. Smith v. Jardine*, 130 Idaho 318, 940 P.2d 1137 (1997).

In denying attorney fees to both parties, the trial court did not venture outside the boundaries of its discretion, nor did it act inconsistently with the legal standards applicable to the award of attorney fees; the trial court's decision to require each party to bear its own fees appeared to have been reached through the exercise of reason. *Israel v. Leachman*, 139 Idaho 24, 72 P.3d 864 (2003).

Trial court properly awarded respondents costs because it found plaintiff's petition to be frivolous, unreasonable and without foundation in claiming a violation of nonexistent constitutional and statutory rights. *Ackerman v. Bonneville County*, 140 Idaho 307, 92 P.3d 557 (Ct. App. 2004).

Award of attorney's fees in favor of the prevailing party was affirmed because the decision was left to the sound discretion of the district court, and the reviewing court could not find that the district court abused its discretion. *Luce v. Marble*, 142 Idaho 264, 127 P.3d 167 (2005).

In a dispute over trust property, the magistrate court did not err in refusing to award costs and fees to the decedent's second wife with respect to claims for construction fraud, fraud, conversion, and a resulting trust that were voluntarily dismissed by the decedent's son because Idaho R. Civ. P. 54(d)(1)(B) permits the trial judge to apportion the costs in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained. *Carter v. Carter (In re Carter JJC Trust)*, 143 Idaho 373, 146 P.3d 639 (2006).

Because a partial judgment, certified under Idaho R. Civ. P. 54(b)(1) as final for appeal in an easement dispute, was "final" as provided in Idaho R. Civ. P. 52(a), the district court had discretion under paragraph (d)(1)(B) of this

rule to award costs and fees; and it acted within its discretion when it found that there was no prevailing party. *Caldwell v. Cometto*, — Idaho —, 253 P.3d 708 (2011).

Discretionary Costs.

Where a prima facie showing was made by the plaintiff that it incurred \$500 for truck rental and \$552 for forklift rental in retaking possession of the prefabricated building components from the defendant under the writ of possession, and the district court failed to make any findings regarding the disallowance of these expenses, the cost award was remanded to specifically find whether the equipment rental qualified as an allowable discretionary cost. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931 (Ct. App. 1988).

Trial court did not abuse discretion in denying discretionary costs to plaintiffs where majority of costs incurred were due to appearance of out of state counsel where court recognized cost issue as one of discretion, applied the correct legal standard and reached its decision by an exercise of reason and although it did not evaluate the costs item by item, it made the express finding required under this section as to the general character of the requested costs. *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996).

Although the trial court did not make a specific finding on each discretionary cost item it did evaluate the costs item by item and make express findings as required by subdivision (d)(1)(D) with regard to the general character of the requested costs. *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998).

The district court did not abuse its discretion in awarding discretionary costs where it correctly perceived the issue as discretionary, where the court did not act outside the boundaries of its discretion or inconsistently with the applicable legal standard, and where the court reached its determination through the exercise of reason when it described the circumstances giving rise to its findings. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 983 P.2d 834 (1999).

Where the judge awarded discretionary costs on the basis of his determination that the costs appeared to be ordinary and necessary, his failure to make express findings that the costs were exceptional, necessary, reasonably incurred, and should in the interest of justice be assessed against the adverse party, required reversal. *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 987 P.2d 1035 (1999).

The district court's decision denying discretionary costs to defendant was upheld where the district court's order clearly illustrated

that it was aware that it had the discretion to award or deny the discretionary costs, and the court made express findings for each of the requested discretionary costs submitted by defendant and ultimately concluded that none of the requested costs was "exceptional." *Nampa & Meridian Irrigation Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001).

The district court will be deemed to be acting within the bounds of its discretion even though it may not evaluate the costs item by item, if the district court makes express findings as required by subdivision (d)(1)(D) with regard to the general character of the requested costs. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001).

While the trial court had discretion to determine the prevailing party in a dispute between a materialman and a homeowner, since the trial court failed to rule on the issue and in essence denied the homeowner's motion to determine the prevailing party, the Idaho Supreme Court was able to award the homeowner's costs of litigation. *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 40 P.3d 96 (2002).

Pursuant to § 11-203(b) and subsection (D) of this rule, the debtor's alternate transportation expenses could not have been appropriately awarded as discretionary costs. *Powell v. Powell*, 142 Idaho 815, 135 P.3d 761 (Ct. App. 2006).

Award of exceptional expert witness fees was not proper where the only reason given by the court to justify exceptional fees was that the case required experts on the vascular system to travel and testify. Such specialized knowledge and expert testimony of the witnesses was of a type required in every malpractice case. *Nightengale v. Timmel*, — Idaho —, 256 P.3d 755 (2011).

—Required Findings.

Since plaintiffs made no showing that their discretionary costs were exceptional, necessary, or reasonable, and since the trial judge did not make such an express finding with regard to each specific cost item, as is required by subsection (D) of this rule, the award of costs was set aside and the matter remanded to the trial court to allow only those costs to which the plaintiffs were entitled as a matter of right pursuant to subsection (C) of this rule. *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991).

Where the trial court did not evaluate costs item by item, but did make express findings as to expert witness fees, the finding that the discretionary costs were reasonable and necessary but not exceptional, after identifying

the general nature of the discretionary costs, satisfied the requirement that the court make express findings. *Inama v. Brewer*, 132 Idaho 377, 973 P.2d 148 (1999).

Where the trial court noted that costs in addition to those allowed as a matter of right were allowed as a matter of discretion, but only if the prevailing party showed that they were necessary, reasonably incurred, exceptional, and assessable against the adverse party in the interests of justice, the court's findings satisfied this rule. *Inama v. Brewer*, 132 Idaho 377, 973 P.2d 148 (1999).

Disputing Award of Costs.

The burden is on the party disputing an award of costs to show an abuse of the court's discretion, and absent an abuse of discretion, the district court's award of costs will be upheld. *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990).

Where the record showed that appellant, as mother and guardian of a minor, sued respondent landowners for personal injuries that the minor received on the landowners' property, the award of costs to the landowners under Idaho R. Civ. P. 54(d)(1)(C)(6) was affirmed because the mother failed to show that the district court abused its discretion. *Gillihan v. Gump*, 140 Idaho 693, 99 P.3d 1083 (Ct. App. 2003).

Environmental Protection and Health Act.

The legislature has made it clear that an award of expenses under the Environmental Protection and Health Act is mandatory and unqualified, stating that a person who violates the act "shall be liable for any expense." By using the term "any expense" rather than "costs", the legislature apparently intended a more extensive recovery of costs than is contemplated by § 12-101 and I.R.C.P. 54(d)(1). For this reason, the trial court should consider a request for costs according to § 39-108(6) rather than Rule 54(d)(1). *Idaho Dep't of Health & Welfare v. Southfork Lumber Co.*, 123 Idaho 146, 845 P.2d 564 (1993).

"Exceptional" Defined.

Trial court did not abuse its discretion in failing to define "exceptional"; in fact by its reasoning in ruling that requested costs were not exceptional, the trial court did give meaning to the word. *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998).

Travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are not exceptional but, on the contrary, common in a personal injury case. *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998).

Supreme Court of Idaho construes the re-

quirement that a cost be “exceptional” under paragraph (D) to include those costs incurred because the nature of a case is itself exceptional. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005), overruled on other grounds, *Farber v. Idaho State Ins. Fund*, — Idaho —, 272 P.3d 467 (Idaho 2012).

In insureds’ class action suit against a state insurance fund for breach of fiduciary duty, court did not abuse its discretion in denying the fund’s expert witness fees because the need for expert witnesses in the case was essential, but was an ordinary part of such litigation, and not exceptional. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005), overruled on other grounds, *Farber v. Idaho State Ins. Fund*, — Idaho —, 272 P.3d 467 (Idaho 2012).

Execution of Judgment.

Idaho R. Civ. P. 54(d)(1)(F) does not provide for any exceptions for adding sheriff’s fees to a judgment, and neither the fees nor the cost of alternative transportation are costs recoverable under § 11-203(b). Therefore, although a debtor prevailed on the issue of an exemption, a magistrate judge did not err by adding the cost of serving the writ of execution to the judgment under Idaho R. Civ. P. 54(d)(1)(F), and there was no evidence that this was a second levy precluding the addition of the costs under § 11-203(d). *Powell v. Powell*, 142 Idaho 815, 135 P.3d 761 (2006).

Expert Witness Fee.

It is not unfair to allow recovery of extraordinary costs in actions to adjudicate water rights since this rule does not indicate any limitations, as to the type of actions or costs, in its application; accordingly, trial court in water rights case did not abuse its discretion in allowing recovery of an expert witness fee as a cost. *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983).

Where, in an action brought by the wife to set aside a divorce property settlement, the grant of “discretionary” costs to the husband under subsection D of this rule was proper, where the expert’s testimony was, by necessity, an expense incurred in response to the issues presented, even though the trial court found that the husband had misrepresented the value of the assets. *Bodine v. Bodine*, 114 Idaho 163, 754 P.2d 1200 (Ct. App. 1988).

Where nothing in the record demonstrated that \$1300 was required in order to obtain the testimony of plaintiff’s expert witness, the fact that the witness charged more than the \$500 provided by this rule is insufficient in and of itself to allow costs for a higher fee. *Turner v. Willis*, 116 Idaho 682, 778 P.2d 804 (1989).

Where corporation sought and was awarded \$1,500 in expert witness fees — an amount which is \$1,000 in excess of the \$500 authorized in subdivision (C)(8) of this rule — this award was not permitted absent express findings which explain why this additional amount for expert witness fees was awarded. *World Cup Ski Shop, Inc. v. City of Ketchum*, 118 Idaho 294, 796 P.2d 171 (Ct. App. 1990).

The trial court erred in allowing a second fee for an expert witness since it exceeded the amount allowed by this Rule. *Perry v. Magic Valley Reg’l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Prevailing defendant in a medical malpractice case was not entitled to an award of discretionary costs to cover the fees of three experts who never actually testified, in the absence of a finding by the trial court that assessment of those costs against the plaintiff patient was required in the interest of justice. *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003).

Where plaintiff and defendant entered into a settlement agreement regarding a limited partnership, it was error to award plaintiff expert witness fees as costs as a matter of right because the expert witness testified by affidavit, not in person. *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008).

Failure to Object.

Lack of a timely objection precludes a party against whom fees are awarded from challenging the award on appeal; however, it does not preclude the court from exercising its discretion in deciding whether to make an award. *Long v. Hendricks*, 114 Idaho 157, 754 P.2d 1194 (Ct. App. 1988), modified on other grounds, *Long v. Hendricks*, 117 Idaho 1051, 793 P.2d 1223 (1990).

Findings of Costs.

The district court should have explicitly stated which costs were recoverable under rule 68 and which costs were recoverable under this rule, together with a statement of reasons supporting award of any discretionary costs under former rule 54, in the event the defendants were found to be the prevailing party at trial. *Masters v. Dewey*, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985).

Costs under this rule must be shown to be both necessary and exceptional, therefore the trial court manifestly abused its discretion by applying the incorrect standard. *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 821 P.2d 973 (1991).

This rule directs that the court compare the final judgment or result of the action in relation to the relief sought by the respective parties, therefore, a magistrate’s focus upon

whether the parties' proffered individual arguments were accepted or rejected was too narrow and did not address the factors enumerated in this rule. *Holmes v. Holmes*, 125 Idaho 784, 874 P.2d 595 (Ct. App. 1994).

Had the creditor not contested the debtor's claim of exemption, her vehicle would have been in storage for approximately seven days; the towing fee and initial days of storage were costs that would have been incurred even if the creditor had not contested the exemption claim, and were properly added onto the judgment under subsection (F), regardless of whether the creditor was the prevailing party at the exemption claim hearing. *Powell v. Powell*, 142 Idaho 815, 135 P.3d 761 (Ct. App. 2006).

—Disallowable.

Cost of the bond should be allowed unless the court makes a finding under subsection (C) of this rule that the cost is disallowable for any of several specifically enumerated reasons, such as if the cost was not reasonably incurred. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931 (Ct. App. 1988).

Where in the memorandum of costs the lessors claimed \$139.95 for the preparation of blueprints used as exhibits at trial but the exhibits were never admitted as evidence to those costs. *George W. Watkins Family v. Messenger*, 115 Idaho 386, 766 P.2d 1267 (Ct. App. 1988).

District court did not err by disallowing plaintiffs' claim to soil compaction tests as discretionary costs incurred in anticipation of litigation since plaintiffs had lost their right to collect these costs by failing to include them in their memorandum of costs filed in the original action. *Gilbert v. Tony Russell Constr.*, 115 Idaho 1035, 772 P.2d 242 (Ct. App. 1989).

District Court did not err in disallowing certain costs that were in excess of those allowed as a matter of right; the court clearly made express findings as to why such specific costs should not be allowed. *Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 831 P.2d 541 (1992).

Court properly denied a portion of the costs requested by a tenant, in a commercial lease suit, finding that the requested costs for an expert witness and expedited deposition transcripts were discretionary. *J. R. Simplot Co. v. Rycar, Inc.*, 138 Idaho 557, 67 P.3d 36 (2003).

The court found additional expert fees were necessary because the rule regarding expert witness fees to be paid a maximum of \$ 500.00 was not adequate; however, that was not a sufficient finding to support an award of dis-

cretionary costs under the rule. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

Although creditor indicated that he did not want to execute the writ on the debtor's vehicle and he did not recover any payment toward satisfaction of his judgment, the magistrate specifically found that the vehicle's value was less than the statutory exemption and that it should be immediately released to the debtor, such that the creditor did not prevail at the exemption hearing and was not entitled to a cost award under § 11-203(b) or this rule. *Powell v. Powell*, 142 Idaho 815, 135 P.3d 761 (Ct. App. 2006).

Foreclosure of Lien.

Upon the successful entry of a judgment of foreclosure of a lien claimed under § 45-507, an award of attorney fees and costs is mandatory. The amount of the award, however, is still a matter of discretion for the district court. In determining the amount, the district court is free to consider the factors of I.R.C.P. 54(e)(3) as well as those considerations which are part of a prevailing party analysis under this Rule. *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

Trial court properly denied attorney fees to homeowner who prevailed in foreclosure action brought by a materialman; the homeowner could not recover attorney fees under § 45-513, since attorney fees could not be awarded to a defendant in an action, or § 12-120, since the materialman's pleadings did not plead an amount of \$25,000 or less. *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 40 P.3d 96 (2002).

In General.

The mandate of subsection (B) of this rule is clear: The trial court is vested with the discretion to apportion costs and fees, taking into account counterclaims, crossclaims or other multiple issues. *Jones v. Whiteley*, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987).

The abuse of discretion standard is used to review issues of costs under this rule. *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 956 P.2d 674 (1998).

Under subsection (B) of this rule, there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000).

Under subdivisions (d)(1)(C) and (d)(1)(D), award of costs as a matter of right and discretionary costs are subject to the trial court's

discretion. The party opposing the award bears the burden of demonstrating an abuse of the trial court's discretion. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001).

Legal Malpractice Suit.

The peculiar nature of a legal malpractice action requires the action to proceed as a suit within a suit. Therefore, an award of attorney fees pursuant to an underlying antitrust action constituted a part of the measure of damages in the malpractice case, and must have been submitted as part of the proof of damages under the antitrust claim. It is not sufficient to file a post-trial affidavit of costs and fees under this rule. *Fitzgerald v. Walker*, 121 Idaho 589, 826 P.2d 1301 (1992).

Memorandum of Costs.

—Amendment.

The trial court in condemnation proceeding did not err in allowing amendment of landowners' costs bill to include attorneys' fees, after the ten-day (now 14 day) period allowed by I.R.C.P. 54(d)(5) had expired, where the record disclosed no harm or prejudice resulting to the highway district from the court's allowing amendment of the memorandum of costs. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

—Court to Fix.

Although the plaintiff unions waived their right to take exception to the memorandum of costs filed by the prevailing defendant employer, it did not follow that the memorandum of costs was deemed approved in its entirety and that a writ of execution could be issued thereon, since before a writ of execution could issue on a money judgment, the court, by judgment or supplemental order, must have fixed the amount of recovery; accordingly, where the court neither fixed the amount of costs in the judgment itself, nor entered a separate order fixing the amount of costs, a writ of execution for the costs should not have been issued. *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982).

Necessary and Exceptional Expense.

In action alleging breach of contract and fraud in sale of stock in corporation formed by plaintiff and defendant, to defendant where costs, which were associated with preparation of corporate documents, were not a necessary and exceptional expense because such documents might have been done on account of any number of business concerns not related to the litigation, court did not abuse its dis-

cretion in not awarding such costs. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

In breach of contract suit by subcontractor against firm that it hired to do asphalt work, where deposition of out-of-state witness was taken by subcontractor and where in spite of the fact that had asphalt firm's counsel not attended the deposition there would have been opportunity for evidentiary objection or cross-examination, district court found the costs were not exceptional and therefore denied the award of such costs, district court did not abuse its discretion in concluding that, in the limited circumstance of the case, no showing was made that the costs were exceptional. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

While the trial court stated that all costs claimed were necessary and exceptional, it emphasized that its view of Idaho R. Civ. P. 68 was that the ski instructor was responsible for all costs incurred after the skier made an offer which was rejected by the ski instructor; therefore, it was apparent from the record that the trial court failed to correctly apply Idaho R. Civ. P. 54(d)(1)(D) where it did not individually consider whether each discretionary cost claimed was necessary and exceptional. *Stewart v. McKarnin*, 141 Idaho 930, 120 P.3d 748 (Ct. App. 2005).

Nonprevailing Party.

A nonprevailing party has no right to recover costs or attorney fees from the plaintiff's regardless of its fee agreement with its co-defendant. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985).

Where the owners of the corporation were named as defendants, but by stipulation the plaintiff's complaint was dismissed as to the owners, the owners were not prevailing parties because it was reasonable and prudent to include the individual owners as defendants, the costs that were incurred in the defense of the owners were necessarily incurred in defense of the corporation, and the jury verdict was returned against the corporation. *P.N. Cedar, Inc. v. D & G Shake Co.*, 110 Idaho 561, 716 P.2d 1333 (Ct. App. 1986).

An injured party who receives a damage award that is less than the amount of money offered to him in a proposed settlement before the trial (including subrogation payments made to the party's insurance company) cannot be considered the prevailing party for purposes of this rule. *Carlson v. Stanger*, 146 Idaho 642, 200 P.3d 1191 (2008).

Partial Summary Judgment.

Because the district court's order of partial summary judgment constituted a final judgment with respect to some, but not all, of the

claims raised by the parties, the district court's ruling on the issue of costs and attorney fees was premature. *Bear Island Water Ass'n v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994).

Photocopy and Photography Expenses.

There was no abuse of discretion by the trial court in awarding costs for defendant's photocopying and photography expenses. *Luna v. Shockey Sheet Metal & Welding Co.*, 113 Idaho 193, 743 P.2d 61 (1987).

Where plaintiff and defendant entered into a settlement agreement regarding a limited partnership, it was error to award plaintiff copying costs because there was nothing in the record showing what portion, if any, of the copying costs was incurred to create the exhibits admitted during the hearing. *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008).

Pleading.

In an action relating to the sale of a duplex, two sellers were still allowed to seek attorney fees and costs, despite a failure to plead such in their answer. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

Prevailing Party.

Subsection (A) of this rule, which authorizes costs to the prevailing party and subsection (2) of § 12-120 which authorizes attorney fees to a prevailing party are not applicable where there is no prevailing party; accordingly, where two plaintiffs and defendant were awarded a portion of claims each had not made against the other, the trial court did not err in ruling that all parties should pay their own costs and attorney fees since there was no overall prevailing party. *International Eng'g Co. v. Daum Indus., Inc.*, 102 Idaho 363, 630 P.2d 155 (1981).

Where plaintiff filed an assault and battery suit seeking general damages of \$200,000, punitive damages of \$50,000 and special damages of \$1,000, and defendant prior to trial made an offer of judgment of \$1,700 which was refused, after which the jury found in plaintiff's favor, but awarded him only nominal damages of \$1.00, it was proper for the trial court to award the defendant costs exceeding \$800 and attorney fees exceeding \$5,800 pursuant to § 12-121, since I.R.C.P., Rule 68 clearly entitles a party tendering offer of judgment to those costs accrued following an offer of judgment where the damages awarded are less than the offer of judgment, and since the trial court correctly found pursuant to subsection (B) of this rule that the defendant was the prevailing party. *Odziemek v. Wesely*, 102 Idaho 582, 634 P.2d 623 (1981).

A party need not be awarded affirmative relief in order to be the "prevailing party"; accordingly, the trial court did not abuse its discretion in awarding costs and attorney's fees to defendant contractor in breach of contract action where the contractor prevailed on the main issue of the case although he was denied affirmative relief on his counterclaim. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

Under subsection (B) of this rule, a trial court, in the exercise of its discretion, may consider both the presence and absence of awards of affirmative relief, in determining which party prevailed either in whole or in part; this determination is limited only by the established test of whether an abuse of discretion has occurred. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

In action by homeowners against seller of hydronic heating systems, the trial court did not abuse its discretion in determining that homeowners were the prevailing parties despite the fact that the majority of the homeowners' claims were dismissed, that jury awarded damages amounting to only 3% of the recovery sought, and that seller prevailed on counterclaim against builder. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

Where the district court observed there was no bad faith on the part of any party, that the flooding complained of by plaintiff was abated, that the damage claim was settled, and that the court was not required to decide the case on its merits, but the district judge also observed that because of defendant's unauthorized flooding of plaintiff's property, plaintiff was justified in bringing the suit for injunction and recovery of damages, and that such relief, albeit by settlement, was achieved because of plaintiff's lawsuit, the court properly found that plaintiff was the prevailing party under the circumstances and such finding was sufficient, in and of itself, to justify an award of fees under § 12-121, prior to the effective date of I.R.C.P. 54(e). *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct. App. 1983).

Where there are claims, counterclaims and cross-claims, the mere fact that a party is successful in asserting or defeating a single claim does not mandate an award of fees to the prevailing party on that claim. The rule does not require that; it mandates an award of fees only to the party or parties who prevail "in the action." *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct. App. 1984).

Mere dismissal of a claim without a trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding

costs and fees. Dismissal of a claim may be but one of many factors to consider; when the claim was dismissed may be another such factor. *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct. App. 1984); *P.N. Cedar, Inc. v. D & G Shake Co.*, 110 Idaho 561, 716 P.2d 1333 (Ct. App. 1986).

Where a party has made an offer of judgment greater than the opponent's recovery and the offeror also is the prevailing party at trial, that party may receive its justified costs under this rule. *Masters v. Dewey*, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985).

The trial court did not abuse its discretion in deeming the plaintiffs the prevailing party, even though the plaintiffs originally sought over \$160,000 and only recovered slightly more than \$7500, where certain claims sounding in tort were voluntarily dismissed by the plaintiffs, they then prevailed at trial on a contract theory, and the recovery was limited only because the trial court adopted an alternative measure of damage. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

Where trial court noted that both parties had prevailed on their most significant claims, and also failed on a number of smaller claims, and that all of the claims were brought in good faith and were meritorious, the trial court's finding of no "prevailing party" was affirmed. *Jones v. Whiteley*, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987).

Where, in an action brought by wife to set aside a divorce property settlement agreement, the district court found that the husband had misrepresented the value of the assets, but the wife failed to meet her ultimate burden in proving fraud, the district court did not abuse its discretion in its determination that the wife was not a partially prevailing party and that the husband was the prevailing party. *Bodine v. Bodine*, 114 Idaho 163, 754 P.2d 1200 (Ct. App. 1988).

Where, in a personal injury action, the plaintiffs prevailed on the compensatory damage claim but the defendant prevailed on the claims for loss of consortium and punitive damages, the judge's decision that there was no overall prevailing party was not an abuse of discretion. *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988).

In a sex and age discrimination case where trial court granted motion for a new trial against employer but denied motion for new trial against supervisor, trial court was correct to deny supervisor's petition for costs and attorney fees since all the costs and attorney fees in the litigation were paid by employer, and since neither employer nor supervisor segregated the costs and attorney fees as

between those two parties. *Hinman v. Morrison-Knudsen Co.*, 115 Idaho 869, 771 P.2d 533 (1989).

The determination with regard to which party has prevailed is not a matter of a mechanical measurement of the size of each party's respective recovery; instead, the trial court should analyze each claim separately, and where both parties have successfully asserted claims, the claims should be severed and costs analyzed separately for each. *Ramco v. H-K Contractors*, 118 Idaho 108, 794 P.2d 1381 (1990).

Where plaintiff filed a complaint requesting insurance policy proceeds plus punitive damages, where the defendant denied liability under the policy and where the district court granted summary judgment in favor of the defendants, dismissing plaintiff's complaint, from these facts the defendants prevailed on the complaint and although the trial court did order defendant to return \$189.90 in unused premium payments, this relief was not sought by plaintiff but rather accrued to her as a result of the district court's decision on defendants' motion for summary judgment; accordingly, the award of costs to the plaintiff was vacated as she was not the prevailing party. *Wells v. United States Life Ins. Co.*, 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991).

The trial court did not err in determining that the plaintiffs had to suffer "ascertainable damages" under § 48-608(1) before they could be considered prevailing parties and awarded attorney fees under § 48-608(3). *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 815 P.2d 461 (Ct. App. 1991).

In a suit for breach of contract for provision of goods and services, the court did not abuse its discretion in finding that the defendant was the prevailing party on its counterclaim for the unpaid balance of the contract; even though the plaintiff had prevailed on breach of contract claim, it received less than 10% of damages it sought and the defendant received approximately 90% of the amount it sought in the counterclaim. Therefore, defendant was entitled to attorney fees. *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 815 P.2d 461 (Ct. App. 1991).

The discretion given to the trial court in IRCP 41(a)(2) is not circumscribed by the prevailing party analysis that is mandated by § 12-120 and subsection (B) of this Rule: *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

The trial court did not abuse its discretion in declining to award the injured party costs where the trial court concluded there was no overall prevailing party. *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991).

Pursuant to this rule, the determination of who is a prevailing party, for the purpose of receiving an award of attorney fees, is committed to the sound discretion of the trial court, and that determination will not be disturbed unless an abuse of discretion has occurred. *Deutz-Allis Credit Corp. v. Bakie Logging*, 121 Idaho 247, 824 P.2d 178 (Ct. App. 1992).

Where in determining which party, if any, is the prevailing party magistrate reviewed the memorandum in support of attorney fees and noted that the time itemizations did not clearly separate the amount of time spent on each individual issue and determined that it was reasonable to award husband 75% of the amount claimed for attorney fees based on the fact that husband had incurred approximately 25% of the attorney fees in defending against wife's claim, the magistrate employed the discretion accorded him in determining the prevailing party and did so in a proper reasonable way and therefore the award of attorney fees was proper. *Badell v. Badell*, 122 Idaho 442, 835 P.2d 677 (Ct. App. 1992).

Where trial court concluded that each of the parties in suit in which plaintiff sought possession of farm upon termination of lease, preliminary injunction to prevent the defendant from interfering with their right to possession to do fall work and to obtain total possession of the premises at the expiration of the lease and defendant's counterclaim sought a right to possession after termination of lease and for damages if plaintiff prevailed in obtaining possession, prevailed in part and did not prevail in part, trial court did not abuse its discretion in determining that for the purpose of awarding costs under subsection (B) of this rule neither party prevailed in the litigation. *Farm Credit Bank v. Wissel*, 122 Idaho 565, 836 P.2d 511 (1992).

The determination of who is the prevailing party, if anyone, is within the trial court's discretion, and the appellate court will not disturb the trial court's decision unless there is an abuse of discretion; an analysis of whether or not a trial court has abused its discretion includes: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Farm Credit Bank v. Wissel*, 122 Idaho 565, 836 P.2d 511 (1992).

District court did not abuse its discretion in denying plaintiffs' motion for an award of costs and attorney fees, in malpractice action

against doctor and nurse for misdiagnosis of herpes, where attorney fees were not raised until appeal, and plaintiffs were found to be 49% negligent so that there was no clearly prevailing party. *Adams v. Krueger*, 124 Idaho 74, 856 P.2d 864 (1993).

Where the magistrate found that the children of the deceased were the prevailing parties in an action to remove the personal representative of the estate and that they met the criteria for an award of attorney fees under § 12-121 and subsection (B) of this Rule, and where the magistrate further found, pursuant to subsection (B) of this Rule and Rule 54(e)(1) that the personal representative's bad faith misuse of estate funds supported the conclusion that her defense of the removal was unreasonable and frivolous, it was not an abuse of discretion for the magistrate to award attorney fees to the estate for the removal proceedings. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

School bus drivers, seeking preliminary and permanent injunctions against a school district alleging that the school district had discriminated against and harassed the bus drivers because of their membership in a labor union, were not prevailing parties under this rule where the bus drivers were only marginally successful on their permanent injunction claims, and did not prevail on their damage claim or on the request for a preliminary injunction. *Cunningham v. Waford*, 131 Idaho 841, 965 P.2d 201 (Ct. App. 1998).

Because the jury awarded plaintiff monetary damages, thus finding plaintiff was entitled to compensation, the district court found plaintiff to be the prevailing party, even though plaintiff received less than the entire amount of damages requested. *Collins v. Jones*, 131 Idaho 556, 961 P.2d 647 (1998).

The district court did not err in awarding the defendant 60 percent of his reasonably incurred attorney fees where it found that he only prevailed on part of his counterclaim and where the plaintiff, although failing on his contract claim, was awarded restitutional damages. *Walton, Inc. v. Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

Where the plaintiff prevailed before the district court with respect to some of her claims, the court did not abuse its discretion in determining that she satisfied the requirements of I.R.C.P. 54(e)(1). *Smith v. USAA Property & Cas. Ins.*, 132 Idaho 466, 974 P.2d 1095 (1999).

The district court did not properly apply the criteria of subsection (B) of this rule in holding that defendant was not the prevailing party where the "result obtained" was a dis-

missal of plaintiff's action with prejudice, the most favorable outcome that could possibly be achieved by the defendant. *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000).

Although the prevailing party determination is discretionary in nature, this discretion must be exercised within the bounds of governing legal standards, and under some circumstances, application of these standards requires a holding that one party is the prevailing party on a particular claim as a matter of law. *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000).

Where there was a single claim by plaintiff for collection of an account receivable which was dismissed in favor of defendant, application of the factors in subsection (B) of this rule could lead only to a conclusion that defendant was the prevailing party. *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000).

Building associations and individual owners were entitled to an award of \$6,111.34 in costs to the extent that they prevailed on their equitable claim in this foreclosure action brought by a successor in interest of the original owner and developer of a condominium development project. *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005).

In a subrogation case, a court did not err by awarding costs to plaintiffs where the court properly determined that they were the prevailing party because the court set out the applicable rules, and by citing the correct discretionary standard, the court perceived the issue as one of discretion. Furthermore, by applying the standard and concluding that plaintiffs were the prevailing party, the court acted within the outer boundaries of the discretion and consistent with applicable legal standards. *Boll v. State Farm Mut. Auto. Ins. Co.*, 140 Idaho 334, 92 P.3d 1081 (2004).

In a contract dispute, where defendants sought attorney fees and costs, defendants were prevailing parties under Idaho R. Civ. P. 54(d)(1)(B) because defendants avoided all liability and defendant excavation company was successful on its counterclaim. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005).

In action alleging breach of competition contract, former employer prevailed on issue of breach, but failed to provide adequate proof of damages. Trial court was therefore within its discretion to determine that there was no prevailing party, and refuse to award costs. *Trilogy Network Sys. v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007).

In a suit seeking to enforce a settlement agreement in a property dispute between neighbors, district court properly awarded costs and attorney fees to respondents following summary judgment in their favor. Since the settlement agreement reached through mediation was enforced despite the appellant's attempt to avoid it, respondents were the prevailing party. Also court properly considered factors to determine amount of fees, disallowing certain fees incurred before enforcement of the agreement. *Mihalka v. Shepherd*, 145 Idaho 547, 181 P.3d 473 (2008).

Even if an agreement, upon which a contract action was filed, contained provisions governing attorney's fees, and defined who the prevailing party should be, the court must identify the prevailing party for purposes of this rule. *Univ. of Idaho Found., Inc. v. Civic Partners, Inc.* (In re Univ. Place/Idaho Water Ctr. Project), 146 Idaho 527, 199 P.3d 102 (2008).

Where plaintiffs loaned defendant \$20,000, plaintiffs later took over defendant's farm repair business and agreed not to pursue the note if defendant would leave his tools and equipment on the business premises; in plaintiffs' action to collect on the note, defendant was the prevailing party based on the defense of accord and satisfaction. *Shore v. Peterson*, 146 Idaho 903, 204 P.3d 1114 (2009).

Purchasers were entitled to attorney fees and costs because the trial court did not abuse its discretion in finding that purchasers were the prevailing party under this rule. The court considered the fact that the purchasers recovered substantially less than they sought, but also successfully defended against counterclaims, and the trial court properly considered the factors found in I.R.C.P. 54(e)(3). *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009).

Award of legal fees was authorized to a Chapter 7 debtor who, when sued by his former employer for violating a noncompetition agreement, had prevailed on the issue of whether his conduct justified nondischargeability, under 11 U.S.C.S. § 523(a)(6), even though the former employer had prevailed on the issue of whether employee had breached the agreement. The nondischargeability issue was the crux of the case. *JB Constr., Inc. v. King* (In re King), — Bankr. —, 2009 Bankr. LEXIS 660 (Mar. 23, 2009).

Property owners were denied attorney's fees where they lost on two of their three claims. Plaintiffs were not the prevailing party, and there was no indication that the state defended the claims against plaintiffs unreasonably or without foundation. *Harris v. State Ex Rel. Kempthorne*, 147 Idaho 401, 210 P.3d 86 (2009).

Magistrate court did not err in holding that a contractor was the prevailing party for the purpose of awarding costs and attorney fees in customers' action for damage to their boat; while the customers recovered \$600 on their claim for \$2,820, the contractor recovered the entirety of the \$400 that the contractor sought in damages pursuant to a stipulation. *Crump v. Bromley*, 148 Idaho 172, 219 P.3d 1188 (2009).

Because a prevailing party was determined by who prevailed in the action, Idaho R. Civ. P. 54(d)(1)(B), there would have to be further proceedings in the trial court before a court could determine whether the conveyors or grantees was the prevailing party in this action; the grantees did not properly request an award of attorney fees for the appeal. *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010).

Reasonable and Justified Costs.

The trial court did not abuse its discretion in awarding discretionary costs to the defendant where the costs awarded were reasonable and justified and where the interests of justice required plaintiffs to reimburse the defendant for those costs. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

Trial court's award of costs and attorney fees did not erroneously include costs and fees incurred by prevailing party's unsuccessful resistance to opposing party's motion to set aside a default judgment which had been entered in the early stages of litigation; the prevailing party ultimately obtained summary judgment on the very same complaint. *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

The trial court's judgment for costs revealed that the trial court adequately stated the reasons why it felt that the discretionary costs were exceptional and reasonably incurred. The trial court did not abuse its discretion in awarding these costs. *Marty v. State*, 122 Idaho 766, 838 P.2d 1384 (1992).

District court acted within the bounds of its discretion in determining expenses for which fees were awardable and in making a fee award where some expenses claimed related to the cost of assisting the dispersing agent in carrying out his duties. *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005).

— Failure to Explain.

Where the district judge made no findings by which the appellate court could evaluate either the standard used for determining costs or his exercise of discretion, vacation of the award and remand for further consider-

ation was required. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

Where cross-appellants, who sought an award of discretionary costs for photocopies, fax charges, long distance calls, copies of transcripts, and "other deposition costs", failed to explain why these charges were necessary and exceptional, and should in the interest of justice be assessed against the adverse party as required under subsection (D) of this rule, the district court did not abuse its discretion in refusing to award discretionary costs. *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 865 P.2d 965 (1993).

Research Expenses.

Lender was not entitled to reimbursement of costs for online research, because routine online legal research should be one component of a firm's hourly rates. *Beach v. Wells Fargo Bank, Na (In re Beach)*, — Bankr. —, 2011 Bankr. LEXIS 4027 (Oct. 19, 2011).

Separability of Claims.

The district court distinguished, not between two separate theories supporting a single claim for relief, but between two entirely separate claims, one seeking equitable injunctive relief and the other seeking damages in an action at law, and the rules of procedure envision that a district court may distinguish between separable claims in awarding costs and attorney fees, therefore, it was proper for the court to consider claims separately in awarding attorney fees. *Burns v. County of Boundary*, 120 Idaho 623, 818 P.2d 327 (Ct. App. 1990), *aff'd*, 120 Idaho 614, 818 P.2d 318 (1991).

Special Masters.

State was not entitled to a writ of prohibition to enjoin a district court from assessing fees for a special master against the State because the appointment of special masters and the assessment of special master costs were matters within the discretion of the district courts. Clear statutory authority existed for the award of such fees, as well direction as to how costs awarded against the State were to be paid. *State v. District Court*, 143 Idaho 695, 152 P.3d 566 (2007).

Subsequent Settlement Offers.

Where state made offers of \$225,000 and \$230,000 to condemnnee after she had already been required to go to the expense of preparing for trial, the trial court noted that the original \$150,000 offer was little different after deduction of her costs so incurred; therefore, award of attorney fees to condemnnee following jury verdict was justified. *State ex rel. Smith v. Jardine*, 130 Idaho 318, 940 P.2d 1137 (1997).

Time Limitations.

Properly understood, “[a]ll costs and attorney fees approved by the court,” refers to those costs and fees requested within the 14 day time limit of I.R.C.P. 54(d)(5) and which are approved by the court as reasonable and as having a statutory or contractual basis; only the “fees for the service of the writ of execution upon a judgment” are expressly allowed as post-judgment costs “deemed automatically added to the judgment as costs and collected by the sheriff”; accordingly, the provisions of subsection (F) of this rule and the 14 day requirement of I.R.C.P. 54(d)(5) are in harmony. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992).

The filing of a timely motion to alter or amend a judgment under I.R.C.P. 59(e) tolls the period for filing a memorandum of costs under I.R.C.P. 54(d). The time for filing the city's cost bill did not elapse until 14 days after entry of the order denying consultant's Rule 59(e) motion and because city filed its memorandum of costs well before that deadline, district court properly held that city's memorandum was timely. *J.P. Stravens Planning Assocs. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996).

A decision, order, judgment, or decree that concludes only one of two or more consolidated actions constitutes a ‘judgment’ to which the time limit of this rule will attach, and for which a Rule 54(b) certification will be entered, as a prerequisite to the finality of a judgment in consolidated cases. *Doe I v. Doe II*, 128 Idaho 144, 911 P.2d 140 (Ct. App. 1996).

Waiver.

Failure to timely object constitutes a waiver of the right to contest the requesting party's entitlement to the fees sought. *Harms Mem. Hosp. v. Morton*, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986).

Cited in: *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979); *Bowler v. Board of*

Trustees, 101 Idaho 537, 617 P.2d 841 (1980); *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980); *Ulrich v. Schweiker*, 548 F. Supp. 63 (D. Idaho 1982); *First Sec. Bank v. Absco Whse., Inc.*, 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983); *Tippett v. Bayman*, 105 Idaho 744, 672 P.2d 1074 (Ct. App. 1983); *McBride v. Ford Motor Co.*, 105 Idaho 753, 673 P.2d 55 (1983); *Manduca Datsun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct. App. 1984); *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984); *Wing v. Hulet*, 106 Idaho 912, 684 P.2d 314 (Ct. App. 1984); *Hunt v. Mayr*, 107 Idaho 129, 686 P.2d 74 (1984); *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App. 1985); *McGill v. Lester*, 111 Idaho 841, 727 P.2d 1269 (Ct. App. 1986); *Gem State Homes, Inc. v. Idaho Dep't of Health & Welfare*, 113 Idaho 23, 740 P.2d 65 (Ct. App. 1987); *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987); *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988); *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988); *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988); *Anderson v. Anderson, Kaufman, Ringert & Clark, Chartered*, 116 Idaho 359, 775 P.2d 1201 (1989); *Stevenson v. Prairie Power Coop.*, 118 Idaho 52, 794 P.2d 641 (Ct. App. 1989); *Anderson v. Schwegel*, 118 Idaho 362, 796 P.2d 1035 (Ct. App. 1990); *Ross v. Coleman Co.*, 119 Idaho 152, 804 P.2d 325 (1991); *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991); *Noble v. Fisher*, 126 Idaho 885, 894 P.2d 118 (1995); *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995); *Kelly v. Silverwood Estates*, 127 Idaho 624, 903 P.2d 1321 (1995); *Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 72 P.3d 877 (2003); *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005); *Nguyen v. Bui*, 146 Idaho 187, 191 P.3d 1107 (2008); *Lawrence v. Hutchinson*, 146 Idaho 892, 204 P.3d 532 (2009); *Belstler v. Sheler*, — Idaho —, 264 P.3d 926 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal.

Attorneys — Disciplinary Proceedings.

Attorney's Fees.

Certified Copies of Records.

Common Law.

Contents of Memorandum of Costs.

Costs Against State or State Officers.

Costs in Securing Reversal.

Costs of Assessing Stock.

Cross-Claim or Counterclaim.

Discretion of Court.

Elisor's Fees.

Evidence of Costs.

Filing of Cost Memorandum.

Incident to Judgment.

Injunction.

New Trial.

Quiet Title.

Recovery of Damages.

Recovery of Real Property.

Stenographer's Fees.

Survey Expenses.

Will Contest.

Witnesses.

—Allowance of Mileage.

—Amount of Compensation.

—Corporations.

—Expert.

—Not Examined.

—Not Summoned.

—Relative of Party.

Workmen's Compensation.

Appeal.

An order entered under this rule generally is not appealable. *Perkins v. Pocatello*, 92 Idaho 636, 448 P.2d 250 (1968).

Attorneys — Disciplinary Proceedings.

In disciplinary proceedings, costs thereof may be assessed against the attorney involved therein. In re *Carter*, 59 Idaho 547, 86 P.2d 162 (1938).

Attorney's Fees.

In foreclosure of a mechanic's lien, attorney's fees are no part of costs. *Shaw v. Johnston*, 17 Idaho 676, 107 P. 399 (1910).

There was no provision in former statute which made expenses of attorney incurred in taking depositions taxable as costs. *First Nat'l Bank v. Stringfield*, 40 Idaho 587, 235 P. 897 (1925).

Certified Copies of Records.

The successful party is not entitled to recover for fee paid clerk of district court for certifying certain papers that he desires to attach to his complaint or petition, at least until after opposing counsel has denied the correctness of such copies. *Cronan v. District Court*, 15 Idaho 462, 98 P. 614 (1908).

Common Law.

At common law costs were not recoverable eo nomine. Costs, therefore, can be recovered only in cases where there is statutory authority. *Cronan v. District Court*, 15 Idaho 462, 98 P. 614 (1908); *Schmelzel v. Board of County Comm'rs*, 16 Idaho 32, 100 P. 106 (1909); *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915); *Rhodenbaugh v. Stigel*, 31 Idaho 594, 174 P. 604 (1918); *First Nat'l Bank v. Stringfield*, 40 Idaho 587, 235 P. 897 (1925).

Contents of Memorandum of Costs.

Memorandum of costs should show not only amount due each witness but the number of days that each attended court and the number of miles each traveled. *Stickney v. Berry*, 7 Idaho 303, 62 P. 924 (1900).

Costs Against State or State Officers.

The plaintiff foreign corporation was entitled to recover its costs from the state, it being entitled to payment of its claim for

services rendered pursuant to contract with the Idaho state department for the preparation of certain maps. *Aero Serv. Corp. W. v. Benson*, 84 Idaho 416, 374 P.2d 277 (1962).

In a successful action against the former state tax collector and the acting state tax collector for refund of taxes paid under protest, the plaintiff is entitled to recover its costs incurred in the trial court in appeal by defendants to the state Supreme Court and in appeal to the Supreme Court of the United States. *American Oil Co. v. Neill*, 90 Idaho 333, 414 P.2d 206 (1966), overruled on other grounds, *County of Ada v. Red Steer Drive-Ins*, 101 Idaho 94, 609 P.2d 161 (1980).

Costs in Securing Reversal.

If appellate court has not directed trial court to enter specific judgment, although it may have awarded costs on appeal, costs incurred in lower court by party securing reversal must await further action of trial court, which will make such further orders in progress of case as are not inconsistent with decision of appellate court. *Mountain Home Lumber Co. v. Swartwout*, 33 Idaho 737, 197 P. 1027 (1921).

Costs of Assessing Stock.

Costs of proceeding to assess stock of water users' association held properly taxed against stockholders. *Smith v. Dickerson*, 50 Idaho 477, 297 P. 402 (1931).

Cross-Claim or Counterclaim.

In absence of a showing that plaintiff incurred costs in defending against cross-complaint, failure to allow judgment for costs in their favor was not error. *Commercial Cas. Ins. Co. v. Boise City Nat'l Bank*, 61 Idaho 124, 98 P.2d 637 (1940).

Where plaintiffs recovered in an action for partition and defendants recovered on a counterclaim for accounting of rents and profits, defendants were not entitled to costs in the absence of a showing that the costs which they incurred in the prosecution of their counterclaim exceeded the costs allowable to plaintiffs under the judgment decreeing partition. *Call v. Marler*, 89 Idaho 120, 403 P.2d 588 (1965).

Discretion of Court.

Where both parties have gained a part of their contention, the taxing of costs is largely in the discretion of the court. *Campbell v. First Nat'l Bank*, 13 Idaho 95, 88 P. 639 (1907).

Where new trial is granted, it is within sound discretion of court as to whether or not the party in whose favor order is made will be required to pay a part or all of costs incurred

upon a previous trial. *Wolfe v. Ridley*, 17 Idaho 173, 104 P. 1014 (1909).

Court, when satisfied that justice demands, may divide or apportion costs between parties. *Simmons v. Simmons*, 23 Idaho 485, 130 P. 784 (1913).

Elisor's Fees.

Where elisor appointed by court makes no charge for services performed by him, fees to which elisor would be entitled, had he claimed them, cannot be taxed as costs against losing party. *Griffith v. Montandon*, 4 Idaho 75, 35 P. 704 (1894).

Evidence of Costs.

Where a motion to tax costs is heard upon evidence within knowledge of judge, such evidence should be presented on hearing. *Griffiths v. Montandon*, 4 Idaho 329, 39 P. 195 (1895).

Filing of Cost Memorandum.

Unless a cost bill is filed within the required time, such bill will be stricken from the files. *Harris v. Chapman*, 51 Idaho 283, 5 P.2d 733 (1931).

No costs can be taxed in the absence of the serving or filing of a cost bill. *Gem State Mut. Life Ass'n v. Gray*, 77 Idaho 157, 290 P.2d 217 (1955).

Incident to Judgment.

Allowance of costs as a matter of course is made dependent upon, and a mere incident to, a final judgment. *Rhodenbaugh v. Stigel*, 31 Idaho 594, 174 P. 604 (1918).

Injunction.

Parties to an injunction suit are not entitled to tax as costs fees for witnesses produced by them on hearing of an order to show cause or on an application for dissolution of injunction, unless witnesses are produced either by consent, and their testimony is taken in place of affidavits, or such witnesses are affiants in affidavits and are produced for cross-examination pursuant to notice. *Raft River Land & Cattle Co. v. Langford*, 6 Idaho 30, 51 P. 1027 (1898).

Court was justified in allowing costs to plaintiff in suit for injunction where injunction was granted though no damages were recovered. *Wm. Walker Co. v. Pocatello Monument Co.*, 71 Idaho 294, 230 P.2d 701 (1951).

New Trial.

On granting a new trial it is discretionary with court to require party in whose favor order is made to pay a part or all of costs incurred upon previous trial. *Wolfe v. Ridley*, 17 Idaho 173, 104 P. 1014 (1909).

Quiet Title.

Plaintiff was entitled to recover costs where

trial court held in their favor on quiet title action. *Lawyer v. Sams*, 72 Idaho 101, 237 P.2d 606 (1951).

Recovery of Damages.

The plaintiff, having recovered damages in excess of over \$100 in suit to recover treble damages for timber trespass, was entitled to his costs. *Earl v. Fordice*, 84 Idaho 542, 374 P.2d 713 (1962).

Recovery of Real Property.

Costs are allowed prevailing party in action for recovery of real property. *Mountain Home Lumber Co. v. Swartwout*, 33 Idaho 737, 197 P. 1027 (1921).

Stenographer's Fees.

In order to tax stenographer's fees as costs, it must appear that such services were rendered by court stenographer and incurred under provisions of statute in relation thereto. *McDonald v. Burke*, 3 Idaho 266, 28 P. 440 (1892).

Survey Expenses.

The expenses of a survey made under § 42-1401 are not properly included in costs bill, but should be apportioned unto the several parties. *Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist.*, 14 Idaho 450, 94 P. 761 (1908).

Will Contest.

Costs in an action contesting validity of a will cannot be awarded until final determination of the case, and each party will be required to pay his own costs subject to recovery dependent upon the final outcome. *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

Witnesses.

—Allowance of Mileage.

Former provision governing costs did not preclude allowance of mileage to witnesses who attended from a greater distance than they could be required by subpoena to travel, and taxation of such mileage as costs. *Raft River Land & Cattle Co. v. Langford*, 6 Idaho 30, 51 P. 1027 (1898).

Former provision governing costs did not require, as a condition precedent to recovery of mileage by a witness, that he should have been obliged to attend, or that he should have been subpoenaed, but the only test was whether he was a witness, and one who attended and testified as a witness was entitled to mileage although he lived in another county from that of trial, and more than thirty miles from seat of trial. *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 P. 41 (1906).

Mileage for distance necessarily traveled by

witness within state in attending trial is taxable as costs, although witness resided out of state so that he could not be required to attend. *State v. Baird*, 13 Idaho 126, 89 P. 298 (1907).

Mileage should not be taxed for travel not undertaken in contemplation of being a witness in the cause. *American Nat'l Bank v. Cooper*, 44 Idaho 288, 256 P. 372 (1927).

—Amount of Compensation.

Where trial lasts more than one day, and a witness is subpoenaed to be present at trial, and makes arrangements to be called when needed and actually attends only on day he testifies, he is entitled to per diem compensation for one day only. *Griffith v. Montandon*, 4 Idaho 75, 35 P. 704 (1894).

Successful party could not charge in his cost bill more for witnesses than they were entitled to under former statute providing for their compensation, nor could he tax costs for witnesses who did not testify (unless there was some legal excuse for their not testifying) or for witnesses who made no charge for their fees. *Griffith v. Montandon*, 4 Idaho 75, 35 P. 704 (1894).

Costs allowing witnesses five days' attendance when their entire testimony was given in one day upheld on ground that trial court was conversant with all facts of case. *Zilka v. Graham*, 26 Idaho 163, 141 P. 639 (1914).

—Corporations.

Agents, employees and stockholders of corporation which is successful party to suit are none the less entitled to witness fees and mileage for their attendance upon trial when called as witnesses. *Feenaughty Mach. Co. v. Turner*, 44 Idaho 363, 257 P. 38 (1927).

—Expert.

Fees of expert witnesses in excess of regular witness fees are not necessary disbursement and are not taxable as costs. *McDonald v. Burke*, 3 Idaho 266, 28 P. 440 (1892).

—Not Examined.

Fact that witnesses who were subpoenaed by prevailing party were not sworn and examined does not necessarily deprive party of right to tax costs for such witnesses, but in order to tax such costs, he must satisfactorily show reasons for attendance of such witnesses and causes which made it unnecessary for them to testify. *Bechtel v. Evans*, 10 Idaho 147, 77 P. 212 (1904).

—Not Summoned.

If a witness appears merely as a courtesy to a litigant's attorney, fees for his services may not be taxed in the absence of an actual demand therefor by the witness, or some showing that it was a necessary disbursement in accordance with the law. *Griffith v. Montandon*, 4 Idaho 75, 35 P. 704 (1894); *Feenaughty Mach. Co. v. Turner*, 44 Idaho 363, 257 P. 38 (1927).

—Relative of Party.

Witness is entitled to fees and same may be taxed as costs, although such witness is wife or mother of party calling her. *Griffith v. Montandon*, 4 Idaho 75, 35 P. 704 (1894); *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho 418, 86 P. 41 (1906).

Workmen's Compensation.

Former law that provided for costs in proceedings under workmen's compensation law, was not presumed to have been intended to supersede general provisions for taxation of costs. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925).

RESEARCH REFERENCES

A.L.R. Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees

or costs as "prevailing party" or "successful party". 66 A.L.R.3d 1087.

Rule 54(d)(2). Multiple parties.

In the event judgment is entered in favor of multiple parties or coparties, costs shall be allowed as a matter of course to each of the prevailing parties unless the court otherwise directs.

JUDICIAL DECISIONS

Prevailing Parties.

District court did not abuse its discretion in denying plaintiffs' motion for an award of costs and attorney fees in malpractice action against doctor and nurse for misdiagnosis of

herpes, where attorney fees were not raised until appeal, and plaintiffs were found to be 49% negligent so that there was no clearly prevailing party. *Adams v. Krueger*, 124 Idaho 74, 856 P.2d 864 (1993).

Rule 54(d)(3). Costs on postponement.

In the event any party to an action applies for an enlargement of time or postponement of a hearing or trial, the court in its discretion may impose and tax costs and expenses occasioned thereby against the moving party as a condition to such enlargement or postponement.

JUDICIAL DECISIONS**Attorney's Fees Denied.**

Plaintiffs were properly denied attorney's fees for their counsel's initial appearance in court for a collection action which was continued in order for defendants to obtain an attorney, where the court ruled that the collection action should not have been pursued

in the first place because of its bar under the doctrine of res judicata. *Cole v. Kunzler*, 115 Idaho 552, 768 P.2d 815 (Ct. App. 1989).

Cited in: *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988); *State v. Rogers*, 143 Idaho 320, 144 P.3d 25 (2006).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Discretion of Court.

Insertion in Judgment.

Discretion of Court.

It is within trial court's discretion to grant or refuse postponement conditioned on payment of costs occasioned by the postpone-

ment. *Aumock v. Kilborn*, 53 Idaho 506, 25 P.2d 1047 (1933).

Insertion in Judgment.

Costs are imposed as a condition for granting a continuance, which are not paid prior to the entry of a final judgment in a case, and they may be inserted therein. *Aumock v. Kilborn*, 53 Idaho 506, 25 P.2d 1047 (1933).

Rule 54(d)(4). Nonresident cost bond prohibited.

No party to an action shall be required to furnish a cost bond or undertaking by reason of the fact that the party is not a resident of the state of Idaho.

JUDICIAL DECISIONS

Cited in: *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981); *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988).

Rule 54(d)(5). Memorandum of costs.

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment. Such memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs. A memorandum of costs prematurely filed shall be considered as timely. (Amended December 19, 1975, effective January 1, 1976; amended July 2, 1976, effective October 1, 1976; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS**ANALYSIS**

Affidavit Sufficient.
Amended Judgment.
Approval of Memorandum.
Decision of Court.
Depositions.
Due Process.
Extension of Time for Filing.
Failure to Include Costs.
Pleading.
Post-Judgment Attorney Fees.
Premature Filing.
Time Limitations.
Verification.

Affidavit Sufficient.

An affidavit setting forth the defendant's costs and attorney fees covered all of the requirements of this section, and the district court's decision to award attorney fees to the defendant was affirmed. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

Amended Judgment.

Right to costs, and an award for attorney fees, mature anew when an amended judgment under I.R.C.P. 59(a) is entered reflecting the court's determination that claimant is entitled to an award for fees. *Western World, Inc. v. Prater*, 121 Idaho 870, 828 P.2d 899 (Ct. App. 1992).

Approval of Memorandum.

Although the plaintiff unions waived their right to take exception to the memorandum of costs filed by the prevailing defendant employer, it did not follow that the memorandum of costs was deemed approved in its entirety and that a writ of execution could be issued thereon, since before a writ of execution could issue on a money judgment, the court, by judgment or supplemental order, must have fixed the amount of recovery; accordingly, where the court neither fixed the amount of costs in the judgment itself, nor entered a separate order fixing the amount of costs, a writ of execution for the costs should not have issued. *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982).

Decision of Court.

Where a memorandum opinion was a written pronouncement, signed by the judge, filed with the court, and determinative of the parties' rights, it constituted a "decision." *Big O Tires of Idaho, Inc. v. Hanley*, 101 Idaho 56, 608 P.2d 413 (1980).

Depositions.

Since this section does not require that a deposition be used at trial before its cost may be taxed, but only that it was necessarily incurred in the action, denial of plaintiff's objection to the cost bill submitted by defendant following judgment in defendant's favor on the sole ground that the bill included the costs of depositions not used at trial was not error. *Suchan v. Henry's Farm Sales, Inc.*, 97 Idaho 78, 540 P.2d 263 (1975).

Due Process.

I.R.C.P. 54(e)(5) and this rule provide for notice and an opportunity to be heard and to present objections before the trial court, thus satisfying the right to due process. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Extension of Time for Filing.

A district court, in its discretion, may extend the time for filing a memorandum of costs under this rule. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Failure to Include Costs.

District court did not err by disallowing plaintiffs' claim to soil compaction tests as discretionary costs incurred in anticipation of litigation since plaintiffs had lost their right to collect these costs by failing to include them in their memorandum of costs filed in the original action. *Gilbert v. Tony Russell Constr.*, 115 Idaho 1035, 772 P.2d 242 (Ct. App. 1989).

Pleading.

In an action relating to the sale of a duplex, two sellers were still allowed to seek attorney fees and costs, despite a failure to plead such in their answer. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

Post-Judgment Attorney Fees.

Post-judgment attorney fees are not allowed under any statutes or rules of civil procedure; as a result, an enlargement of time would have been of no avail and not dispositive of the issues presented on the issue of an award of post-judgment attorney fees and the 14 day limit on objecting to memorandums of cost did not apply. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992).

After judgment had been perfected in this case, plaintiff became a judgment creditor and no longer depended on the note as the basis of defendant's obligation; accordingly, while an award of pre-judgment attorney fees was made to plaintiff without objection, § 12-120(3) does not provide for a post-judgment

award of attorney fees; further, this rule explicitly limits the time period in which a memorandum of costs can be filed to 14 days after the entry of judgment and in the instant action the judgment was entered on September 12, 1988, and the memorandum of costs seeking an additional award of post-judgment attorney fees was filed on June 21, 1990, nearly 21 months later. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992).

Premature Filing.

The premature filing of a memorandum of costs does not constitute a ground for striking the memorandum of costs. *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 683 P.2d 854 (1984).

Special master had authority in a water rights proceeding to entertain a motion for attorney fees and costs; its prematurity under Idaho R. Civ. P. 54(d)(5) did not invalidate it. *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 237 P.3d 1 (2010).

Time Limitations.

The time periods allowed under this rule may be enlarged at the discretion of the trial court. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

The trial court in condemnation proceeding did not err in allowing amendment of landowners' costs bill to include attorneys' fees, after the ten-day period allowed by this rule had expired, where the record disclosed no harm or prejudice resulting to the highway district from the court's allowing amendment of the memorandum of costs. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

A memorandum of costs need not be filed within ten days of a decision, but may not be filed later than ten days after entry of judgment. *Wolske Bros. v. Hudspeth Sawmill Co.*, 116 Idaho 714, 779 P.2d 28 (Ct. App. 1989) (decided under this section prior to 1987 amendment).

A magistrate's determination to award fees

to defendant constituted an "order from which an appeal lies," within the definition of a judgment as described in IRCP 54(a), and as that term is therefore used in this rule regulating the filing of a memorandum of costs; where defendant's memorandum of costs was not filed within fourteen days after the magistrate court entered its decision entitling him to the award, by the express provision of this rule, the right to recover that award was waived as defendant did not timely file a memorandum. *Harney v. Weatherby*, 116 Idaho 904, 781 P.2d 241 (Ct. App. 1989).

Properly understood, "[a]ll costs and attorney fees approved by the court" in subsection (F) of I.R.C.P. 54(d)(1), refers to those costs and fees requested within the 14-day time limit of this rule and which are approved by the court as reasonable and as having a statutory or contractual basis; only the fees for the service of the writ of execution upon a judgment are expressly allowed as post-judgment costs deemed automatically added to the judgment as costs and collected by the sheriff; accordingly, the provisions of subsection (F) of I.R.C.P. 54(d)(1) and the 14 day requirement of this rule are in harmony. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992).

Verification.

Failure to verify a memorandum of costs, including attorney fees, renders it subject to timely objection but does not render it jurisdictionally defective. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Cited in: *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978); *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979); *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985); *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985); *Kunzler v. Kunzler*, 109 Idaho 350, 707 P.2d 461 (Ct. App. 1985); *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986); *Sanchez v. Arave*, 120 Idaho 321, 815 P.2d 1061 (1991); *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995); 87 A.L.R.5th 715.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Application.
Assignment.
Burden of Proof.
Contents of Memorandum.
"Decision" Defined.
Failure to File.
Motion to Tax Costs.
Notice.

Reversal and Remittitur.
Time for Filing.

Application.

Former similar provision referred only to such costs and disbursements as were occasioned in an action or proceeding in courts of this state and did not contemplate costs occasioned by proceedings in United States land office. *Golden Marguerite Silver & Copper*

Mining Co. v. National Copper Mining Co., 28 Idaho 290, 154 P. 207 (1915).

Assignment.

Assignee of cost bill, on which execution may be issued, takes it subject to any right of offset against such cost bill existing at time of assignment. *Northwestern & Pac. Hypotheek Bank v. Rauch*, 8 Idaho 50, 66 P. 807 (1901).

Burden of Proof.

Where none of the items on face of a cost bill appears to be illegal, such bill with affidavit verifying same is sufficient to prevail against a motion to tax costs, unsupported by any affidavit controverting cost bill (*Thiessen v. Riggs*, 5 Idaho 487, 51 P. 107 (1897); *Elliott v. Collins*, 6 Idaho 157, 53 P. 453 (1898)); but where a cost bill is contested, none of the contested items should be allowed unless court is satisfied from evidence produced on hearing that contested items have been necessarily incurred. *Griffith v. Montandon*, 4 Idaho 75, 35 P. 704 (1894).

Contents of Memorandum.

Memorandum of costs should show not only amount due each witness but should show number of days that each attended court and number of miles each traveled. *Stickney v. Berry*, 7 Idaho 303, 62 P. 924 (1900).

The expenses of a survey made under § 42-1401 are not properly included in cost bill, but should be apportioned to the several parties. *Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist.*, 14 Idaho 450, 94 P. 761 (1908).

Former statute only required that the cost bill submitted by the prevailing party aver that the items claimed were correct and necessarily incurred in the action. *Rosenberg v. Toetly*, 94 Idaho 413, 489 P.2d 446 (1971).

"Decision" Defined.

Decision of court refers to a formal decision or findings of fact, conclusions of law, and decree or judgment. *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915).

The findings and conclusions are ordinarily "the decision of the court". *Harris v. Chapman*, 51 Idaho 283, 5 P.2d 733 (1931).

The findings and conclusions of law are the "decision". *Lusty v. Lusty*, 70 Idaho 382, 219 P.2d 280 (1950).

By using the words "a decision" the legislature intended, in former statute, to refer to a pronouncement, reduced to writing, signed by the judge and filed with the clerk of the court, determining the rights of the parties in an action or proceedings. The court did not agree that a minute entry constituted such "decision." *Page v. Noland*, 85 Idaho 369, 379 P.2d 661 (1963).

Failure to File.

Party who fails to file with clerk a memorandum of costs within time limit waives his right thereto, whether they are clerk's or sheriff's fees or other costs, and in absence of such a memorandum, clerk has no power to include costs in judgment. *Cantwell v. McPherson*, 3 Idaho 321, 29 P. 102 (1892).

Failure to both serve and file within time prescribed by former statute was fatal and costs could not be allowed where statute was not complied with. Filing and service of cost bill was jurisdictional. It was the evident purpose of the statute to require party claiming costs to furnish adverse party with an itemized statement of same so as to enable him to file his objections to any item therein contained or to whole cost bill for any cause which might appear to be good grounds for disallowing same. *Steensland v. Hess*, 25 Idaho 181, 136 P. 1124 (1913).

Unless a cost bill is filed within the required time, such bill will be stricken from the files. *Harris v. Chapman*, 51 Idaho 283, 5 P.2d 733 (1931).

No costs can be taxed in the absence of the serving or filing of a cost bill. *Gem State Mut. Life Ass'n v. Gray*, 77 Idaho 157, 290 P.2d 217 (1955).

Motion to Tax Costs.

Where a cost bill is filed by one party to an action and the other files a motion with the court to tax costs, contending that the cost bill contains items not properly taxable as costs, it is error for the court to make no disposition of this motion. *Dalton Hwy. Dist. v. Sowder*, 88 Idaho 556, 401 P.2d 813 (1965).

Notice.

Where no notice of the filing of a cost bill is given, the adverse party may obtain relief from the bill if it is exorbitant. *McDonald v. Burke*, 3 Idaho 266, 28 P. 440 (1892).

Reversal and Remittitur.

When judgment is reversed and lower court is directed to enter particular judgment and remittitur is transmitted to court below, judgment should be docketed for costs taxed in appellate court, and prevailing party should also file and serve his memorandum of costs incurred in original trial. *Mountain Home Lumber Co. v. Swartwout*, 33 Idaho 737, 197 P. 1027 (1921).

Time for Filing.

Where the jury returns an advisory verdict, memorandum of costs may be filed within five days (now 14 days) after judge announces that he adopts findings of jury. *Peters v. Leflang*, 6 Idaho 364, 55 P. 857 (1898).

On a motion to strike a cost bill from the

files on the ground that such bill was not filed within five (now 14) days after the notice of the decision of the court, a showing upon opposition to said motion that at the time of the decision plaintiff was in an eastern state and that his attorney did not have sufficient data to make out such bill is not sufficient to excuse the failure to file such bill. *Stickney v. Berry*, 7 Idaho 303, 62 P. 924 (1900).

Where plaintiff dismisses, it is necessary for defendant to file his cost bill within five (now 14) days after a notice of dismissal. *Chicago, M. & St. P. Ry. v. Trueman*, 18 Idaho 687, 112 P. 210 (1910).

Memorandum of costs must be served and filed, not within five (now 14) days of judgment, but within five (now 14) days after verdict or notice of decision. *Young v. Washington Water Power Co.*, 39 Idaho 539, 228 P. 323 (1924).

Memorandum of costs and disbursements filed before making of formal decision is prematurely filed and will be stricken on motion. *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915); *Crawford v. Inglin*, 44 Idaho 663, 258 P. 541 (1927).

Where counsel for respondent and cross-complainant received formal findings of fact and conclusions of law from and signed by the trial judge, he received actual notice of the decision of the court, and thereupon the time within which he was required to file his memorandum of costs commenced to run. *Harris v. Chapman*, 51 Idaho 283, 5 P.2d 733 (1931).

Respondent's motion to strike cost bill on ground that bill was not filed within five (now 14) days after "notice of decision of the court," should be denied, where record does not disclose when appellant had notice of decision. *Lusty v. Lusty*, 70 Idaho 382, 219 P.2d 280 (1950).

Premature filing of memorandum of costs is waived unless party charged with costs files a motion to strike. *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 245 P.2d 1045 (1952).

It was error to award costs to a plaintiff who did not file his itemized memorandum of costs until twelve days after the date of judgment. *Williams v. Havens*, 92 Idaho 439, 444 P.2d 132 (1968).

Rule 54(d)(6). Objections to costs.

Any party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of cost. Such motion shall not stay execution on the judgment, exclusive of costs, and shall be heard and determined by the court as other motions under these rules. Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed. (Amended July 2, 1976, effective October 1, 1976; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Application to Uniform Post-Conviction Procedure Act.

Discretion of Court.

Due Process Rights.

Enlargement.

Failure of Court to Fix Costs.

Failure to Object.

Objection to Particular Amount.

Premature Filing of Memorandum.

Purpose.

Specificity.

Time for Objections.

Timely Motion.

Verification of Cost Memorandum.

Application to Uniform Post-Conviction Procedure Act.

The Idaho Rules of Civil Procedure are applicable to proceedings brought under the Uniform Post-Conviction Procedure Act §§ 19-4901 et seq. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Discretion of Court.

The lack of an objection to a memorandum of costs and attorney fees does not preclude the court from exercising its discretion in deciding whether to award attorney fees, nor must the court automatically award the full amount sought. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App.

1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990) (decision prior to 1987 amendment of I.R.C.P. 54(d)).

Due Process Rights.

Where the obligors under a deed of trust were not deprived of the opportunity to object to costs and attorney fees, but were merely constrained by certain time limitations stated in this rule, this rule did not violate their due process rights. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

Enlargement.

The 10-day period (now 14 days) of Rule 54(d)(6), unlike the 10-day periods (now 14 days) of Rules 52 and 59 (now Rules 52(b) and 59(b)) may be enlarged at the discretion of the trial court. *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979).

Post-judgment attorney fees are not allowed under any statutes or rules of civil procedure; as a result, an enlargement of time would have been of no avail and not dispositive of the issues presented on the issue of an award of post-judgment attorney fees and the 14 day limit on objecting to memorandums of cost did not apply. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992).

Failure of Court to Fix Costs.

Although the plaintiff unions waived their right to take exception to the memorandum of costs filed by the prevailing defendant employer, it did not follow that the memorandum of costs was deemed approved in its entirety and that a writ of execution could be issued thereon, since before a writ of execution could issue on a money judgment, the court, by judgment or supplemental order, must have fixed the amount of recovery; accordingly, where the court neither fixed the amount of costs in the judgment itself, nor entered a separate order fixing the amount of costs, a writ of execution for the costs should not have issued. *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982).

Failure to Object.

Where a plaintiff wife brought an appeal to a district court from a magistrate's determination of property issues in a divorce action, the wife's failure to object to the memorandum of costs filed by the defendant husband in the district court did not constitute a waiver of all objections to the claimed attorney fees, because the district judge was sitting as an appellate court in this action and, therefore, the district judge was required to determine the appeal in the same manner and upon the same standards of review as an appeal from the district court to the Supreme

Court; thus, I.A.R. 41 governed the procedure for applying for attorney fees on appeal. *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

In the absence of a showing in the record that defendants agreed not to assert the argument that plaintiffs waived the right to object to costs and attorney fees by failing to timely object, the language of this Rule that failure to object in ten days (now 14 days) to the items in the memorandum of cost constitutes a waiver of all objections to the costs claimed controls. *Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982).

Where the record reflected that no objection was ever filed to defendants' memorandum of cost as required by this Rule, plaintiffs thereby waived their right to further contest an award of attorney fees. *Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982).

Where the plaintiff unions did not file any objection within ten days to any of the items listed in the memorandum of costs filed by the prevailing defendant employer, the unions waived their right to contest the amount of attorney fees listed in the memorandum. *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982).

Failure to timely object to a memorandum of costs and attorney fees constitutes a waiver of the right to contest the requesting party's entitlement to the fees sought. This does not mean the trial court automatically must award the full amount specified in the memorandum; but it does mean that the party who fails to object has waived its right to contest any award within the amount sought. *Fearless Farris Whse., Inc. v. Howell*, 105 Idaho 699, 672 P.2d 577 (Ct. App. 1983).

Where the obligors under a deed of trust failed to object within ten days of the service of memorandum of costs or anytime thereafter, they waived the right to contest the award. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

Objections to the memorandum of costs must be made within ten days of its service under this rule; a failure to timely object, however, does not automatically entitle the prevailing party to the attorney fees requested. An award of attorney fees under § 12-121 is discretionary with the trial court; lack of an objection does not preclude the court from exercising its discretion in deciding whether to award attorney fees under I.R.C.P. 54(d)(1)(D). *Long v. Hendricks*, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985), *aff'd*, *Long v. Hendricks*, 114 Idaho 157, 754 P.2d 1194 (Ct. App. 1988).

Failure to timely object to a memorandum

of costs and attorney fees constitutes a waiver of the right to contest the entitlement to the costs or fees. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990).

An inmate, who was served with a copy of the court's decision to award attorney fees and costs to the State for responding to inmate's second post-conviction relief application and who was also given a copy of the State's memorandum of cost, but did not file any objection as allowed by the Rules of Civil Procedure, has waived the right to further contest the award. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Conveyors did not file a timely objection to the claimed costs, Idaho R. Civ. P. 54(d)(6) and by failing to timely object, they waived any objections to the costs claimed. *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d. 972 (2010).

Objection to Particular Amount.

Where the defendant appealed the declaratory judgment that costs and fees be awarded to the plaintiff, challenging not the amount of the assessments, but rather the authority of the court to award fees, the defendant properly preserved the question of awarding costs and fees for appeal, but did not preserve an objection to any particular amount. *Wefco, Inc. v. Monsanto Co.*, 111 Idaho 55, 720 P.2d 643 (Ct. App. 1986), reversed on other grounds, *Borchard v. Wefco, Inc.*, 112 Idaho 555, 733 P.2d 776 (1987).

Premature Filing of Memorandum.

The premature filing of a memorandum of costs does not constitute a ground for striking the memorandum of costs. *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 683 P.2d 854 (1984).

Purpose.

This rule is designed to establish a deadline for informing the court of any objection to items claimed in the memorandum of costs. It enables the trial court expeditiously to rule upon such objections and bring the case to a conclusion. *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982).

Specificity.

The defendant's motion to disallow fees did not comply with this rule or I.R.C.P. 7 (b)(1) and 54(e)(6) because the motion did not specify any basis or grounds for the objection.

Nanney v. Linella, Inc., 130 Idaho 477, 943 P.2d 67 (Ct. App. 1997).

Time for Objections.

Where plaintiff conceded that, although sent, the bill for attorney's fees had not been received, it was not error to permit defense counsel to be heard before passing on the request, notwithstanding the fact that objection was not strictly timely. *Cunningham v. Bundy*, 100 Idaho 456, 600 P.2d 132 (1979).

Attorney's appearance at hearing on cost bill did not constitute the requisite filing of a motion to disallow attorney fees. *Templeton v. Hogue*, 125 Idaho 130, 867 P.2d 1004 (Ct. App. 1994).

Timely Motion.

In an appeal of a County Planning and Zoning Commission's grant of a conditional use permit and zoning certificate for a veterinary clinic, the county's objection to the prevailing parties' motion for costs and attorney fees was timely pursuant to this rule and I.R.C.P. 54(e) which, at that time, required that a motion to disallow costs and attorney fees be filed within ten days of service of the memorandum of costs and fees, where the parties were served with the memorandum by mail, and the objection was filed 13 days later, under I.R.C.P. 6(e)(1) and I.R.C.P. 6(a) allowing a three-day extension where service is by mail, and exclusion of the day of service. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990) (decision prior to 1987 amendment).

Verification of Cost Memorandum.

Failure to verify a memorandum of costs, including attorney fees, renders it subject to timely objection but does not render it jurisdictionally defective. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Cited in: *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979); *Big O Tires of Idaho, Inc. v. Hanley*, 101 Idaho 56, 608 P.2d 413 (1980); *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983); *Gillingham v. Swan Falls Land & Cattle Co.*, 106 Idaho 859, 683 P.2d 895 (Ct. App. 1984); *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 702 P.2d 917 (Ct. App. 1985); *Bissett v. Unnamed Members of Political Compact*, 111 Idaho 863, 727 P.2d 1291 (Ct. App. 1986); *Long v. Hendricks*, 114 Idaho 157, 754 P.2d 1194 (Ct. App. 1988); *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001).

Rule 54(d)(7). Settlement of costs by order of court.

After a hearing on an objection to a memorandum of costs, or after the time for filing an objection has past, the court shall, upon motion of any party or upon the court’s own initiative, enter an order settling the dollar amount of costs, if any, awarded to any party to the action. (Adopted March 23, 1983, effective July 1, 1983.)

JUDICIAL DECISIONS

Cited in: Farber v. Howell, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

Rule 54(e)(1). Attorney fees.

In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment. (Adopted January 2, 1979, effective March 1, 1979; amended March 9, 1999, effective July 1, 1999.)

JUDICIAL DECISIONS

ANALYSIS

Alteration of Judgment.
 Amount of Fees.
 Appellate Review.
 Application.
 Attorney Fees on Appeal.
 Award Improper.
 Award Proper.
 Basis for Award.
 “Brought” and “Pursued.”
 Child Support Payments.
 Consequences for Attorney.
 Construction with Other Laws.
 Contractual Claim.
 Denial Proper.
 Discretion of Court.
 Divorce Action.
 Eminent Domain.
 Expert Testimony.
 Factors Considered.
 Failure to Object.
 Failure to Settle.
 Foreclosure of Lien.
 Frivolous and Unreasonable Pursuit.
 Frivolous Appeal.
 Genuine Issue on Appeal.
 Hearing.
 Insurance Coverage.

Multiple Claims.
 Nonprevailing Party.
 Objection Timely Filed.
 Paralegal Fees.
 Partial Summary Judgment.
 Prevailing Party.
 Private Attorney General Action.
 Proof of Entitlement.
 Quiet Title Action.
 Removal of Personal Representative.
 Sanctions Distinguished.
 Separability of Claims.
 Taxpayer’s Action.
 Voluntary Dismissal.
 Worker’s Compensation Case.

Alteration of Judgment.

Where no motion was made to alter or amend judgment which awarded attorney fees within ten days, the district judge did not have jurisdiction to amend that judgment to change it from a Rule 68 award of attorney fees to a § 12-121 and Rule 54(e) award. *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987).

Amount of Fees.

When attorney fees are allowed under this rule, either by statute or contract, the amount should not be calculated based upon indi-

vidual prevailing "theories"; rather, the amount should be determined by appropriate application of the Rule 54(e)(3) factors. *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987).

The fact that an award is made to a party does not necessarily require the amount to be limited to the party-attorney agreement; § 48-608 provides for the award of an objectively "reasonable" fee, and such a fee may be higher or lower than what the party must pay to the attorney under their agreement. *Nalen v. Jenkins*, 114 Idaho 973, 763 P.2d 1081 (Ct. App. 1988).

Appellate Review.

How the trial court exercised its discretion below is not controlling on Supreme Court's determination of whether or not appeal was brought frivolously, unreasonably, and without foundation. *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983).

While normally the trial court's award of attorney fees is accorded a great degree of deference as being within its unique expertise and discretion, such an award cannot be sustained where the record itself discloses that the claim was not frivolously pursued. *J.M.F. Trucking, Inc. v. Carburetor & Elec. of Lewiston, Inc.*, 113 Idaho 797, 748 P.2d 381 (1987).

Attorney fees will be awarded to the prevailing party on appeal when the Court of Appeals is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. *Sinclair & Co. v. Gurule*, 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988).

Application.

Where a personal injury action was initiated prior to March 1, 1979, the effective date of this rule, it was not necessary for the trial court to make the findings presently required by that rule before awarding attorney fees under § 12-121. *Quincy v. Joint Sch. Dist. No. 41*, 102 Idaho 764, 640 P.2d 304 (1981).

Prior to the advent of this rule, § 12-121, standing alone, gave the trial court broad discretion to award attorney fees to prevailing parties; therefore, where in an unlawful detainer action filed before the effective date of the rule, both parties partially prevailed, but one party prevailed on all the issues except one, the trial court did not abuse its discretion in awarding attorney fees to that party. *Haskin v. Glass*, 102 Idaho 785, 640 P.2d 1186 (Ct. App. 1982).

This rule creates no substantive right to attorney fees, but merely establishes a framework for applying § 12-121. *Huff v. Uhl*, 103 Idaho 274, 647 P.2d 730 (1982).

Where action was filed prior to effective

date of this rule but heard after that date, the standards imposed by this rule did not apply, and the decision to award attorney fees rested in the sound discretion of the trial court pursuant to § 12-121. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982).

Where the trial judge incorrectly assumed that he was bound by the provisions of this rule and that he had no discretion to exercise under § 12-121 in the matter of the award of attorney fees, when in fact this rule did not become effective until over a year after the case was filed, attorney fees were denied on improper grounds and, therefore, the cause was remanded so that the trial court could decide, in the proper exercise of its discretion, whether to award attorney fees under § 12-121. *Barnes v. Hinton*, 103 Idaho 619, 651 P.2d 553 (Ct. App. 1982).

This rule was inapplicable to an action that was filed prior to March 1, 1979. *City of Nampa v. McGee*, 104 Idaho 63, 656 P.2d 124 (1982).

In case filed prior to adoption of this rule, a trial court could award attorney fees to the prevailing party in its discretion, without the limitations now stated in the rule. *Briscoe v. Nishitani*, 105 Idaho 175, 667 P.2d 278 (Ct. App. 1983).

The district court was not required to apply this rule retroactively to a case which was commenced prior to the effective date of the rule. *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct. App. 1983).

Where suit was brought against individual defendant prior to effective date of this rule and complaint was amended, after such effective date, to add defendant's corporation as a party defendant, the amended complaint related back, under I.R.C.P. 15(c), to the date of the original complaint and, consequently, this rule governing award of attorney's fees was inapplicable with respect to both individual and corporate defendants. *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct. App. 1983).

In determining whether this rule applies in a particular case, the relevant date is the date on which the cause of action was filed; therefore, the standard imposed by this rule was not applicable to case filed prior to adoption of rule, even though attorney fees were awarded after effective date of rule, and the award of attorney fees under § 12-121 was within the discretion of the trial court. *Cottonwood Elevator Co. v. Zenner*, 105 Idaho 469, 670 P.2d 876 (1983).

This rule applies only to actions filed after March 1, 1979; consequently, where action was filed in September, 1975, the trial judge incorrectly determined that he was bound by this rule and denied attorney fees on im-

proper grounds. *Jones v. Mountain States Tel. & Tel. Co.*, 105 Idaho 520, 670 P.2d 1305 (Ct. App. 1983).

This rule was not applicable to case which was filed prior to March 1, 1979, the effective date of the rule. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

This rule was not applicable to case filed before the rule's effective date. *Manduca Dat-sun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 676 P.2d 1274 (Ct. App. 1984).

This rule creates no independent right to attorney fees, but merely establishes a frame-work for applying § 12-121. *Robison v. State, Dep't of Health & Welfare (In re Robison)*, 107 Idaho 1055, 695 P.2d 440 (Ct. App. 1985).

It was within the discretion of the district court to award attorney's fees under § 12-121 without making findings as required by I.R.C.P. 54(e)(1) where the action was filed prior to the effective date of this rule. *Pickering v. El Jay Equip. Co.*, 108 Idaho 512, 700 P.2d 134 (Ct. App. 1985).

This rule only applies to actions filed after March 1, 1979; thus, where the action was filed well before this rule became effective, the trial judge incorrectly assumed that he was bound by the rule, when in fact his exercise of discretion in considering an award of fees under § 12-121 was not subject to the limitations of that rule. Due to the trial judge's erroneous assumption, attorney fees were denied on improper grounds. *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Ct. App. 1985).

Where the action was instituted prior to the effective date of this rule, the district court was not required to find that the case was brought or pursued "frivolously, unreasonably or without foundation," prior to awarding fees under the provisions of § 12-121. *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986).

Attorney Fees on Appeal.

Where the appeal was not taken or pursued frivolously, unreasonably, or without foundation, the Court of Appeals declined to award attorney fees to the prevailing party. *Ada County Hwy. Dist. v. Smith*, 113 Idaho 878, 749 P.2d 497 (Ct. App. 1988).

Where the Court of Appeals was not left with the abiding belief that the appeal was frivolously or unreasonably pursued, it denied the respondent's request for attorney fees on appeal. *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 748 P.2d 410 (Ct. App. 1987).

When a Fair Labor Standards Act (FLSA) case is appealed, the appellate court has discretion to award attorney's fees expended on the appeal, and where appeal was not de-

fended frivolously, unreasonably, or without foundation and was a case of first impression in determining reasonable attorney fees under the FLSA, attorney fees were not awarded on appeal. *Stanley v. McDaniel*, 128 Idaho 343, 913 P.2d 76 (Ct. App. 1996).

Award of attorney fees by the district court to neighboring property owners, who owned a servient estate, was not appropriate, as the neighboring property owners were not the prevailing parties in an easement dispute, and further, neither the property owners nor the neighboring property owners were entitled to attorney fees on appeal, as the appeal was not frivolous. *Walker v. Boozer*, 140 Idaho 451, 95 P.3d 69 (2004).

In a collection suit, no attorney fees were awarded on appeal since there was no prevailing party; although a portion of the decision awarding only \$200 in attorney fees to a debt collector was upheld, a portion of the decision relating to an award of paralegal fees was remanded for further consideration. *Medical Recovery Servs., LLC v. Jones*, 145 Idaho 106, 175 P.3d 795 (Ct. App. 2007).

In an action on a credit card account, a bank was not entitled to an award of attorney's fees on appeal because the bank failed to cite to any legal authority authorizing such an award. Idaho App. R. 41 merely set forth the procedure for awarding attorney's fees on appeal; neither Idaho App. R. 35 or Idaho R. Civ. P. 54(e)(1) provided any authority for such an award; and the bank failed to provide any argument that the action fit within the provisions of I.C. § 12-120(3). *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 240 P.3d 583 (2010).

Award Improper.

An award of attorney fees was not authorized where the trial court made no analysis of the issues litigated to support its conclusion that the plaintiff pursued an action frivolously, unreasonably, and without foundation. *Anderson v. Anderson, Kaufman, Ringert & Clark, Chartered*, 116 Idaho 359, 775 P.2d 1201 (1989).

Attorney fees may not be awarded under § 12-121 and this section when there is a legitimate, triable issue of fact to be submitted to a jury, but one (or perhaps both) of the parties assert legal or factual issues which have no support in the law or the facts. *Turner v. Willis*, 119 Idaho 1023, 812 P.2d 737 (1991).

Judge, in making award of fees to defendants, gave undue importance to another judge's dismissal of plaintiff's claim at the conclusion of plaintiff's case since the record on appeal suggested that the judge relied heavily on the fact that the Rule 41(b) motion

was granted by the other judge and it was clear that the other judge did not make any findings as is required by Rule 41(b) or 52(a). *Bonaparte v. Neff*, 116 Idaho 60, 773 P.2d 1147 (Ct. App. 1989).

Judge, in making award of fees to defendants, improperly relied upon another judge's instruction that the defendants submit an affidavit for their costs and fees, since the directive was not an implicit "finding" that plaintiff's action was brought or pursued unreasonably or without foundation, and since Rule 54(e)(2) requires a written finding stating the basis and reasons for awarding attorney fees, and the defendants did not point to anything in the record of the trial court that satisfied this rule. *Bonaparte v. Neff*, 116 Idaho 60, 773 P.2d 1147 (Ct. App. 1989).

Plaintiffs' legal argument was not so plainly fallacious as to be deemed frivolous, nor was their case not supported by a good faith argument for the extension or modification of the law in Idaho, whether under §§ 12-121 or 12-123; accordingly, the trial court's award of attorney fees under either § 12-123 or § 12-121 and this Rule, was not appropriate. *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991).

The district court made no written findings regarding its award of attorney fees to city. While an award of attorney fees is within the unique expertise and discretion of a trial court, such an award cannot be sustained where the record itself discloses that the claim was not frivolously pursued. *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992).

Where wife argued that an award of attorney fees at trial and on appeal to the district court was proper under § 12-121 and under provisions of the parties' settlement agreement, the Supreme Court held that an award of attorney fees could not be based on § 12-121 because this rule supplemented § 12-121 and allowed attorney fees to be awarded by the court only if an action was brought frivolously, unreasonably or without foundation, which was not the situation in the instant case. *Noble v. Fisher*, 126 Idaho 885, 894 P.2d 118 (1995).

Where record and arguments did not lead to conclusion that action was brought, pursued, or defended frivolously, unreasonable or without foundation attorney's fees were inappropriate. *Tisdale v. Tisdale*, 127 Idaho 331, 900 P.2d 807 (Ct. App. 1995).

The district court abused its discretion in awarding attorney fees to the plaintiff where it was the plaintiff who filed the declaratory judgment action in which the award was rendered, and where defendant's action for negligent supervision was supported by a

good faith argument for the extension or modification of state law. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 990 P.2d 1204 (1999).

The district court did not err in denying the company an award of attorney fees in the wife's action claiming that the company was obligated to make a cash payment to her for her community property interest in the 80 shares of stock that the husband held in the company pursuant to § 12-123 and I.R.C.P. 11 because R. 11(a)(1) was not a basis for an overall award of attorney fees and the same analysis was applicable to claims based on § 12-121 and I.R.C.P. 54(e); further, given the district court's analysis under § 12-121, the same result would follow under I.R.C.P. 11(a)(1) and § 12-123 if they were applicable. *Tolley v. THI Co.*, 140 Idaho 253, 92 P.3d 503 (2004).

Award Proper.

Where parents of man killed in accident brought separate action asserting that they were heirs within the meaning of the Idaho wrongful death statute when clearly they were not, and when they knew that a prior action had been brought by the wife and minor child who, under Idaho law, were clearly the proper persons to bring that action, such case was a proper case for the award of attorney fees on appeal. *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983).

Although the defendant's arguments to the Supreme Court superficially read reasonably, its contentions in fact were unreasonably grounded; therefore, the district court correctly awarded attorney's fees to the plaintiff. *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 739 P.2d 301 (1987).

Where the action was filed before March 1, 1979, the effective date of this rule, an award of fees under § 12-121 was not contingent upon a finding that the action was defended frivolously, unreasonably or without foundation; standing alone § 12-121 gave the district court broad discretion to award attorney fees. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988).

After plaintiff attorneys had lost on their lien claim for fees and costs in one county, the appropriate remedy would have been to perfect an appeal in that proceeding, and subjecting the defendants to further litigation in another county on the same issue was unreasonable; the court also decided that once the *res judicata* defense became blatantly apparent, further litigation became frivolous and an award of fees was properly made under this rule to defendants. *Cole v. Kunzler*, 115 Idaho 552, 768 P.2d 815 (Ct. App. 1989).

Judge did not err by awarding fees under I.C. § 12-121 without reviewing a transcript

of the trial where sufficient facts were presented to the judge upon which he could determine that the action had been “pursued unreasonably” or “without foundation,” where the judge examined the entire district court file, where he considered the various legal theories advanced by plaintiff and the extent of discovery undertaken by the parties, and where the judge had court minutes of the trial and other documents. *Bonaparte v. Neff*, 116 Idaho 60, 773 P.2d 1147 (Ct. App. 1989).

Where the trial court found that plaintiffs’ theory as to the source of a fire and the defendant’s responsibility was unreasonable and unfounded, based on (1) the improbability or inconsistency of the testimony of some of the plaintiffs’ witnesses, (2) evidence that the fire started before the condition the plaintiffs contended was the cause of the fire occurred, and (3) the inconsistency of the physical evidence with the cause advanced by the plaintiffs, and where these findings were supported by the record the award of attorney fees pursuant to § 12-121 and this rule was proper. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

The magistrate acted within his discretion in awarding attorney fees to wife. *Desfosses v. Desfosses*, 120 Idaho 354, 815 P.2d 1094 (Ct. App. 1991).

Trial court’s award of costs and attorney fees did not erroneously include costs and fees incurred by prevailing party’s unsuccessful resistance to opposing party’s motion to set aside a default judgment which had been entered in the early stages of litigation; the prevailing party ultimately obtained summary judgment on the very same complaint. *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

Because plaintiffs’ quiet title action was involuntarily dismissed, he was clearly a non-prevailing party. The district court awarded costs and attorney fees incurred by the defendant landowners to the extent the costs and attorney fees were incurred in preparing a defense against plaintiff’s claim of prescriptive easement. The district court reached its conclusion through the exercise of reason and did not abuse its discretion in awarding costs and attorney fees to the defendant landowners. *Bonaparte v. Neff*, 122 Idaho 714, 838 P.2d 317 (Ct. App. 1992).

Award allocating one-half of all plaintiff’s attorney fees to the prosecution of successful trespass claim was within the boundaries of court’s discretion. *Bumgarner v. Bumgarner*, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993).

Where husband, appealing property division pursuant to divorce proceeding, attempted to reargue facts that he was unable

to establish at trial and to introduce new facts and evidence that were not in the record below and made no cogent legal arguments or requested a repeal or modification of existing law, an award of attorney fees under § 12-121 and this rule was appropriate. *Huerta v. Huerta*, 127 Idaho 77, 896 P.2d 985 (Ct. App. 1995).

Where the supreme court affirmed the lower court on the contractual issues in a case involving a lease, holding that the lease did not exempt the defendant from liability for fires it negligently caused, the plaintiff was entitled to an award of costs and attorney fees pursuant to the terms of the lease. *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.*, 132 Idaho 295, 971 P.2d 1119 (1998).

A district judge’s award of fees was affirmed where he perceived the issue as one of discretion, correctly set out and applied the standard for such an award, and reached his decision by an exercise of reason. *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 987 P.2d 1035 (1999).

Finding in favor of the wife’s estate was proper where, pursuant to controlling Indiana law, the alleged agreement involving the division of marital property was not a valid enforceable contract because the agreement was not reduced to writing; further, the wife’s estate was entitled to attorney fees on appeal pursuant to § 12-121 and I.R.C.P. 54(e)(1) because the supreme court stated that the appeal was unreasonable. *Sword v. Sweet*, 140 Idaho 242, 92 P.3d 492 (2004).

Basis for Award.

In normal circumstances, attorney fees will only be awarded when the court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979).

An award of attorney fees on appeal will not be made where a decision is based upon legal authorities from other jurisdictions, and the appeal has helped to develop Idaho case law on the subject; thus, where a lawsuit was characterized by an interface of assignment law with the legal and ethical duties created by the attorney-client relationship, where it generated issues of first impression in Idaho, and where the Court of Appeals relied largely upon authorities from other jurisdictions to reach, and to support, its decision, no attorney fees would be awarded on appeal. *Bonanza Motors, Inc. v. Webb*, 104 Idaho 234, 657 P.2d 1102 (Ct. App. 1983).

Where the trial judge observed that no meaningful negotiations to settle case had been entered into between the parties, but

expressly declined to find that defendants had defended the case frivolously or in bad faith, the absence of such a finding required reversal of the award of attorney fees which had been based on judge's desire to make plaintiff "whole." *Bosshardt v. Taylor*, 104 Idaho 660, 662 P.2d 241 (Ct. App. 1983).

One party's failure to negotiate does not, by itself, establish the opposing party's right to attorney fees under § 12-121; an award of fees must be supported by a finding that one or more of the criteria prescribed by this rule have been satisfied. *Bosshardt v. Taylor*, 104 Idaho 660, 662 P.2d 241 (Ct. App. 1983).

In action for conversion of inventory of debtor against supplier, by bank that held perfected security interest in inventory, where complaint contained a general allegation that the bank had employed counsel to pursue the action and had and would incur attorney's fees, but there was nothing else in the record to support bank's position that it was entitled to attorney's fees, and bank made no specific contention that one or more criteria of I.R.C.P., Rule 54(e) had been satisfied, since the court could not presume from a silent record that the trial court erred, it upheld trial court's refusal to award attorney's fees. *First Sec. Bank v. Absco Whse., Inc.*, 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983).

In condemnation proceeding, where landowners were entitled to award of attorney's fees only if they could show entitlement under § 12-121, trial judge did not err in finding that case was not pursued frivolously or unreasonably, as required by this rule, so as to warrant award of attorney fees. *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983).

Where appellant did not point to any finding of fact, with one exception, which was not supported by substantial and competent evidence, and that exception did not affect the trial court's ultimate conclusions of law nor did he ask the court to establish any new legal standards, nor to modify or clarify any existing standards, the appeal was brought frivolously, unreasonably and without foundation. Therefore, the court awarded attorney fees to the respondents. *Fairchild v. Fairchild*, 106 Idaho 147, 676 P.2d 722 (Ct. App. 1984).

A misperception of law or of one's interest under the law is not, by itself, unreasonable conduct; if it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing party under § 12-121. Rather, the question must be whether the position adopted by the losing party was not only incorrect but so plainly fallacious that it could be deemed frivolous,

unreasonable or without foundation. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984), overruled on other grounds, *NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987).

Where third-party defendant offered no defense, called no witnesses, presented no supported legal argument in favor of its position, and it did not vigorously cross-examine any of the witnesses called by other parties in an attempt to support its defense, an award of attorney fees under §§ 12-120(2), 12-121, and this rule was proper. *Del Milam & Sons v. Bailey*, 107 Idaho 587, 691 P.2d 1202 (1984).

Where trial court in awarding attorney fees pursuant to § 12-121 failed to find that the case was defended frivolously, unreasonably or without foundation and failed to make a written finding as to the basis and reasons for awarding attorney fees, such award was vacated. *Kerr Land & Livestock, Inc. v. Glaus*, 107 Idaho 767, 692 P.2d 1199 (1984).

In determining whether to award costs and attorney's fees when procedural defenses raise genuine questions concerning the court's jurisdiction or the propriety of granting relief upon the record then before the court, such defenses cannot be deemed frivolous, unreasonable or without foundation. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Where the Tax Commission has defended its case without foundation and unreasonably in misreading and misinterpreting §§ 63-3002 and 63-3022 to its advantage it can be assessed attorney's fees under § 12-121. *Bogner v. State Dep't of Revenue & Taxation*, 107 Idaho 854, 693 P.2d 1056 (1984).

An award of attorney's fees is only proper when an action was either brought or defended frivolously, unreasonably, or without foundation. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

Where the defendant had the opportunity to settle the case for \$6,500, his highest offer was \$1,500, and the jury ultimately awarded the plaintiff nearly \$9,000, the trial court properly concluded that the defendant failed to negotiate in good faith prior to trial. *Etch-very Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 740 P.2d 57 (1987).

Where the investor's appeal was frivolous and without foundation, the Court of Appeals awarded attorney fees on appeal to futures commission merchant, the amount to be determined under I.A.R. 41(d). *Sinclair & Co. v. Gurule*, 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988).

Attorney fees will be awarded only when the appeal was brought, pursued, or defended frivolously, unreasonably or without founda-

tion. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

Plaintiff was not entitled to attorney fees under § 41-1839 where a suit was not brought for the fire loss, but rather for the defendant's negligence in failing to settle that fire loss within a reasonable time, therefore § 41-1839 was inapplicable; instead, to award attorney fees or not would involve § 12-121 and this rule. *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 766 P.2d 1243, (1988).

Section 12-121 has been supplemented by this rule and Rule 54(e)(2). This rule provides that attorney fees under § 12-121 may be awarded only when the court finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. Additionally, Rule 54(e)(2) requires the court — whenever an award of fees is made pursuant to § 12-121 — to make a written finding, either in the award or in a separate document, as to the basis and reasons for awarding such fees. The purpose of giving the reasons for such an award (as well as stating reasons when no award is made) is to provide the appellate court with a meaningful basis to review the trial court's exercise of discretion. *Needs v. Idaho State Dep't of Corr.*, 115 Idaho 399, 766 P.2d 1280 (Ct. App. 1988).

Where, in connection with a motion to review an order for summary judgment, the movants offered no additional authority, theory, or reason for amending the original summary judgment, nor did they cite any error in the district court's original ruling, the district court did not abuse its discretion by awarding reasonable attorney fees to the prevailing party as it found from the facts presented that the case was brought, pursued or defended frivolously, unreasonably or without foundation. *Zehm v. Associated Logging Contractors*, 116 Idaho 349, 775 P.2d 1191 (1988).

Under this rule, an award of attorney fees under § 12-121 may be made only if the trial court finds that a claim was brought or defended frivolously, unreasonably or without foundation. *Jerry J. Joseph C.L.U. Ins. Assocs., Inc. v. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990); *Hossner v. Idaho Forest Indus., Inc.*, 122 Idaho 413, 835 P.2d 648 (1992).

Because this rule is procedural in nature, the Court of Appeals was not bound by it or § 12-121, and where standing arguments and state law claims were meritless because, as held by the District Court, the failure to post the required bond precluded the appellants' actions, the Court of Appeals awarded the appellees attorneys' fees for the frivolous ap-

peal. *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991).

Where attorney fees are allowed under this rule, the amount of attorney fees should not be calculated based upon individual prevailing and nonprevailing theories. Rather, upon final resolution the court should fix the amount of the fee award by an appropriate application of the factors set forth in I.R.C.P. 54(e)(3). *Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct. App. 1991).

Airport manager prevailed in his equitable claim for injunctive relief and was awarded attorney fees in that endeavor, however, on his remaining claims in which he sought recovery of \$1,000,000, and obtained a judgment for \$45 on his breach of contract theory while the other claims were dismissed, the district court did not abuse its discretion in limiting the award of attorney fees to those incurred in obtaining injunctive relief. *Burns v. County of Boundary*, 120 Idaho 623, 818 P.2d 327 (Ct. App. 1990), *aff'd*, 120 Idaho 614, 818 P.2d 318 (1991).

Every party found to have committed fraud is not automatically required to pay the opposing party's attorney fees for having unsuccessfully defended against the claim of fraud. It is possible for defendants to raise a reasonable, yet unsuccessful, defense against a claim of fraud. *Haney v. Molko*, 123 Idaho 132, 844 P.2d 1382 (Ct. App. 1992).

Financial planners could not recover attorney fees after prevailing in a suit brought against them by clients, because the parties' contractual fee provision did not cover the type of dispute involved and this rule does not provide an independent authority for awarding attorney fees. *Wattenbarger v. A.G. Edwards & Sons*, 150 Idaho 308, 246 P.3d 961 (2010).

“Brought” and “Pursued.”

The terms “brought” and “pursued,” used disjunctively in this rule, signify that a non-prevailing litigant may suffer an award of fees if a claim which is arguably meritorious when initially asserted is rendered frivolous, unreasonable or without foundation by subsequent events or information during the pendency of the suit; a fee award in such circumstances would encompass only the fees reasonably incurred by the prevailing party after the claim had ceased to be arguably meritorious. *Ortiz v. Reamy*, 115 Idaho 1099, 772 P.2d 737 (Ct. App. 1989).

Child Support Payments.

Award of attorney fees under I.R.C.P. 54 or §§ 12-120 or 12-121 to mother and state as prevailing parties in paternity action against defendant was improper as mother did not

plead any specific amount of damages as required under § 12-120(1) and the magistrate made no findings that father's defense of the action was frivolous or unreasonable as required under this section. *Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6 (1996).

Where the court did not discuss the welfare of the children before offsetting father's attorney fees against the child support payments and the record showed mother had two children in need of support and could not provide for them on her own, in these circumstances, regardless of mother's conduct, it was not proper for the trial court to reduce child support payments in order to satisfy an award of attorney fees. *Ireland v. Ireland*, 123 Idaho 955, 855 P.2d 40 (1993), overruled on other grounds, *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009).

Consequences for Attorney.

An award of attorney fees based on a finding to the effect that an action was brought frivolously, unreasonably or without foundation, would not necessarily subject the attorney to possible prosecution for barratry, or to disciplinary action by the Idaho State Bar. *Barnes v. Hinton*, 103 Idaho 619, 651 P.2d 553 (Ct. App. 1982).

Construction with Other Laws.

To the extent that this rule, which requires the finding of a prevailing party within the discretion of the district court, is inconsistent with § 45-513, which provides for a mandatory award of attorney fees as part of the enforcement of a lien, the rule has no application and does not modify the statute. *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

Section 12-121, as modified by this rule, allows the court to award fees to a prevailing party in certain allowed circumstances. An award of attorney fees is not a matter of right and a court should only award fees pursuant to § 12-121 when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation. *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Utils. Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994), superseded by statute as stated in *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996).

An award of attorney fees pursuant to § 32-704 is not dependent upon who prevails, and the magistrate did not abuse its discretion in awarding attorney fees to the wife for her defense of the appeal to the district court without first determining that the wife was a prevailing party pursuant to this rule. *Perez v. Perez*, 134 Idaho 555, 6 P.3d 411 (Ct. App. 2000).

Contractual Claim.

The more restrictive criteria set forth in this rule, for determining entitlement to an award of attorney fees under § 12-121, are not applicable where claim for attorney fees is based upon a contract. *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982).

Denial Proper.

Where in an action to correct a faulty description of land sold by the plaintiff to the defendant and to revoke an option previously granted, the defendant was legally entitled to refuse a request to give up his option to purchase the plaintiff's real estate, the plaintiff was properly denied attorney's fees since the defendant's defense was neither frivolous, unreasonable nor without foundation. *McLaughlin v. Robinson*, 103 Idaho 211, 646 P.2d 453 (Ct. App. 1982).

The confusion in deciding what was proper compensation for trustee due to trustee's inadequate recordkeeping made the resort to legal proceedings and appeals nonfrivolous, thereby negating any award of attorney's fees under § 12-121 and this rule. *Grover v. Grover*, 109 Idaho 687, 710 P.2d 597 (1985).

Where it could not be said as a matter of law that defendant should have paid plaintiffs the amount of damages sought by complaint, which was over \$140,000, the award of attorney's fees to plaintiff under § 12-121 and this rule was improper. *Davis v. Professional Bus. Servs., Inc.*, 109 Idaho 810, 712 P.2d 511 (1985).

The district court did not abuse its discretion in not awarding attorney's fees in view of the large damage claims against the defendant and the complexity of the case. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

The trial court did not abuse its discretion in denying an award of fees at trial, where the appeal was not brought, pursued or defended frivolously, unreasonably or without foundation. *Thieme v. Worst*, 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987).

It was inconsistent and arbitrary for the trial court to have denied the motion to dismiss the cross-complaint, stating that reasonable factual conflicts existed sustaining the claim, but to later allow an award of attorney fees on the basis that the cross-claim was frivolously and unreasonably pursued; therefore, the award of attorney fees was reversed. *J.M.F. Trucking, Inc. v. Carburetor & Elec. of Lewiston, Inc.*, 113 Idaho 797, 748 P.2d 381 (1987).

Where, in a prescriptive easement action, extensive factual contentions were presented which were argued under fairly debatable

legal principles, simply being a prevailing party was not sufficient for an award of attorney fees. *French v. Sorensen*, 113 Idaho 950, 751 P.2d 98 (1988), overruled on other grounds, 116 Idaho 739, 779 P.2d 414 (1989).

In denying the plaintiff's motion for attorney fees, the court correctly ruled that the defendant's defense of liability was not frivolous, unreasonable or without foundation even though the defendant abandoned it; the mere fact that the defendant's able counsel made a tactical decision to admit liability prior to trial, without more, did not indicate that the defendant previously had defended the issue unreasonably. *Spreader Specialists, Inc. v. Monroc, Inc.*, 114 Idaho 15, 752 P.2d 617 (Ct. App. 1987), overruled on other grounds, *Walton, Inc. v. Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

The district court erred when it imposed costs and attorney fees for failure to engage in good faith settlement negotiations. *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988).

Where the defendants were the prevailing parties in the jury trial, and not only was there substantial evidence to support the defense, the defendants prevailed, the action was not defended frivolously or unreasonably, and thus no award of attorney fees could be assessed under § 12-121 and this rule against the defendants, even assuming that the in limine order to prevent reference to the settlement agreement had viability and had only been violated by the defendants. *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988).

Where the court was not left with the abiding belief that an appeal was pursued frivolously, unreasonably or without foundation, in an action which sought to set aside a stipulated settlement, an award of attorney fees was properly withheld from the prevailing party. *Artiach Trucking, Inc. v. Wolters*, 118 Idaho 656, 798 P.2d 938 (Ct. App. 1990).

While § 12-121 allows fees to be awarded to a prevailing party, the prevailing party must show that the losing party brought, pursued or defended the action frivolously, unreasonably or without foundation in action seeking to hold third party vicariously liable for plaintiff's torts theory of joint enterprise district court did not abuse its discretion in denying an award of fees at trial where district judge stated that he believed the joint enterprise theory of recovery "was incorrect but arguable," and that he was "not able to say that this case was frivolous or that it was not in good faith." *Maselli v. Ginner*, 119 Idaho 702, 809 P.2d 1181 (Ct. App. 1991).

In an insurance coverage case, in which the

insurer sought a judicial declaration that under a homeowner's insurance policy it was neither obligated to defend the insured nor to cover claims against him arising from injuries sustained by the insured's son in a swimming pool accident and in which the insurer ultimately prevailed, the court determined that there was a clear enough question of the insurance policy's proper interpretation such that the award of attorney fees should be denied. *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 912 P.2d 119 (1996).

Where the district court made no findings that the plaintiff brought, pursued or defended his case frivolously, unreasonably or without foundation, attorney fees were not awardable. *Karterman v. Jameson*, 132 Idaho 910, 980 P.2d 574 (Ct. App. 1999).

Where a plaintiff presented legitimate issues relating to an insurer's duty in calculating premiums, his appeal from summary judgment was not frivolous, and the defendants were not entitled to attorney fees on appeal. *Simper v. Farm Bureau Mut. Ins. Co.*, 132 Idaho 471, 974 P.2d 1100 (1999).

Trust beneficiaries claimed that they were entitled to an award of attorney fees under an earnest money agreement; however, the trial court properly determined that the beneficiaries could not receive attorney fees pursuant to I.C. § 12-120(3) because the earnest money agreement was between the trust and a real estate broker and his wife, and, therefore, the beneficiaries were not parties to the transaction. Finally, the district court declined to award attorney fees pursuant to I.C. § 12-121 because it found the real estate broker and his wife had not pursued their claims frivolously, unreasonably, or without foundation. *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009).

Discretion of Court.

The award of attorney fees rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982).

Although this rule was not in force when the action was commenced, the district court was at liberty to follow the rule as a guide to the exercise of discretion. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).

Based upon its finding that the defendants acted maliciously, the trial court could reasonably have believed, under the circumstances of the case, that the defendants were defending frivolously, unreasonably or without foundation, and plaintiff was the prevailing party in that action. Accordingly, there was no abuse of discretion in the award of attorney's

fees in the trial court. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

A party need not be awarded affirmative relief in order to be the "prevailing party"; accordingly, the trial court did not abuse its discretion in awarding costs and attorney's fees to defendant contractor in breach of contract action where the contractor prevailed on the main issue of the case although he was denied affirmative relief on his counterclaim. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983).

The determination of who is a prevailing party, for the purpose of receiving an award of attorney fees, is committed to the sound discretion of the trial court; that determination will not be disturbed unless an abuse of discretion has occurred. Where the trial court has exercised its discretion after a careful consideration of the relevant factual circumstances and principles of law, and without arbitrary disregard for those facts and principles of justice, that exercise of discretion has not been abused and will not be disturbed. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

Even if this rule was inapplicable to case filed before effective date of rule, it was permissible for the district court to apply the conceptual principles of the rule; but where the court had the alternative of applying the principles of this rule, or of applying another principle, i.e., the "prevailing party" provision of § 12-121, unfettered by the limitation subsequently imposed on the statute by this rule on March 1, 1979, and the court chose the latter and stated reasons for that choice, there was no abuse of discretion in making that decision. *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct. App. 1983).

The award of attorney fees at the trial level, under § 12-121 and this rule, is a matter within the trial court's discretion. *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983).

A district court's determination when awarding attorney's fees that an action was frivolously defended will not be overturned absent an abuse of discretion; however, the district court must consider all relevant factors in exercising its sound discretion. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

The determination to award or not to award attorney's fees is committed to the discretion of the trial court. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

In a case where buyers of land had sued seller for misrepresenting availability of building permits, the court did not abuse its discretion in determining that buyers had not "brought" the action "frivolously, unreason-

ably or without foundation" since seller had not furnished a transcript in which the court could determine whether the buyers failed to present substantial evidence of alleged oral representations about building permits; however, the case was remanded since the suit could have been pursued frivolously, unreasonably or without foundation where, with information in hand, the buyers had a scant basis to continue insisting that the seller's alleged representations had been fraudulent. *Ortiz v. Reamy*, 115 Idaho 1099, 772 P.2d 737 (Ct. App. 1989).

The trial court did not abuse its discretion in determining that an airport manager was entitled only to those attorney fees which were incurred in obtaining a preliminary injunction against the county board of commissioners to prevent the termination of a contract. *Burns v. County of Boundary*, 120 Idaho 614, 818 P.2d 318 (1991).

The trial court did not abuse its discretion when it determined that neither party prevailed, that the city had not acted frivolously, and that plaintiff was not entitled to costs and attorney fees where plaintiff attempted to prevent city from leasing a former hospital to the state for use as a correctional facility. *Foster v. City of St. Anthony*, 122 Idaho 883, 841 P.2d 413 (1992).

When an exercise of discretion is involved, an appellate court conducts a three-step analysis: (1) whether the trial court properly perceived the issue as one of discretion; (2) whether that court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

An award of attorney fees at trial under this rule and § 12-121 is subject to reversal only upon a showing that the district court abused its discretion and where the district court found that the defendants unreasonably defended and pursued frivolous claims against plaintiff, the Court of Appeals held that there was no abuse of discretion in awarding attorney fees to plaintiff. *United States Nat'l Bank v. Cox*, 126 Idaho 733, 889 P.2d 1123 (Ct. App. 1995).

An award of reasonable attorneys' fees to a condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion and such award will be overturned only upon a showing of abuse. *State ex rel. Smith v. Jardine*, 130 Idaho 318, 940 P.2d 1137 (1997).

The decision to award costs to the prevailing party is within the sound discretion of the

district court, and in a wrongful death action brought by the parent's of the murder victim the court was within its discretion in not taxing costs against the parents where their claim was dismissed. *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 968 P.2d 215 (1998).

In a subrogation case, a court did not err by denying attorney's fees to plaintiffs where, at the time of the lawsuit the law was not settled whether an insurer would be required to pay a proportionate share of costs and attorney fees when the insurer did not consent to the insured taking action to collect the insurer's claim, it was only after an applicable case was decided that plaintiffs amended their complaint seeking recovery under the common fund doctrine for punitive damages, and the trial court concluded that under the circumstances, it could not say that the insurer's defense of the law suit was frivolous, unreasonable or without foundation. *Boll v. State Farm Mut. Auto. Ins. Co.*, 140 Idaho 334, 92 P.3d 1081 (2004).

Divorce Action.

The wife was entitled to attorney fees on appeal, where the magistrate ratified an unequal property settlement agreement and incorporated it into the divorce decree, the district court, finding that the unequal division was procured through the husband's fraud, redivided the property, and the wife was ultimately awarded only that amount which she was lawfully entitled to from the very beginning of the proceedings. *Golder v. Golder*, 110 Idaho 57, 714 P.2d 26 (1986).

In a proceeding to modify a divorce decree, where it was determined that the defenses of the party objecting to the proposed modification were not pursued or defended frivolously, unreasonably or without foundation and where the magistrate's decision did not apply the factors set forth in § 32-705, the magistrate's decision to award attorney fees was in error and could not be upheld. *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133 (1996).

Where neither party pursued nor defended an appeal frivolously, unreasonably or without foundation, neither was entitled to an award of attorney fees on appeal. *McAffee v. McAfee*, 132 Idaho 281, 971 P.2d 734 (Ct. App. 1999).

Eminent Domain.

Attorneys' fees and costs are allowable, in eminent domain proceedings, under I.R.C.P. 54(d)(1), however, such fees and costs are not mandatory as within the definition of just compensation. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

In condemnation actions, attorneys' fees may be awarded to the condemnee without a showing and finding that the action was brought and pursued "frivolously, unreasonably or without foundation." *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

An award of reasonable attorneys' fees to the condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion and, as in other areas of the law, such award will be overturned only upon a showing of abuse; the condemnee's costs may be awarded under I.R.C.P. 54(d)(1)(C) or 54(d)(1)(D). *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

In determining award of attorneys' fees to a condemnee, the court should consider the following factors: whether the condemnor reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict; whether such offer was made within a reasonable period after the institution of the action; any controverting of the public use and necessity allegations; the outcome of any hearing thereon and any modification in the plans or design of the condemnor's project resulting from the condemnee's challenge; and whether the condemnee voluntarily granted possession of the property pending resolution of the just compensation issue. As to the amount of attorneys' fees awardable, the criteria outlined in I.R.C.P. 54(e)(3) are appropriate in condemnation, as in all other civil cases; however, the court should not automatically adopt any contingent fee or contractual arrangement, but rather the fee awarded may be more or less than that provided in the lawyer-client contract. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

Expert Testimony.

The defendant's argument that it should be awarded attorney's fees because the plaintiff's theory of causation was unreasonable and unfounded since they called no experts at trial and based their entire suit on the testimony of one witness was erroneous and the trial court's refusal to award fees was proper. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997).

Factors Considered.

Attorney fees are properly awarded where a case is defended unreasonably; if the defense was reasonable, the fact that the conduct which brought about the law suit in the first place may have been unreasonable is irrelevant to the decision whether to award attor-

ney fees. *Verway v. Blincoe Packing Co.*, 108 Idaho 315, 698 P.2d 377 (Ct. App. 1985).

The failure to enter into or conduct settlement negotiations is not a basis for awarding attorney fees under § 12-121 and this rule; the Supreme Court, by this decision, expressly disapproved and found to be in error, the contrary language in *Sigdestad v. Gold*, 106 Idaho 693, 682 P.2d 646 (Ct. App. 1984). *Anderson v. Anderson, Kaufman, Ringert & Clark, Chartered*, 116 Idaho 359, 775 P.2d 1201 (1989).

An award of attorney's fees to a defendant in a personal injury action was an abuse of discretion where the court based the award upon consideration of matters that were neither issues in the case nor part of the record. *Severson v. Hermann*, 116 Idaho 497, 777 P.2d 269 (1989).

The district court did not err in giving due consideration to defendants' refusal to make any advances on plaintiff's sum-certain medical bills in awarding attorney fees to a prevailing personal injury plaintiff, especially given defendants' belated admission of liability. *Turner v. Willis*, 116 Idaho 682, 778 P.2d 804 (1989).

The frivolity and unreasonableness of a defense is not to be examined only in the context of trial proceedings; the entire course of the litigation will be taken into account. *Turner v. Willis*, 116 Idaho 682, 778 P.2d 804 (1989).

The court's prognostication of what the verdict would be was not a proper consideration under this rule, and the judge's ability to confidently and accurately predict the jury's verdict did not mean the case was brought frivolously, unreasonably, or without foundation; it meant that the judge made either an astute or lucky guess. *Edwards v. Donart*, 116 Idaho 687, 778 P.2d 809 (1989).

The percentage of pages in an appellate opinion discussing defendant's liability was not an appropriate factor to consider in allocating attorney fees. *Davidson v. Beco Corp.*, 116 Idaho 696, 778 P.2d 818 (Ct. App. 1989).

Where in determining which party, if any, is the prevailing party, magistrate reviewed the memorandum in support of attorney fees and noted that the time itemizations did not clearly separate the amount of time spent on each individual issue and determined that it was reasonable to award husband 75% of the amount claimed for attorney fees based on the fact that husband had incurred approximately 25% of the attorney fees in defending against wife's claim, the magistrate employed the discretion accorded him in determining the prevailing party and did so in a reasonable way and therefore the award of attorney

fees was proper. *Badell v. Badell*, 122 Idaho 442, 835 P.2d 677 (Ct. App. 1992).

Award of attorney fees under marriage settlement agreement contract where magistrate, after reviewing marriage settlement agreement to determine whether or not an award of attorney fees was appropriate on the issues presented to him, concluded that an award of attorney fees on issue of modification of child support would be inappropriate because this issue was specifically excluded under terms of the agreement, but the award of attorney fees on tax refund issue was appropriate because this was an express provision of the agreement; there was no error in magistrate's interpretation of the contract. *Badell v. Badell*, 122 Idaho 442, 835 P.2d 677 (Ct. App. 1992).

Where a court stated it awarded an engineering firm attorney fees in the amount of \$61,846, the record provided sufficient information to presume that the court had considered the pertinent factors of Idaho R. Civ. P. 54(e)(3); the writings submitted by the parties in connection with the claim for attorney fees addressed several of the factors listed in rule 54(e)(3), including the time and labor required, the novelty and difficulty of the questions, the prevailing charges for like work, that the fee was fixed, the amount involved and results obtained, and conduct that the parties alleged unreasonably increased the cost of the litigation. *Pinnacle Eng'rs, Inc. v. Heron Brook, LLC*, 139 Idaho 756, 86 P.3d 470 (2004).

The reasonableness of an attorney fee award is based on the trial court's consideration of the factors in this rule. The court need not specifically address all of the factors contained in the rule in writing, so long as the record clearly indicates that the court considered them all. *Thomas v. Thomas*, 150 Idaho 636, 249 P.3d 829, 32 I.E.R. Cas. (BNA) 695 (2011).

Failure to Object.

Where a plaintiff wife brought an appeal to a district court from a magistrate's determination of property issues in a divorce action, the wife's failure to object to the memorandum of costs filed by the defendant husband in the district court did not constitute a waiver of all objections to the claimed attorney fees, because the district judge was sitting as an appellate court in this action and, therefore, the district judge was required to determine the appeal in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court; thus, I.A.R. 41 governed the procedure for applying for attorney fees on appeal. *Grif-*

fin v. Griffin, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

Failure to timely object constitutes a waiver of the right to contest the requesting party's entitlement to the fees sought. *Harms Mem. Hosp. v. Morton*, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986).

An inmate, who was served with a copy of the court's decision to award attorney fees and costs to the State for responding to inmate's second post-conviction relief application and who was also given a copy of the State's memorandum of cost, but did not file any objection as allowed by the Rules of Civil Procedure, has waived the right to further contest the award. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Where appellee asked the Court of Appeals to award attorney fees on appeal under § 12-121 and this rule due to her claim that the appeal was brought "frivolously, unreasonably, and without foundation," the Court of Appeal noted that, under I.A.R. 11.1, it could award fees against a party or the party's attorney involved in the appeal of its own motion. The Court of Appeals held that by failing to appeal an I.R.C.P. 9(b) dismissal, the appellant could not have prevailed under any circumstances and so it awarded costs and attorney fees against appellant's counsel, as it was the responsibility of the attorney, not the client, to recognize the legal basis upon which an order was granted and to properly evaluate whether or not good faith grounds existed for an appeal. *MacLeod v. Reed*, 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995).

Failure to Settle.

Settlement negotiations and an asserted failure to settle do not amount to the type of conduct which may precipitate an award of attorney fees against a nonprevailing party; moreover, it would be an unusual case where attorney fees would be assessed against a defendant who conceded liability, notwithstanding the fact that possible defenses were available and that the foregoing of the same was beneficial to the judicial system, and likewise to the plaintiff, who accordingly could concentrate solely on the issue of damages. *Braley v. Pangburn*, 118 Idaho 575, 798 P.2d 34 (1990).

There is no authority in a trial court to insist upon, oversee, or second guess settlement negotiations, if any, and certainly no authority to impose sanctions for "bad faith" bargaining. *Braley v. Pangburn*, 118 Idaho 575, 798 P.2d 34 (1990).

A trial court's consideration of failed settlement negotiations or of a refusal to negotiate a settlement when deciding whether to award attorney fees is prohibited under Idaho law.

Smith v. Angell, 122 Idaho 25, 830 P.2d 1163 (1992).

The absence of specific findings of fact and conclusions of law providing a basis and reason for awarding attorney fees requires a reversal and remand for additional findings and conclusions. Thus, where district court's findings in instant case did not explain its decision to award attorney fees, such reversal and remand was necessary. *Snipes v. Schalo*, 130 Idaho 890, 950 P.2d 262 (Ct. App. 1997).

Foreclosure of Lien.

Upon the successful entry of a judgment of foreclosure of a lien claimed under § 45-507, an award of attorney fees and costs is mandatory. The amount of the award, however, is still a matter of discretion for the district court. In determining the amount, the district court is free to consider the factors of this Rule as well as those considerations which are part of a prevailing party analysis under I.R.C.P. 54(d)(1)(B). *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

Frivolous and Unreasonable Pursuit.

In suit for personal injuries suffered at concert where when complaint was filed information as to who had sponsored the concert was in the exclusive possession of defendant and once plaintiff had the opportunity to explore the issue in discovery it should have been abundantly clear that defendant had engaged in no activity that would have imposed upon him any responsibility to concert attendees, the action should have been dismissed, therefore, defendant was entitled to attorney's fees for that portion attributable to legal services after it was clear that it became frivolous and unreasonable for plaintiff to persist in pursuing the claim against defendant. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

Where plaintiff failed to provide argument or authority in support of the only issues on appeal that were properly before the court, the appeal was brought and pursued frivolously, unreasonably, and without foundation and thus defendants were entitled to attorney fees and costs on appeal pursuant to § 12-121, I.A.R. 41 and this rule. *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997).

Where the cross-claimant failed to specifically argue in any of her briefs that the magistrate erred, where she failed to provide any authority for reversal, and where the court found her cross-claim to be frivolously pursued and without foundation, the recognition by the magistrate that the issue of the award of attorney fees was one of discretion supported a finding that there was no abuse

of discretion in the awarding of fees against the cross-claimant. *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 979 P.2d 605 (1999).

Frivolous Appeal.

Because the appeal was taken and pursued frivolously, unreasonably, and without foundation, and because the lease and option to purchase at issue provided for the award of attorney fees to the prevailing party in any action for enforcement, attorney fees in addition to costs were awarded on appeal. *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141 845 P.2d 559 (1992).

Husband's motion was frivolous and without basis where husband raised issues unrelated to a special clause in divorce decree allowed a motion to modify only in relation to items in the stipulation, and husband also raised additional new issues without facts to support a request for relief under I.R.C.P. 60(b). *Lunn v. Lunn*, 125 Idaho 193, 868 P.2d 521 (Ct. App. 1994).

Where mortgagees who had defaulted on several loans subsequently filed bankruptcy petition which invoked automatic stay which relieved mortgagees from terms of stipulations with bank which was reached after bank brought foreclosure action, and where court of appeals holding that because of automatic stay district court could not enter the original decree of foreclosure was vacated and after the case was remanded for further proceedings the district court entered a new order reinstating the foreclosure, since there was no basis in law or fact to support mortgagees' contention that district court was bound by Court of Appeal's decision to find that automatic stay was in effect at the time the district court reinstated the decree of foreclosure and since both the Supreme Court and the Bankruptcy Court held that the automatic stay had terminated on a date well before the district court entered the reinstatement order, mortgagees' appeal was brought frivolously and without foundation and thus mortgagor bank was entitled to attorney fees. *Valley Bank v. Stecklein*, 126 Idaho 487, 887 P.2d 32 (1994).

Where counsel readily acknowledged that the argument he made was an extension of existing state tort law, it was not a frivolous or unreasonable argument made without foundation. *Turpen v. Granieri*, 133 Idaho 244, 985 P.2d 669 (1999).

Genuine Issue on Appeal.

Where the evidence showed that a wife's appeal to the district court, from a magistrate's determination of property issues in a divorce action, seriously addressed the then

unresolved and genuine issue of the transmutation of her husband's property from separate to community property, the district judge improperly determined that the husband was entitled to attorney fees since the appeal was not brought or pursued frivolously, unreasonably or without foundation. *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

Where case involving question of whether an equity buy-in method of determining connection fees of water and sewer system was reasonable and whether the collection and use of those fees for replacement of system components constituted a revenue raising method not authorized by law and furthermore, the district court's decision in former similar case contains some dicta inferring that the city's collection and use of connection fees in this case may be unauthorized and it was clear that this dicta resulted in some confusion for appellants, the case was not brought frivolously, unreasonably or without foundation and award of attorney's fees was not justified. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

Hearing.

In overruling an appellate court's reversal of a trial court decision, the Supreme Court remanded, rather than reinstated, the trial court's award of attorney fees where a hearing was never held on a motion challenging the original award of attorney fees. *Murray v. State*, 116 Idaho 744, 779 P.2d 419 (Ct. App. 1989).

Insurance Coverage.

In a declaratory judgment action over insurance coverage brought by an insurance company, § 41-1839 did apply so as to permit attorney's fees to be awarded as costs to a non-insured claiming against the insured in a personal injury case. *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 865 P.2d 965 (1993).

Multiple Claims.

Attorney fees are not appropriate under § 12-121 and this rule unless all claims brought or all defenses asserted are frivolous and without foundation. Where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. The total defense of plaintiff's proceedings must be unreasonable or frivolous. *Management Catalysts v. Turbo W. Corpac, Inc.*, 119 Idaho 626, 809 P.2d 487 (1991).

Where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine

which were or were not frivolously defended or pursued in order to justify award of attorney fees; the total defense of a party's proceedings must be unreasonable or frivolous. *Magic Valley Radiology Assocs. v. Professional Bus. Servs., Inc.*, 119 Idaho 558, 808 P.2d 1303 (1991).

Nonprevailing Party.

A nonprevailing party has no right to recover costs or attorney fees from the plaintiffs regardless of its fee agreement with its co-defendant. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985).

District court properly denied individual's request for disclosure of documents from the office of the attorney general that would have interfered with law enforcement proceedings or investigations, and therefore, the district court did not abuse its discretion in denying attorney fees for the individual. *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (2002).

Appellant, a losing bidder on a project to renovate a university building, was not entitled to attorney fees on appeal, pursuant to Idaho R. Civ. P. 54(e)(1), where appellant did not prevail on appeal. *SE/Z Constr., L.L.C. v. Idaho State Univ.*, 140 Idaho 8, 89 P.3d 848 (2004).

Objection Timely Filed.

Defendant's objection to costs and fees was deemed timely where the court was unable to determine from the record when the memorandum of costs was filed. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 990 P.2d 1204 (1999).

Paralegal Fees.

In a dispute over a land sale contract, a district court did not err by awarding a seller the cost of paralegal work. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 159 P.3d 870 (2007).

In a collection suit, a magistrate court improperly determined that it was not allowed to order the recovery of paralegal fees. *Medical Recovery Servs., LLC v. Jones*, 145 Idaho 106, 175 P.3d 795 (Ct. App. 2007).

Partial Summary Judgment.

Because the district court's order of partial summary judgment constituted a final judgment with respect to some, but not all, of the claims raised by the parties, the district court's ruling on the issue of costs and attorney fees was premature. *Bear Island Water Ass'n v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994).

Prevailing Party.

In action by homeowners against seller of hydronic heating systems, the trial court did not abuse its discretion in determining that

homeowners were the prevailing parties despite the fact that the majority of the homeowners' claims were dismissed, that jury awarded damages amounting to only 3% of the recovery sought, and that seller prevailed on counterclaim against builder. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

Plaintiff in quiet title action could not be awarded his attorney fees where he did not prevail on the merits. *Fairchild v. Fairchild*, 106 Idaho 147, 676 P.2d 722 (Ct. App. 1984).

Where the plaintiff prevailed before the district court with respect to some of her claims, the court did not abuse its discretion in determining that she satisfied the requirements of this rule. *Smith v. USAA Property & Cas. Ins.*, 132 Idaho 466, 974 P.2d 1095 (1999).

In a contract dispute, where defendants sought attorney fees and costs, defendants were prevailing parties under Idaho R. Civ. P. 54(d)(1)(B) because defendants avoided all liability and defendant excavation company was successful on its counterclaim. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005).

Award of legal fees was authorized to a Chapter 7 debtor who, when sued by his former employer for violating a noncompetition agreement, had prevailed on the issue of whether his conduct justified nondischargeability, under 11 U.S.C.S. § 523(a)(6), even though the former employer had prevailed on the issue of whether employee had breached the agreement. The nondischargeability issue was the crux of the case. *JB Constr., Inc. v. King (In re King)*, — Bankr. —, 2009 Bankr. LEXIS 660 (Mar. 23, 2009).

Magistrate court did not err in holding that a contractor was the prevailing party for the purpose of awarding costs and attorney fees in customers' action for damage to their boat because while the customers recovered \$ 600 on their claim for \$2,820, the contractor recovered the entirety of the \$400 that the contractor sought in damages pursuant to a stipulation. *Crump v. Bromley*, 148 Idaho 172, 219 P.3d 1188 (2009).

Private Attorney General Action.

Attorney fees are to be awarded only where they are authorized by statute or contract. Since § 12-121 provides the trial court with discretion to award fees to the prevailing party, there is a statutory basis and the question then becomes whether the limitation in this section restricting the award to those cases which are "defended frivolously, unreasonably, or without foundation" is applicable. Where the award of attorney fees is under the private attorney general doctrine the limita-

tion does not apply. *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984).

Proof of Entitlement.

Where a lease-option agreement provided no independent contractual entitlement to an award of fees, but simply authorized such when "provided by law or court rule," the defendant was required to demonstrate an entitlement to attorney fees pursuant to law or court rule. *Karterman v. Jameson*, 132 Idaho 910, 980 P.2d 574 (Ct. App. 1999).

Quiet Title Action.

Where plaintiffs had benefit of court decision, released over two years before they brought their action to quiet title, concerning the essential elements and controlling law regarding the doctrine of boundary by agreement; the case law made it clear that two points in their complaint—payment of taxes and failure to actively use land—were not material elements in the doctrine of boundary by agreement; the fence in question had been in place since 1929 and considered the boundary until 1990, thus, award of attorney fees to the opposing party for pursuit of an unreasonable action was upheld. *Cameron v. Neal*, 130 Idaho 898, 950 P.2d 1237 (1997).

Removal of Personal Representative.

Where the magistrate found that the children of the deceased were the prevailing parties in an action to remove the personal representative of the estate and that they met the criteria for an award of attorney fees under § 12-121 and Rule 54(d)(1)(B), and where the magistrate further found, pursuant to Rule 54(d)(1)(B) and this rule that the personal representative's bad faith misuse of estate funds supported the conclusion that her defense of the removal was unreasonable and frivolous, it was not an abuse of discretion for the magistrate to award attorney fees to the estate for the removal proceedings. *Kolouch v. First Sec. Bank*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996).

Sanctions Distinguished.

The reasons for which attorney fees may be awarded pursuant to § 12-121 and this rule are not reasons that will support an award of sanctions pursuant to I.R.C.P. 11(a)(1). *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

Separability of Claims.

The district court distinguished, not between two separate theories supporting a single claim for relief, but between two entirely separate claims, one seeking equitable injunctive relief and the other seeking damages in an action at law, and the rules of

procedure envision that a district court may distinguish between separable claims in awarding costs and attorney fees, therefore, it was proper for the court to consider claims separately in awarding attorney fees. *Burns v. County of Boundary*, 120 Idaho 623, 818 P.2d 327 (Ct. App. 1990), *aff'd*, 120 Idaho 614, 818 P.2d 318 (1991).

Taxpayer's Action.

Where the district court was unable to ascertain with any degree of certainty the benefit allegedly bestowed upon the general public as a result of a taxpayer's actions, but where it did find that a substantial benefit was bestowed upon the affected property owners, a paramount societal interest in the matter being litigated, one of the basic factors required for an award of attorney's fees under the private attorney general theory was missing. *County of Ada v. Red Steer Drive-Ins of Nev., Inc.*, 101 Idaho 94, 609 P.2d 161 (1980).

Voluntary Dismissal.

A party's voluntary dismissal of a cause of action does not establish that a valid defense to the claim existed or was asserted in determining an award of attorney fees. *United States Nat'l Bank v. Cox*, 126 Idaho 733, 889 P.2d 1123 (Ct. App. 1995).

Worker's Compensation Case.

Supreme court had no authority to award attorney fees against the Industrial Special Indemnity Fund on appeal under I.C. § 12-121 and this rule since the case was not a civil action, but an appeal for a worker's compensation case; the legislation establishing the worker's compensation system in Idaho specifically abolishes all civil actions and civil causes of action for personal injuries suffered by workers in industrial and public work. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

There is no authority for the award of attorney fees against a worker's compensation claimant who unsuccessfully appeals to the Supreme Court of Idaho. *Swanson v. Kraft, Inc.*, 116 Idaho 315, 775 P.2d 629 (1989).

Cited in: *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979); *Fouser v. Paige*, 101 Idaho 294, 612 P.2d 137 (1980); *Tanner v. Estate of Cobb*, 101 Idaho 444, 614 P.2d 984 (1980); *Lewis v. Fletcher*, 101 Idaho 530, 617 P.2d 834 (1980); *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980); *Odziemek v. Wesely*, 102 Idaho 582, 634 P.2d 623 (1981); *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102

Idaho 744, 639 P.2d 442 (1981); Wetzel v. Goldsmith (In re Comstock), 16 B.R. 206 (Bankr. D. Idaho 1981); Payne v. Foley, 102 Idaho 760, 639 P.2d 1126 (1982); Tappen v. State, Dep't of Health & Welfare, 102 Idaho 807, 641 P.2d 994 (1982); White v. Rehn, 103 Idaho 1, 644 P.2d 323 (1982); T-Craft Aero Club, Inc. v. Blough, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982); Bastian v. Albertson's, Inc., 102 Idaho 909, 643 P.2d 1079 (Ct. App. 1982); Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982); Calvin v. Salmon River Sheep Ranch, 104 Idaho 301, 658 P.2d 972 (1983); Packard v. Joint Sch. Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983); Curtis v. DeAtley, 104 Idaho 787, 663 P.2d 1089 (1983); DeWils Interiors, Inc. v. Dines, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984); Andre v. Morrow, 106 Idaho 455, 680 P.2d 1355 (1984); Ace Realty, Inc. v. Anderson, 106 Idaho 742, 682 P.2d 1289 (Ct. App. 1984); Gillingham v. Swan Falls Land & Cattle Co., 106 Idaho 859, 683 P.2d 895 (Ct. App. 1984); Hunt v. Mayr, 107 Idaho 129, 686 P.2d 74 (1984); All Am. Realty, Inc. v. Sweet, 107 Idaho 229, 687 P.2d 1356 (1984); Goodwin v. Wulfenstein, 107 Idaho 492, 690 P.2d 947 (Ct. App. 1984); Argonaut Ins. Cos. v. Tri-West Constr. Co., 107 Idaho 643, 691 P.2d 1258 (Ct. App. 1984); Wolford v. Tankersley, 107 Idaho 1062, 695 P.2d 1201 (1984); Newman v. Associated Sys., 107 Idaho 922, 693 P.2d 1124 (Ct. App. 1985); Smith v. Whittier, 107 Idaho 1106, 695 P.2d 1245 (1985); Amlin v. Hamilton, 108 Idaho 320, 698 P.2d 838 (Ct. App. 1985); Northwest Roofers & Employers Health & Sec. Trust Fund v. Bullis, 108 Idaho 368, 699 P.2d 1382 (1985); Marriage v. Berriocha (In re Estate of Berriocha), 108 Idaho 474, 700 P.2d 96 (Ct. App. 1985); Price v. Aztec Ltd., 108 Idaho 674, 701 P.2d 294 (Ct. App. 1985); Orr v. Orr, 108 Idaho 874, 702 P.2d 912 (Ct. App. 1985); Long v. Hendricks, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985); Kunzler v. Kunzler, 109 Idaho 350, 707 P.2d 461 (Ct. App. 1985); Steelman v. Mallory, 110 Idaho 510, 716 P.2d 1282 (1986); P.N. Cedar, Inc. v. D & G Shake Co., 110 Idaho 561, 716 P.2d 1333 (Ct. App. 1986); Jerome Thriftway Drug, Inc. v. Winslow, 110 Idaho 615, 717 P.2d 1033 (1986); Twin Falls Bank & Trust Co. v. Holley, 111 Idaho 349, 723 P.2d 893 (1986); Sunshine Mining Co. v. Metropolitan Mines Corp., 111 Idaho 654, 726 P.2d 766 (1986); Nelson v. Holdaway Land & Cattle Co., 111 Idaho 1035, 729 P.2d 1098 (Ct. App. 1986); Erickson v. Amoth, 112 Idaho 1122, 739 P.2d 421 (Ct. App. 1987); McAtee v. Faulkner Land & Livestock, Inc., 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); Burrup v. Stanger, 114 Idaho 50, 753

P.2d 261 (Ct. App. 1988); Myers v. Vermaas, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988); Long v. Hendricks, 114 Idaho 157, 754 P.2d 1194 (Ct. App. 1988); Lowery v. Board of County Comm'rs, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988); Taggart v. Highway Bd., 115 Idaho 816, 771 P.2d 37 (1988); Jensen v. Westberg, 115 Idaho 1021, 772 P.2d 228 (Ct. App. 1988); Stevenson v. Prairie Power Coop., 118 Idaho 52, 794 P.2d 641 (Ct. App. 1989); Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1990); Weaver v. Millard, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991); Wulff v. Peralta (In re Peralta), 123 Idaho 567, 850 P.2d 216 (Ct. App. 1993); St. Alphonsus Regional Medical Ctr., Ltd. v. Killeen, 124 Idaho 197, 858 P.2d 736 (1993); Higley v. Woodard, 124 Idaho 531, 861 P.2d 101 (Ct. App. 1993); Templeton v. Hogue, 125 Idaho 130, 867 P.2d 1004 (Ct. App. 1994); Thompson v. Pike, 125 Idaho 897, 876 P.2d 595 (1994); Keeven v. Estate of Keeven, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994); Dunnick v. Elder, 126 Idaho 308, 882 P.2d 475 (Ct. App. 1994); Dunham v. Dunham, 128 Idaho 55, 910 P.2d 169 (Ct. App. 1994); State v. Owen, 126 Idaho 871, 893 P.2d 818 (Ct. App. 1995); Western Stockgrowers Ass'n v. Edwards, 126 Idaho 939, 894 P.2d 172 (Ct. App. 1995); Weyyakin Ranch Property Owners' Ass'n v. City of Ketchum, 127 Idaho 327, 896 P.2d 327 (1995); Pocatello Auto Color, Inc. v. Akzo Coatings, Inc., 127 Idaho 41, 896 P.2d 949 (1995); Foster v. Shore Club Lodge, Inc., 127 Idaho 921, 908 P.2d 1228 (1995); Haley v. Clinton, 128 Idaho 123, 910 P.2d 795 (Ct. App. 1996); McCuskey v. Canyon County Comm'rs, 128 Idaho 213, 912 P.2d 100 (1996); Marshall v. Blair, 130 Idaho 675, 946 P.2d 975 (1997); Pines, Inc. v. Bossingham, 131 Idaho 714, 963 P.2d 397 (Ct. App. 1998); Idaho State Tax Comm'n v. Beacom, 131 Idaho 569, 961 P.2d 660 (Ct. App. 1998); Israel v. Leachman, 139 Idaho 24, 72 P.3d 864 (2003); Jenkins v. Boise Cascade Corp., 141 Idaho 233, 108 P.3d 380 (2005); VanVooren v. Astin, 141 Idaho 440, 111 P.3d 125 (2005); Ross v. Ross, 145 Idaho 274, 178 P.3d 639 (Ct. App. 2007); Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457 (2009); Citibank (South Dakota), N.A. v. Carroll, 148 Idaho 254, 220 P.3d 1073 (2009); Craig v. Gellings, 219 P.3d 1208, 2009 Ida. App. LEXIS 109 (Nov. 4, 2009); Jones v. Starnes, 150 Idaho 257, 245 P.3d 1009 (2011); Kelley v. Yadon, 150 Idaho 334, 247 P.3d 199 (2011); Garner v. Povey, — Idaho —, 259 P.3d 608 (2011); Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC, — Idaho —, 264 P.3d 379 (2011).

RESEARCH REFERENCES

A.L.R. Recovery of Computer-Assisted Research Costs as Part of or in Addition to Attorney's Fees Under State Law. 33 A.L.R.6th 305.

Rule 54(e)(2). Findings.

Whenever the court awards attorney fees pursuant to section 12-121, Idaho Code, it shall make a written finding, either in the award or in a separate document, as to the basis and reasons for awarding such attorney fees. (Adopted January 2, 1979, effective March 1, 1979.)

JUDICIAL DECISIONS

ANALYSIS

Application.
Award Vacated.
Reasons for Award.
Separate Claims.
When Required.

Application.

This rule applies only to actions filed on or after March 1, 1979, therefore, where a damage action was filed in March of 1978, the trial court was not required to make written findings prior to awarding attorney fees. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982).

Award Vacated.

Because appeal involving modification of child support was not entirely frivolous, the Supreme Court of Idaho vacated the district court's award of attorney fees. *Mecham v. Mecham*, 123 Idaho 219, 846 P.2d 221 (1993).

Reasons for Award.

If a prevailing party makes a specific contention that one or more of the criteria of I.R.C.P., Rule 54(e) have been satisfied, the court should state its reasons for declining to award attorney's fees. Otherwise, the appellate court has no meaningful basis to review the trial court's exercise of discretion. *First Sec. Bank v. Absco Whse., Inc.*, 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983).

The district court made no written findings regarding its award of attorney fees to city. While an award of attorney fees is within the unique expertise and discretion of a trial

court, such an award cannot be sustained where the record itself discloses that the claim was not frivolously pursued. *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992).

Separate Claims.

The district court distinguished, not between two separate theories supporting a single claim for relief, but between two entirely separate claims, one seeking equitable injunctive relief and the other seeking damages in an action at law, and the rules of procedure envision that a district court may distinguish between separate claims in awarding costs and attorney fees, therefore, it was proper for the court to consider claims separately in awarding attorney fees. *Burns v. County of Boundary*, 120 Idaho 623, 818 P.2d 327 (Ct. App. 1990), *aff'd*, 120 Idaho 614, 818 P.2d 318 (1991).

When Required.

Findings are required under this rule only when a court awards attorney fees pursuant to § 12-121. *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

Cited in: *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982); *Fearless Farris Whse., Inc. v. Howell*, 105 Idaho 699, 672 P.2d 577 (Ct. App. 1983); *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984); *Newman v. Associated Sys.*, 107 Idaho 922, 693 P.2d 1124 (Ct. App. 1985); *Verway v. Blincoe Packing Co.*, 108 Idaho 315, 698 P.2d 377 (Ct. App. 1985); *Tudor Eng'g Co. v. Mouw*, 109 Idaho 573, 709 P.2d 146 (1985); *Stevenson v. Prairie Power Coop.*, 118 Idaho 52, 794 P.2d 641 (Ct. App. 1989).

Rule 54(e)(3). Amount of attorney fees.

In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:

(A) The time and labor required.

- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case. (Adopted January 2, 1979, effective March 1, 1979; amended March 23, 1990, effective July 1, 1990.)

JUDICIAL DECISIONS

ANALYSIS

Appellate Review.
 Applicability of Factors.
 Condemnation Proceedings.
 Consideration of Other Factors.
 Construction with Statutes.
 Contingent fees
 Contractual Limit.
 Contractual Right.
 Discretion.
 Divorce Cases.
 Duplication of Services.
 Examination of Reasonableness by Court.
 Expertise of Attorney.
 Improper Consideration.
 Information Needed to Consider Factors.
 Offset.
 Paralegal Services.
 Record of Factors Considered.
 Size of Damage Award.
 Specific Findings Not Required.
 Weight Given Factors.

Appellate Review.

A reasonable attorney fee is not always susceptible to mathematical calculation. Based on a thorough examination of the factors set out in this rule, the district court set a reasonable attorney fee; this precludes a finding that the award bears no relationship to the case. A determination of a reasonable attorney fee will not be overturned unless it is clearly erroneous. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct. App. 1985).

In a suit seeking to enforce a settlement agreement in a property dispute between neighbors, district court properly awarded costs and attorney fees to respondents following summary judgment in their favor. Since the settlement agreement reached through mediation was enforced despite the appellant's attempt to avoid it, respondents were the prevailing party. Also court properly considered factors to determine amount of fees, disallowing certain fees incurred before enforcement of the agreement. *Mihalka v. Shepherd*, 145 Idaho 547, 181 P.3d 473 (2008).

Applicability of Factors.

This rule sets forth factors to be considered in fixing the amount of the award, which are applicable wherever they would not conflict with the contract or statute upon which the award is based. *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982).

In determining the amount of attorney fees awarded under § 12-120, the court correctly considered the factors under this rule. *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct. App. 1986).

When attorney fees are allowed under this rule, either by statute or contract, the amount should not be calculated based upon individual prevailing "theories"; rather, the amount should be determined by appropriate application of the Rule 54(e)(3) factors. *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987).

In determining the amount of attorney fees,

the district court must, at a minimum, provide a record which establishes that the court considered the factors under this rule, including such items as the time and labor required, the skill requisite to perform the legal service properly, the amount involved, and the results obtained, as well as "any other factor which the court deems appropriate." *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931 (Ct. App. 1988).

The amount of attorney fees awarded at trial is an appropriate factor in determining the award of attorney fees on appeal under subsection (3) of § 12-120. *Phillips v. Miles*, 116 Idaho 842, 780 P.2d 593 (Ct. App. 1989).

Section 6-202 mandates the award of a reasonable attorney fee to a plaintiff who prevails in an action brought under the statute and the amount of the award is to be determined through consideration of the factors articulated in this rule. *Bubak v. Evans*, 117 Idaho 510, 788 P.2d 1333 (Ct. App. 1989).

What constitutes a reasonable fee under Rule 54(d)(1) is a discretionary determination for the trial court that is to be guided by the criteria of this rule. *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000).

Homeowners who prevailed in an action against their builders, receiving a jury verdict of \$40,000, were entitled by contract to recover their actual attorney's fees of \$106,049; the trial did not err in refusing to consider whether the fees were reasonable under this rule. To consider the factors in this rule would be contrary to the language of the parties' contract and, therefore, contrary to Idaho Civil Rule 54(e)(8). *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009).

Purchasers were entitled to attorney fees and costs where they were prevailing party under I.R.C.P. 54(d)(1). The court considered the fact that the purchasers recovered substantially less than they sought but also successfully defended against counterclaims, and the trial court properly considered the factors set out in this rule. *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009).

Condemnation Proceedings.

In determining award of attorneys' fees to a condemnee, the court should consider the following factors: whether the condemnor reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict and whether such offer was made within a reasonable period after the institution of the action; any controverting of the public use and necessity allegations; the outcome of any hearing thereon and any modification in the plans or design of the condemnor's project resulting from the condemnee's challenge; and whether the condemnee voluntarily

granted possession of the property pending resolution of the just compensation issue. As to the amount of attorneys' fees awardable, the criteria outlined in this rule are appropriate in condemnation, as in all other civil cases; however, the court should not automatically adopt any contingent fee or contractual arrangement, but rather the fee awarded may be more or less than that provided in the lawyer-client contract. *Ada County Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983).

Consideration of Other Factors.

The court may not focus upon "other" factors to the exclusion of the "time and labor" and the remaining factors listed in the rule. *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984).

An attorney fee award is not the proper place to give indirect relief from an adverse judgment; the arguably harsh effect of a judgment is not an appropriate "other" factor to consider in fixing attorney fees. *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984).

Where the record failed to show any consideration was given to the appropriate factors under this rule and the court stated only that it recognized merit in the defendant's argument that the suit and its accompanying expenses could have been avoided, the amount of the attorney fee award had to be reconsidered in light of other proper criteria under this rule. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931 (Ct. App. 1988).

The district court did not give proper consideration to the contingent fee agreement, where insured's counsel initially tried to orchestrate a settlement without litigation or arbitration, and insurer held back from settling and cost the insureds considerably more in attorney fees, causing the ultimate result, not consistent with the statute, of substantially diminishing the insured's recovery. *Walton v. Hartford Ins. Co.*, 120 Idaho 616, 818 P.2d 320 (1991).

Construction with Statutes.

The proper measure of attorney fees under I.C. 44-1704(2), a state law cause of action, is governed by this rule. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

Contingent fees

In suit by injured driver against insurance company, trial court did not abuse its discretion by awarding \$20,000 in attorney fees pursuant to contingent fee agreement. Contingent fee agreement was not unreasonable simply because attorney would recover more

than he would have under an hourly fee contract. *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 152 P.3d 614 (2007).

Contractual Limit.

The fact that an award is made to a party does not necessarily require the amount to be limited to the party-attorney agreement; § 48-608 provides for the award of an objectively “reasonable” fee, and such a fee may be higher or lower than what the party must pay to the attorney under their agreement. *Nalen v. Jenkins*, 114 Idaho 973, 763 P.2d 1081 (Ct. App. 1988).

Contractual Right.

The last item in this rule, “any other factor which the court deems appropriate in the particular case,” should not be applied to penalize a bank for exercising any right to attorney’s fees expressly granted to it by the guaranty instrument on which it sought to collect. *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982).

Discretion.

The trial court has discretion, after considering the factors contained in this rule, to determine the amount of attorney fees that should be awarded pursuant to § 41-1839. *Young v. State Farm Mut. Auto. Ins. Co.*, 127 Idaho 122, 898 P.2d 53 (1995).

Where district court concluded that gravamen of the law suit was a commercial transaction after determining that the nature of the underlying action was in contract and considering fact that award of attorney fees was a discretionary act, court acted within boundaries of its discretion in awarding attorney fees to architect. *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 917 P.2d 737 (1996).

Trial court did not abuse its discretion in awarding fees to the insurer where the owner’s claim was unreasonable and without foundation; there was no indication that judgment creditors occupied some different status than the injured parties. *Graham v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 611, 67 P.3d 90 (2003).

District court abused its discretion in determining the amount of attorney fees awarded to the claimant, where it was unclear why the court determined that the attorney fees submitted by the claimant were excessive, other than the judge’s vague statement that he knew what was excessive and what was reasonable based on his own litigation experience. *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008).

Divorce Cases.

Where an appeal in a divorce case is brought frivolously and without foundation,

an appellate court may award fees under § 12-121 and in such a case, the amount awarded is fixed by reference to this rule which enables the judge to consider the factors listed in § 32-705 and incorporated by reference into § 32-704(2). In this way § 12-121 plays a role in divorce cases without unduly encroaching upon the financial assistance scheme contemplated by § 32-704(2). *Hentges v. Hentges*, 115 Idaho 192, 765 P.2d 1094 (Ct. App. 1988).

Duplication of Services.

Where some of the costs incurred in litigation were a result of duplication, in that three changes of attorney occurred during the course of the case, and the case was set for trial four times before it was finally heard, the district court acted within its sound discretion in reducing the amount of attorney fees. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct. App. 1985).

Whether it is an abuse of discretion to award fees for two attorneys being present during the trial depends upon whether the trial court concludes that two attorneys were reasonably required. *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008).

Examination of Reasonableness by Court.

A court is permitted to examine the reasonableness of the time and labor expended by the attorney under subdivision (A) of this rule and need not blindly accept the figures advanced by the attorney; such figures may be measured against a standard of reasonableness. An attorney cannot spend his time extravagantly and expect to be compensated by the party who loses at trial; thus, in an action to recover less than \$2,000, where the claim for attorney fees amounted to \$9,000, the district court did not err in allowing only \$3,000. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct. App. 1985).

The question of what constitutes a “reasonable” attorney fee involves a discretionary determination by the trial court, and in exercising this discretion, the court must act consistently with the applicable legal standards listed in this rule. *Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct. App. 1991).

An award of attorney fees in the lower court, based on a contingency agreement, may be enough to subsume any amount that might be awarded for attorney fees on appeal; ultimately, the determination of reasonableness will rest with the trial court after it has recalculated the interest award and reconsidered all the factors under this rule. *Hoopes v.*

Hoopas, 124 Idaho 518, 861 P.2d 88 (Ct. App. 1993).

What constitutes a “reasonable” fee is a discretionary determination for the trial court, to be guided by the criteria of Civil Procedure Rule 54(e)(3), and a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney “churning”. *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000).

Trial court properly considered the factors of Idaho R. Civ. P. 54(e)(3) and acted within the boundaries of its discretion in determining that the victim’s claimed attorney fees were reasonable. *Johnson v. Sanchez*, 140 Idaho 667, 99 P.3d 620 (Ct. App. 2004).

In a dispute over a land sale contract, a district court did not abuse its discretion by awarding attorney fees where it considered itemized memoranda and affidavits of costs, and items were removed if they were deemed excessive. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 159 P.3d 870 (2007).

Where plaintiff and defendant entered into a settlement agreement regarding a limited partnership, the award of attorney fees to plaintiff was proper, because, *inter alia*, (1) the award was properly based on the hourly rates charged by plaintiff’s Boise counsel, (2) defendant’s actions were properly considered in determining the amount of time reasonably required by plaintiff’s attorneys, and (3) defendant failed to show that it was error to award fees for the time spent by two attorneys to be present at the trial representing plaintiff. *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008).

In the trout farmers’ breach of a commercial sales contract action against a fish hatchery, awarding the trout farmers attorney fees after remand pursuant to their contingency fee agreement rather than on an hourly basis as they had previously been awarded was reasonable considering the attorney fees as a whole, despite the late switch regarding the method of computation. *Griffith v. Clear Lakes Trout Co.*, 146 Idaho 613, 200 P.3d 1162 (2009).

After the court dismissed debtors’ complaint against a lender, which asserted violations of federal and state consumer protection and lending laws, the court awarded the lender an amount less than the amount sought by the lender, in part, because (1) of the disproportionate nature of the requested fees when compared to the amount of its monetary interest at stake if the lender were prevented from foreclosing, (2) the request was not justified by the complexity of the

issues, and (3) the billing rates were excessive. *Beach v. Wells Fargo Bank, Na (In re Beach)*, — Bankr. —, 2011 Bankr. LEXIS 4027 (Oct. 19, 2011).

Expertise of Attorney.

While there was evidence offered by defendant insurance company that hourly rate for the plaintiffs’ attorney exceeded the usual rate in the local area, the trial court considered the factors listed in this rule, especially the expertise of the attorney in prosecuting claims against insurance companies, and was within its discretion in the award of attorney fees. *Garnett v. Transamerica Ins. Servs.*, 118 Idaho 769, 800 P.2d 656 (1990).

Improper Consideration.

Where trial court made no finding as to the time allocated to defending homeowners against claim by real estate broker but, rather, based its determination on what had been awarded to potential purchasers when they prevailed in dismissal of the third-party complaint by homeowners against them, the trial court failed to properly take into consideration the factors enumerated in this rule and case had to be remanded for redetermination of amount of attorney fees. *Logosz v. Childers*, 105 Idaho 173, 667 P.2d 276 (Ct. App. 1983).

The trial court improperly exercised its discretion in calculating the amount of fees on the basis of the success or failure of plaintiff’s alternative theories of recovery. *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987).

Information Needed to Consider Factors.

If the trial court is required to consider the enumerated factors in this rule, then it logically follows as a corollary that the court must have sufficient information at its disposal concerning those factors, some of which can only be supplied by the attorney of the party who is requesting the fee award. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985).

It is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider factors as they specifically relate to the prevailing party or parties seeking fees. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985).

Considering the factors of Idaho R. Civ. P. 54(e)(3), the district court’s award of attorney fees in favor of the refinery was proper; however, the refinery’s refusal to submit time sheets foreclosed the district court from determining the proper amount to award, and because the refinery exercised its right to

claim the privilege, it was foreclosed from collecting attorney fees at the trial court level. *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 86 P.3d 475 (2004).

Trial court did not have enough information to arrive at a reasonable attorney fee award where it had information as to some, but not all, of the criteria required to be considered under this rule. *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005).

Where the employee sued his employer for breach of contract and tort claims arising from his termination, his employer, as the prevailing party upon summary judgment, was entitled to an award of attorney fees. The fees attributable to the defense of the contract-related claims were sufficiently isolated from fees attributable to the defense of the other claims to make the award of attorney fees calculable. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380 (2005).

Offset.

In action alleging breach of contract and fraud in sale of stock in corporation formed by plaintiff and defendant to defendant, where defendant counterclaimed and such claim was ultimately settled, when awarding attorney's fees it was entirely appropriate to consider release of counterclaim asserted by defendant; moreover, defendant admitted in interrogatories that the attorney's fees incurred in defending the complaint were the only quantifiable damages she asserted in her counterclaim, and thus district court was correct when it offset her award of attorney's fees by a portion of the award she received in her release of the counterclaim since she should not receive a double recovery. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Paralegal Services.

Fees for paralegal services clearly are not contemplated as awardable attorney's fees or costs under this rule even though in *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), the United States Supreme Court approved an award for paralegal fees, for the Supreme Court's reasoning in such case was not applicable to this rule. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Paralegal fees are not contemplated as awardable attorney fees or costs under this rule. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

Record of Factors Considered.

Where the district court did not provide a record establishing that the court considered the factors under this rule, vacation of the award of attorney fees and remand for further

consideration was required. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

District court properly awarded attorney fees to the property owners where the district court pointed out all the considerations that had to be taken before awarding attorney fees including the factor listed in Idaho R. Civ. P. 54(e)(3) and stated that it had taken those factors into consideration. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 69 P.3d 1035.

In a collection suit, a magistrate court did abuse its discretion by awarding a debt collector \$200 in attorney fees, even though the magistrate initially acted prematurely and improperly by awarding a specific amount of fees before all of the required documents were filed. *Medical Recovery Servs., LLC v. Jones*, 145 Idaho 106, 175 P.3d 795 (Ct. App. 2007).

Size of Damage Award.

Nowhere does this rule indicate that the amount of an attorney fees award must be proportionate to the size of the damages award. *Meldco, Inc. v. Hollytex Carpet Mills, Inc.*, 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990).

Even considering the factors in this rule, where an attorney has given the court little information about his services upon which to base a fee award, the court will have to necessarily rely upon its own estimates of the attorney's time and labor involved in representing a client in an action. *Jones v. State Farm Mutual Auto Ins. Co. (In re Jones)*, — Bankr. —, 2009 Bankr. LEXIS 5518 (Apr. 9, 2009).

Specific Findings Not Required.

In determining the amount of a "reasonable attorney fee" the court is required to consider the existence and applicability of the factors set forth in this rule, however, the court is not required to make specific findings demonstrating how it employed any of those factors in reaching an award amount. Hence, failure to specifically address each separate factor does not, by itself, constitute an abuse of discretion, rather, it is incumbent upon the appellant to demonstrate that the court failed to consider or apply the appropriate criteria. *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

This rule does not require the district court to make specific findings in the record when awarding attorney fees, but rather requires the district court to consider the stated factors in determining the amount of the fees; the court need not make specific findings demonstrating how it employed any of those factors in reaching an award amount. *Empire Fire &*

Marine Ins. Co. v. North Pac. Ins. Co., 127 Idaho 716, 905 P.2d 1025 (1995)

The court is not required to make specific findings demonstrating how it employed any of the factors in Rule 54 of the Rules of Civil Procedure in reaching the award amount; therefore such failure does not by itself constitute an abuse of discretion. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018 (1998).

The district court need not make specific findings demonstrating how it employed any of the factors listed in this rule, but is required only to consider the stated factors in determining the amount of attorney fees. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

Although it is preferable that the trial court list its specific findings on each factor in this rule, the lack of written findings in itself cannot be considered a manifest abuse of discretion. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

This rule provides a list of factors for trial courts to consider when determining the amount of attorney fees, and although the trial court should provide some written findings to support its award of fees, a lack of written findings regarding the factors set forth in this rule, in itself, cannot be considered a manifest abuse of discretion. *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 999 P.2d 877 (2000).

Weight Given Factors.

Under this section the trial court is required to consider the existence and terms of a contingency fee arrangement, but the court is not required to give that factor any more weight than should be given to the other factors applicable to reaching the ultimate determination of the reasonableness of the amount to be awarded, and is not prohibited from allowing recovery to the prevailing party in excess of the amount which the party is contractually obligated to pay to his attorney. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

Under this rule, the trial court is required to consider the existence and applicability of

each factor: no one element is to be given undue weight or emphasis. *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987).

The judge may recognize the hardship imposed upon a prevailing party and his lawyer by a lengthy time span between the rendition of legal services and the eventual receipt of a fee award. However, the judge should weigh this hardship in a general balance with all other applicable criteria under this rule, rather than isolating and attempting to quantify it through interest charges on attorney billings. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988).

Although subdivision (G) of this rule requires the trial court to consider the amount involved in the case and the results obtained, the court is not required to give that factor more weight or emphasis than should be given to the other applicable factors. *Meldco, Inc. v. Hollytex Carpet Mills, Inc.*, 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990).

When determining the amount of attorney fees to award pursuant to Idaho R. Civ. P. 54(e)(3), courts are not required to give the amount involved in the case more weight or emphasis than should be given to the other applicable factors. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 41 P.3d 242 (2001).

Cited in: *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981); *Acoustic Specialties, Inc. v. Wright*, 103 Idaho 595, 651 P.2d 529 (1982); *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 702 P.2d 917 (Ct. App. 1985); *Simonovich v. Simonovich*, 110 Idaho 9, 713 P.2d 445 (Ct. App. 1985); *Hale v. Walsh*, 113 Idaho 759, 747 P.2d 1288 (Ct. App. 1987); *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992); *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 865 P.2d 965 (1993); *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 896 P.2d 949 (1995); *Stanley v. McDaniel*, 128 Idaho 343, 913 P.2d 76 (Ct. App. 1996); *Action Collection Servs. v. Bigham*, 146 Idaho 286, 192 P.3d 1110 (Ct. App. 2008); *Jones v. State Farm Mut. Auto Ins.* (In re Jones), — F. Supp. 2d —, 2009 Bankr. LEXIS 5520 (June 22, 2009).

Rule 54(e)(4). Pleading — Default judgments.

It shall not be necessary for any party in a civil action to assert a claim for attorney fees in any pleading; provided, however, attorney fees, when claimed to be allowable by contract or statute other than section 12-121, Idaho Code, shall not be awarded unless the prayer for relief in the complaint states that the party is seeking attorney fees and the dollar amount thereof in case judgment is entered by default. Any award of attorney fees in default judgments shall be subject to the other provisions of

this Rule 54(e), and shall not exceed the amount prayed for in the complaint. Any award of attorney fees pursuant to I.C. Section 12-120, in default judgments in which the defendant has not appeared shall not exceed the amount of the judgment for the claim, exclusive of costs. (Adopted January 2, 1979, effective March 1, 1979; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Attorney's Fees.
Attorney's Fees upon Default.
Damages.
Default judgment
Pleading.

Attorney's Fees.

Defendants adequately supported their request for fees by citing § 12-120 in their initial memorandum of costs and attorney fees; they were not required to assert their request in their pleadings. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005).

Attorney's Fees upon Default.

Pursuant to this rule, there is no automatic entitlement to the specific amount of attorney fees claimed in a complaint simply because the defendant has defaulted. *Nickels v. Durbano*, 118 Idaho 198, 795 P.2d 903 (Ct. App. 1990).

Damages.

Because the attorney fees, incurred by pur-

chasers of land which had unrecorded water agreement in their action against vendors to quiet title, provided the measure of their damages, § 6-402 and this rule were not relevant. *Koelker v. Turnbull*, 127 Idaho 262, 899 P.2d 972 (1995).

Default judgment

In an action brought by a musician to recover royalties on music, where a default judgment was entered in favor of musician, musician was not entitled to attorney fees in excess of the amount requested in his pleading. *Holladay v. Lindsay*, 143 Idaho 767, 152 P.3d 638 (Ct. App. 2006).

Pleading.

In an action relating to the sale of a duplex, two sellers were still allowed to seek attorney fees and costs, despite a failure to plead such in their answer. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

Cited in: *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982).

Rule 54(e)(5). Attorney fees as costs.

Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs; provided, however, the claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed. (Adopted January 2, 1979, effective March 1, 1979.)

JUDICIAL DECISIONS

ANALYSIS

Apportionment.
Award As Condition of Mistrial.
Due Process.
Failure to Verify Memorandum of Costs.
Insurance Action.
Supported by Record.
Support for Request.

Apportionment.

The trial judge may apportion attorney fees and costs in relation to parties' recoveries or by any other equitable standard. *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989).

Award As Condition of Mistrial.

There was no statutory basis in a personal

injury case for the awarding of fees and costs against defendant by the trial court as a "condition" of declaring a mistrial. *Valentine v. Perry*, 118 Idaho 653, 798 P.2d 935 (1990).

Due Process.

I.R.C.P. 54(d)(5) and this rule provide for notice and an opportunity to be heard and to present objections before the trial court, thus satisfying the right to due process. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Failure to Verify Memorandum of Costs.

Failure to verify a memorandum of costs, including attorney fees, renders it subject to timely objection but does not render it jurisdictionally defective. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Insurance Action.

In a declaratory judgment action over insurance coverage brought by an insurance company, § 41-1839 did apply so as to permit attorney's fees to be awarded as costs to a non-insured claiming against the insured in a personal injury case. *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 865 P.2d 965 (1993).

Supported by Record.

The introduction of hourly time sheets into

evidence is not a prerequisite to an award of reasonable attorney fees; however, an award of attorney fees must be supported by findings which must, in turn, be supported by the record. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985).

Support for Request.

Defendants adequately supported their request for fees by citing § 12-120 in their initial memorandum of costs and attorney fees; they were not required to assert their request in their pleadings. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005).

Cited in: *Industrial Inv. Corp. v. Rocca*, 102 Idaho 920, 643 P.2d 1090 (Ct. App. 1982); *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982); *Fearless Farris Whsle., Inc. v. Howell*, 105 Idaho 699, 672 P.2d 577 (Ct. App. 1983); *Kunzler v. Kunzler*, 109 Idaho 350, 707 P.2d 461 (Ct. App. 1985); *Ayotte v. Redmon*, 110 Idaho 726, 718 P.2d 1164 (1986); *Thomas v. John Hancock Mut. Life Ins. Co. (In re Death of Cole)*, 113 Idaho 98, 741 P.2d 734 (Ct. App. 1987); *Harney v. Weatherby*, 116 Idaho 904, 781 P.2d 241 (Ct. App. 1989); *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995); *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008).

Rule 54(e)(6). Objection to attorney fees.

Any objection to the allowance of attorney fees, or to the amount thereof, shall be made in the same manner as an objection to costs as provided by Rule 54(d)(6). The court may conduct an evidentiary hearing, if it deems it necessary, regarding the award of attorney fees. (Adopted January 2, 1979, effective March 1, 1979.)

JUDICIAL DECISIONS

ANALYSIS

Application to Uniform Post-Conviction Procedure Act.

Discretion of Court.

Failure to Verify Memorandum of Costs.

Specificity.

Timely Motion.

Waiver of Objections to Costs.

Application to Uniform Post-Conviction Procedure Act.

The Idaho Rules of Civil Procedure are applicable to proceedings brought under the Uniform Post-Conviction Procedure Act §§ 19-4901 et seq. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Discretion of Court.

The lack of an objection to a memorandum of costs and attorney fees does not preclude the court from exercising its discretion in deciding whether to award attorney fees, nor must the court automatically award the full amount sought. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990).

To determine whether the award of attorney fees was an abuse of discretion, the Supreme Court of Idaho applies the three-factor test from *Sun Valley Shopping Center*: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its

discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Trial courts may award attorney fees under § 12-121 if the case was “brought, pursued or defended frivolously, unreasonably or without foundation,” I.R.C.P. 54(e)(1). *Burns v. Baldwin*, 138 Idaho 480, 65 P.3d 502 (2003).

Awarding of attorney fees and costs under § 12-121, and I.R.C.P. 54(d)(1) and 54(e)(1), is within the discretion of the trial court and subject to an abuse of discretion standard of review; the burden is on the party disputing the award of attorney fees to show an abuse of discretion. *Burns v. Baldwin*, 138 Idaho 480, 65 P.3d 502 (2003).

Failure to Verify Memorandum of Costs.

Failure to verify a memorandum of costs, including attorney fees, renders it subject to timely objection but does not render it jurisdictionally defective. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Specificity.

The defendant's motion to disallow fees did not comply with this rule or I.R.C.P. 7(b)(1) and 54(d)(6) because the motion did not specify any basis or grounds for the objection. *Nanney v. Linella, Inc.*, 130 Idaho 477, 943 P.2d 67 (Ct. App. 1997).

Timely Motion.

In an appeal of a County Planning and Zoning Commission's grant of a conditional use permit and zoning certificate for a veterinary clinic, the county's objection to the prevailing parties' motion for costs and attorney fees was timely pursuant to I.R.C.P. 54(d)(1) and this rule which, at that time, required that a motion to disallow costs and attorney fees be filed within ten days of service of the memorandum of costs and fees, where the parties were served with the memorandum by mail, and the objection was filed 13 days later, under I.R.C.P. 6(e)(1) and this rule allowing a three-day extension where service is by mail, and exclusion of the day of service. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990) (decision prior to 1987 amendment of I.R.C.P. 54(d)).

Waiver of Objections to Costs.

In the absence of a showing in the record that defendants agreed not to assert the ar-

gument that plaintiffs waived the right to object to costs and attorney fees by failing to timely object, the language of I.R.C.P. 54(d)(6) that failure to object in ten days to the items in the memorandum of cost constitutes a waiver of all objections to the costs claimed controls. *Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982).

Where the record reflected that no objection was ever filed to defendants' memorandum of cost as required by I.R.C.P. 54(d)(6), plaintiffs thereby waived their right to further contest an award of attorney fees. *Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982).

Failure to timely object to a memorandum of costs and attorney fees constitutes a waiver of the right to contest the requesting party's entitlement to the fees sought. This does not mean the trial court automatically must award the full amount specified in the memorandum; but it does mean that the party who fails to object has waived its right to contest any award within the amount sought. *Fearless Farris Whsle., Inc. v. Howell*, 105 Idaho 699, 672 P.2d 577 (Ct. App. 1983).

Where the obligors under a deed of trust failed to object within ten days (now 14 days) of the service of memorandum of costs or anytime thereafter, they waived the right to contest the award. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

Failure to timely object to a memorandum of costs and attorney fees constitutes a waiver of the right to contest the entitlement to the costs or fees. *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), *aff'd*, 117 Idaho 1079, 793 P.2d 1251 (1990).

An inmate, who was served with a copy of the court's decision to award attorney fees and costs to the State for responding to inmate's second post-conviction relief application and who was also given a copy of the State's memorandum of cost, but did not file any objection as allowed by the Rules of Civil Procedure, has waived the right to further contest the award. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Cited in: *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982); *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 702 P.2d 917 (Ct. App. 1985); *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008).

**Rule 54(e)(7). Settlement of attorney fees by order of court —
Determination not binding on attorney and client.**

After a hearing on an objection to a claim for attorney fees, or after the time for filing an objection has passed, the court shall, upon motion of any party or upon the court's own initiative, enter an order settling the dollar amount of attorney fees, if any, awarded to any party to the action. If there was a timely objection to the amount of attorney fees, the court shall include in the order its reasoning and the factors it relied upon in determining the amount of the award. The allowance of attorney fees by the court under this rule is not to be construed as fixing the fees between attorney and client. (Adopted January 2, 1979, effective March 1, 1979; amended March 23, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended April 22, 2004, effective July 1, 2004.)

Rule 54(e)(8). Claims to which rule applies.

The provisions of this Rule 54(e) relating to attorney fees shall be applicable to all claims for attorney fees made pursuant to section 12-121, Idaho Code, and to any claim for attorney fees made pursuant to any other statute, or pursuant to any contract, to the extent that the application of this Rule 54(e) to such a claim for attorney fees would not be inconsistent with such other statute or contract. (Adopted January 2, 1979, effective March 1, 1979.)

Contractual Attorney's Fees.

Homeowners who prevailed in an action against their builders, receiving a jury verdict of \$40,000, were entitled by contract to recover their actual attorney's fees of \$ 106,049; the trial did not err in refusing to consider

whether the fees were reasonable under Civil Rule 54(e)(3). To consider the factors in that rule would be contrary to the language of the parties' contract and, therefore, contrary to this rule. *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009).

Rule 54(e)(9). Effective date.

This Rule 54(e) shall become effective on the first day of March, 1979, and shall apply to all actions filed on or after the effective date. (Adopted January 2, 1979, effective March 1, 1979.)

JUDICIAL DECISIONS

Cited in: *Rickel v. Board of Barber Exmrs.*, 102 Idaho 260, 629 P.2d 656 (1981); *Haskin v. Glass*, 102 Idaho 785, 640 P.2d 1186 (Ct. App. 1982); *T-Craft Aero Club, Inc. v. Blough*, 102

Idaho 833, 642 P.2d 70 (Ct. App. 1982); *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986).

Rule 55(a)(1). Default — Entry.

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the court shall order entry of default against the party. Default shall not be entered against a party who has appeared in the action unless that party (or, if appearing by representative, the party's representative) has been served with three (3) days

written notice of the application for entry of such default. (Amended April 22, 2004, effective July 1, 2004.)

STATUTORY NOTES

Cross References. Application equally to plaintiffs, counterclaimants, and cross-claimants, Rule 55(d).

Default judgment entered by court or clerk, Rule 55(b)(1).

Entered by the court, Rule 55(b)(2).

Failure of party to attend or serve answers, entry of default judgment, Rule 37(d).

Setting aside default, Rule 55(c).

State, judgment against, Rule 55(e).

Summons to appear or suffer default judgment, Rule 4(b).

JUDICIAL DECISIONS

ANALYSIS

Appellate Proceedings.

Default.

Discretion of Court.

Factors Considered.

Failure to Answer.

Failure to Pursue the Cause.

Notice Not Required.

Refusal to Grant Proper.

Separate Acts.

Withdrawal of Attorney.

Appellate Proceedings.

Entry of default is not available in appellate proceedings. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987).

Default.

Where the buyer did not contend that she had otherwise defended the sellers' action to have a contract for the sale of property declared forfeited, to recover possession of the real property, and to have title to the property quieted, she was required to file an answer in order to prevent the entry of default against her and her failure to do so did not entitle her to relief from a default judgment. *Suitts v. Nix*, 141 Idaho 706, 117 P.3d 120 (2005).

Discretion of Court.

The grant or denial of an application for the entry of default judgment rests within the discretion of the trial court. *Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987).

Factors Considered.

In exercising its discretion to grant or deny an application for entry of default judgment, the court may consider the reasons for the failure to respond; if the default was caused by a good faith mistake or by excusable neglect, the court may deny the application, and the court may consider the adequacy of notice, whether the nondefaulting party has been substantially prejudiced by the delay, and the merits of the underlying cause of action.

Johnson v. State, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987).

Failure to Answer.

Where defendants filed motions to dismiss and to strike in lieu of an answer to plaintiff's complaint, they had an obligation to file an answer to the complaint after their motions were denied, and their failure to do so made the case ripe for entry of a default judgment against them. *Bach v. Miller*, 148 Idaho 549, 224 P.3d 1138 (2010).

Failure to Pursue the Cause.

Upon motion by plaintiff lender, the district court entered default against defendant borrowers for failing to timely answer the lender's complaint, and the borrowers then filed a motion to have the default set aside and specified they would submit a brief in support of said motion within 14 days; however, the borrowers did not file a brief to support their motion to have the default set aside, nor did they notice their motion for hearing. The default was not set aside and the failure of the borrowers to have had the default set aside barred their appeal to the Supreme Court of Idaho. *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp.* Idaho, 139 Idaho 492, 80 P.3d 1093 (2003).

Because this rule provides that default is proper only against a party who has failed to plead or otherwise defend, and because a defendant's motion to dismiss for lack of in personam jurisdiction is otherwise defending as provided by the rules of civil procedure, a default judgment could not be entered against defendant unless his motion to dismiss was denied and he thereafter failed to plead. *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008).

Notice Not Required.

Entry of default by the clerk under this rule requires no notice to the party who has failed to plead or otherwise defend as provided by

these rules. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Refusal to Grant Proper.

The district court did not abuse its discretion in refusing to grant default judgment on an inmate's application for post-conviction relief based on the state's failure to respond, where the prosecutor initially failed to respond to the petition because the clerk had not delivered the papers to the prosecutor's office, the inmate did not identify any unfair prejudice resulting specifically from the state's part in the totality of events producing delay, and he did not challenge the district judge's determination that the assertions of ineffective assistance and of breach of a plea bargain in the application for post-conviction relief were meritless. *Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987).

Separate Acts.

Under I.R.C.P. 55(b) and this rule, entry of default by the clerk and entry of judgment by default by the district court are two distinctly different acts. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Withdrawal of Attorney.

Where district court granted defense counsel's motion to withdraw pursuant to I.R.C.P. 11(b)(3), which precludes any action in the proceeding that would adversely affect the withdrawing attorney's client for a period of twenty days, and district court mistakenly entered plaintiff's motion for default judgment under this rule, only 10 days after the order for withdrawal of defendant's attorney, Court of Appeals granted defendant's motion to set aside the default judgment. Defendant demonstrated that his inaction following withdrawal of his attorney was the product of excusable neglect pursuant to I.R.C.P. 60(b)(1) and further, pleaded a meritorious defense, and the Court of Appeals noted that the district court had erred in refusing to grant defendant's motion as defendant was misled by the improper entry of judgment which dissuaded him from making a new appearance in the case. *State, Dep't of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

Cited in: *Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Additional Time Granted to Plead.
Avoidance of Default.
Endorsement on Complaint.
Entry of Counterclaim.
Filing of Special Appearance.
Hearing after Default.
Removal to Federal Court.

Additional Time Granted to Plead.

Where within the time allowed defendant to plead to an amended complaint, the court granted additional time within which to plead and within such additional time demurrers and motion to strike were filed, the plaintiffs were not entitled to a default judgment. *Aker v. Coleman*, 60 Idaho 118, 88 P.2d 869 (1939).

Avoidance of Default.

To avoid suffering judgment by default, after service of summons upon him, defendant must, within the time prescribed in the summons, file answer with the clerk of the court; deposit of it in the post-office addressed to clerk will not do. *Pendrey v. Brennan*, 31 Idaho 54, 169 P. 174 (1917).

Endorsement on Complaint.

Default of defendant in not answering should be indorsed upon the complaint; but if clerk neglects to make such indorsement, it is

mere irregularity that cannot be taken advantage of in collateral attack on the judgment; especially is that true where the judgment recites fact that the default of defendant was duly entered. *Harpold v. Doyle*, 16 Idaho 671, 102 P. 158 (1908).

Entry of Counterclaim.

Where pleadings set up what is, as matter of law, a counterclaim, it is deemed denied and no default can be entered or judgment rendered without trial upon merits. *First Sav. Bank v. Sherman*, 33 Idaho 343, 195 P. 630 (1920).

Filing of Special Appearance.

It is not inconsistent or illogical to hold that filing of special appearance is answer. *Central Deep Creek Orchard Co. v. C.C. Taft Co.*, 34 Idaho 458, 202 P. 1062 (1921); *In re Smith*, 38 Idaho 746, 225 P. 495 (1924).

Hearing after Default.

It is unnecessary to serve a notice of a hearing before judgment after the entry of a default, such hearing being to fix the amount of and to enter judgment. *Nuestel v. Spokane Int'l Ry.*, 27 Idaho 367, 149 P. 462 (1915).

Removal to Federal Court.

If defendant has case removed to a federal court but it is remanded on ground that it is

not removable, and defendant has not answered within time prescribed by the summons, clerk of the state court may properly enter his default, and judgment may be had; vain endeavor to get out of the state court into

the federal court does not extend time for answering. *Morbeck v. Bradford-Kennedy Co.*, 19 Idaho 83, 113 P. 89 (1910); *State ex rel. Mills v. American Sur. Co.*, 26 Idaho 652, 145 P. 1097 (1914).

RESEARCH REFERENCES

A.L.R. Appealability of order setting aside, or refusing to set aside, default judgment. 8 A.L.R.3d 1272.

Judgment in favor of plaintiff in state court

action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 55 A.L.R.3d 303, 30 A.L.R.4th 9.

Rule 55(a)(2). Default proof — Time limitation.

Default proof shall not be presented to the court nor a default entered against a party prior to the expiration of the period of time allowed by these rules for an appearance or defense unless, (1) the party required to make the appearance or defense executes a waiver under oath stating that the party waives the permitted time for appearance or defense, refuses to plead further, and consents to the immediate hearing of a default proceeding without further notice, and (2) the court enters an order shortening the time for appearance or defense by such party for good cause shown by the affidavit or testimony of the moving party. Upon compliance with this rule, default may be entered, a default proceeding held and judgment by default be entered without notice to the defaulting party in the same manner as though the normally prescribed time for an appearance or defense had expired, subject to the limitations of section 32-716, Idaho Code. (Amended December 19, 1975, effective January 1, 1976.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Necessity of Proof.
Premature Entry.

Necessity of Proof.

Plaintiff, after taking default, must apply to the court for relief demanded in the complaint, and must establish by proof the material allegations of his complaint. *Joyce v. Rubin*, 23 Idaho 296, 130 P. 793 (1913).

Where issue of fact is tendered and defendant fails to appear at trial, court should require submission of evidence to sustain

complaint, and it is error to enter judgment without doing so. *Hemminger v. Parks*, 37 Idaho 464, 216 P. 1042 (1923).

Premature Entry.

Where bankrupt made oral answers to complaints and judge failed to enter their substance in his docket, but entered defaults and judgments without knowledge of bankrupt after having set the cases for trial, such judgments were prematurely entered and void. *In re Nelson*, 36 F.2d 979 (D. Idaho 1929).

RESEARCH REFERENCES

A.L.R. Necessity taking proof as to liability against defaulting defendant. 8 A.L.R.3d 1070.

Rule 55(a)(3). Actions at issue — Not default.

This rule shall not prevent a trial hearing on any action which is at issue in which the parties are represented in person or by their attorneys of record, which hearing shall not be deemed a default hearing whether or not a defending party actively participates or opposes the claim of another.

JUDICIAL DECISIONS**Application of Rule.**

This rule deals only with actions placed "at issue" by responsive pleadings as any broader reading would eliminate the efficacy of rules

55(b)(2) and 55(d). *Goodtimes, Inc. v. IFG Leasing Co.*, 117 Idaho 452, 788 P.2d 853 (Ct. App. 1990).

Rule 55(b)(1). Default judgment by the court or clerk.

When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the court or the clerk thereof, upon request of the plaintiff, and upon the filing of an affidavit of the amount due showing the method of computation, together with any original instrument evidencing the claim unless otherwise permitted by the court, shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person, and has been personally served, other than by publication or personal service outside of this state. Any application for a default judgment must contain written certification of the name of the party against whom judgment is requested and the address most likely to give the defendant notice of such default judgment, and the clerk shall use such address in giving such party notice of judgment. An application for default judgment in a divorce or annulment action must be accompanied by a certificate furnished by the department of vital statistics fully filled out by the party seeking the default divorce or annulment. (Amended January 8, 1976, effective March 1, 1976.)

STATUTORY NOTES

Cross References. Notice of orders or judgments, I.R.C.P., Rule 77(d).

JUDICIAL DECISIONS

Cited in: *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986); *University of Utah Hosp. v. Ada County*, 111 Idaho 1023, 729 P.2d 1086 (Ct. App. 1986).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Attorney's Fees.
Contract for Payment of Money.
Conversion Action.
Damages or Amount Recovered to Be Certain.

Unliquidated Damages.**Attorney's Fees.**

What is reasonable attorney's fee to be allowed is question for judicial determination and not within ministerial authority con-

ferred on clerk. *Gustin v. Byam*, 41 Idaho 538, 240 P. 600 (1925).

Contract for Payment of Money.

Where plaintiff alleged that he had sold and delivered to defendant at his instance and request and upon his promise to pay groceries and merchandise of the value of \$871.43, of which amount \$640.00 had been paid, and defendant failed to appear or answer, plaintiff was entitled to default judgment for \$231.43 without proof on value of merchandise and groceries, since allegations were sufficient to show a contract for payment of money. *Starry v. Hamilton*, 72 Idaho 313, 240 P.2d 824 (1952).

Conversion Action.

The statutory provisions do not authorize

an entry of judgment by the clerk in an action of conversion. *Parker v. Wardner*, 2 Idaho 285, 13 P. 172 (1887).

Damages or Amount Recovered to Be Certain.

To authorize clerk to enter judgment, damages or amount to be recovered must be liquidated or capable of mathematical calculation from terms of contract itself. *Gustin v. Byam*, 41 Idaho 538, 240 P. 600 (1925).

Unliquidated Damages.

Where plaintiff failed to answer action brought by defendant seeking judgment including something other than money or liquidated damages, clerk could not enter judgment. *Tripp v. Dotson*, 51 Idaho 200, 4 P.2d 349 (1931).

RESEARCH REFERENCES

A.L.R. Defaulting defendant's right to notice and hearing as to determination of amount of damages. 15 A.L.R.3d 586.

Rule 55(b)(2). Default judgment by the court — Persons exempt from.

In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. In actions for divorce, the statutes of the state of Idaho shall apply. Any application for a default judgment must contain written certification of the name of the party against whom the judgment is requested and the address most likely to give the party notice of such default judgment, and the clerk shall use such address in giving such party notice of judgment. (Amended January 8, 1976, effective March 1, 1976.)

STATUTORY NOTES

Cross References. Demand for judgment, Rule 54(c).

Jury trial of right, Rule 38(a).

JUDICIAL DECISIONS

ANALYSIS

Additional Evidence.
Allegations Deemed True.
Appearance.
Application of Rule.
Default Judgment.
—Invalid.
Divorce Actions.
Effect of Rule 55(a)(3).
Incompetent Defendant.
Irregularities.
Notice Requirement.

Additional Evidence.

Generally, where the defendant has been defaulted, a plaintiff has no obligation to introduce evidence in support of the allegation of its complaint; however, the court may exercise its discretion in determining whether additional evidence is necessary. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Allegations Deemed True.

While this rule vests the court with discretion to conduct such hearings, or order such references as are necessary in order to determine the amount of damages for which a party is liable, it does not permit the court to ignore the long-established precept that on default all well-pleaded factual allegations in the complaint are deemed admitted. *Cement Masons'-Employers' Trust v. Davis*, 107 Idaho 1131, 695 P.2d 1270 (Ct. App. 1985).

Appearance.

The "appearance" required to trigger the three-day notice requirement of this rule has been broadly defined, and is not limited to a formal court appearance; conduct on the part of the defendant which indicates an intent to defend against the action can constitute an appearance within the meaning of this rule. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

Where the record showed that not only did the defendant visit the plaintiffs' attorney at his office, but after being sent notice he attended the deposition of a third party in a foreign state, the defendant's presence and self-representation at the deposition constituted an "appearance" within the meaning of this rule; thus, since the defendant was not given the three-day notice required by this rule, the default judgment entered against him was set aside. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

A prerequisite to the notice requirement is an appearance in the action by the party

against whom judgment by default is sought; while this appearance need not be a formal appearance before the court, a single letter from the party's attorney does not constitute the requisite appearance. *Marano v. Dial*, 108 Idaho 680, 701 P.2d 300 (Ct. App. 1985).

A prerequisite to the three-day notice requirement is an appearance in the action by the party against whom judgment by default is sought; this appearance is not limited to a formal court appearance. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Where beyond participating in preliminary settlement negotiations, the record did not present any intent on the part of the defendant to defend the action, the defendant did not show that an "appearance" was made entitling him to the three-day notice under this rule. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Where defendant, after she was served with a summons and complaint, contacted plaintiff's attorney for the purpose of settlement, and a month later plaintiff's attorney responded with a letter rejecting her settlement offer and giving assurances of pursuing a final judgment, and defendant never retained an attorney or responded to the letter, but rather, allowed the matter to lay idle, defendant thereby failed to make an appearance for the purpose of this section and was not entitled to the three-day notice provided for herein. *Phillips v. Miles*, 116 Idaho 842, 780 P.2d 593 (Ct. App. 1989).

Where husband, against whom a default judgment for divorce was taken, asserted that, prior to wife's application for default judgment, they discussed the terms of a settlement proposal and that he continually indicated to her that he could not comply with the provisions of the division of property and payment of the community debts as requested in her complaint, such conduct was insufficient to constitute an appearance for the purpose of this rule. *Ellis v. Ellis*, 118 Idaho 468, 797 P.2d 868 (Ct. App. 1990).

Application of Rule.

In cases where a party has appeared in the action default judgment must be taken pursuant to this rule. *Deutz-Allis Credit Corp. v. Smith*, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990).

Default Judgment.

Where party failed to show the existence of mistake, excusable neglect, or the existence of a meritorious defense, the trial court did not abuse its discretion in denying the motion to set aside the default judgment. *Clear Springs*

Trout Co. v. Anthony, 123 Idaho 141 845 P.2d 559 (1992).

—Invalid.

Where court, by stipulation, ordered that defendant in a civil action be withdrawn as a defendant and the answer filed by such defendant stricken, no valid default judgment can be entered against that party and jurisdiction must be reestablished before judgment can be granted. Morton v. Rugg, 107 Idaho 886, 693 P.2d 1088 (Ct. App. 1984).

Without allotting defendant the required time period, plaintiff denied him the opportunity of contesting entry of a default judgment against him, a right to which the nonmoving party is entitled under this rule; this was a substantial defect which, under the circumstances, rendered a default judgment taken against defendant voidable. Deutz-Allis Credit Corp. v. Smith, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990).

Divorce Actions.

When this rule was adopted, Idaho divorce statutes required corroboration of the residence of a divorce applicant before a default judgment of divorce could be granted. This provision, no longer in effect, was the divorce statute referred to in the rule. Husband incorrectly attempted to apply it to belatedly raise substantive defenses to property and support issues. Ellis v. Ellis, 118 Idaho 468, 797 P.2d 868 (Ct. App. 1990).

Effect of Rule 55(a)(3).

Rule 55(a)(3) deals only with actions placed "at issue" by responsive pleadings as any broader reading would eliminate the efficacy of this rule and rule 55(d). Goodtimes, Inc. v. IFG Leasing Co., 117 Idaho 452, 788 P.2d 853 (Ct. App. 1990).

Incompetent Defendant.

If defendant was incompetent at the time judgment by default was entered against him, in violation of this rule, that violation would, at most, render the resulting judgment voidable, not void since an entry of judgment against an incompetent, even in the absence of a guardian, does not render the judgment void. Thus, I.R.C.P. 60(b)(4), allowing relief from void judgments, would be inapplicable and defendant's only avenue for relief to set aside the default would be under I.R.C.P. 60(b)(6), and failure to file within the six-month period prescribed therein barred defendant's motion for relief. Southern Idaho Prod. Credit Ass'n v. Ruiz, 105 Idaho 140, 666 P.2d 1151 (1983).

Irregularities.

A default judgment is considered to have

been irregularly obtained and voidable if it is entered without the required three days notice. Radioear Corp. v. Crouse, 97 Idaho 501, 547 P.2d 546 (1976).

Notice Requirement.

Despite defendants' contention that they were not required to file another answer to an amended complaint because the amended complaint did not state a new cause of action but, rather, went only to formal or immaterial matters, defendants were not relieved of their responsibility to respond to the amended pleading; however, their failure to do so did not vitiate the three-day notice requirement of this rule. Farber v. Howell, 105 Idaho 57, 665 P.2d 1067 (1983).

Where the defendants had originally appeared in the action, and an order of withdrawal of attorneys failed to state that default could be entered against the defendants without further notice, the defendants were entitled to the three-day notice required by this rule and a default order entered without such notice was voidable. Farber v. Howell, 105 Idaho 57, 665 P.2d 1067 (1983).

The requirement of a three-day notice to a party that default judgment will be sought against him, provided in this rule, is triggered only when that party or his representative has appeared in the action; an appearance triggering the requirement of the three-day notice has been broadly defined, and conduct on the part of the defendant which indicates an intent to defend against the action can constitute an appearance within the meaning of the rule. However, where the record showed no such conduct, but rather it only revealed defendant to be an unresponsive party who never answered the complaint, or retained an attorney to handle the matter, or initiated any contact with plaintiffs or their attorney, and never expressed any interest in defending the claim, noncompliance with the rule was at best technical and at worst constitutes harmless error which must be disregarded in accordance with I.R.C.P. 61. Catledge v. Transport Tire Co., 107 Idaho 602, 691 P.2d 1217 (1984).

Where, in a divorce action, the magistrate's final discovery order warned that the husband's pleadings could be stricken and that the wife could obtain judgment, the husband received the three-day notice under this section. McPherson v. McPherson, 112 Idaho 402, 732 P.2d 371 (Ct. App. 1987).

Plaintiff's notice of intent to take default did not properly apprise defendant of the plaintiff's intent to seek a default judgment, nor did it provide defendant with the required three-day time period in which to respond to the application as the notice appeared to be prepared in anticipation of requesting a de-

fault judgment and did not, in any way, suggest that such proceedings were then pending. *Deutz-Allis Credit Corp. v. Smith*, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990).

A prerequisite to the three-day notice described in this section is an appearance in the action by the party against whom judgment by default is sought, and this appearance is not limited to a formal court appearance. *Nickels v. Durbano*, 118 Idaho 198, 795 P.2d 903 (Ct. App. 1990).

District court did not abuse its discretion in upholding a default judgment despite it being

filed without notice under paragraph (b)(2). Law placed a minimal duty on defendant to secure counsel or otherwise respond to the suit, 'something that defendant did not do until nearly a year and a half after he received notice of a debtor's examination. *Meyers v. Hansen*, 148 Idaho 283, 221 P.3d 81 (2009).

Cited in: *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985); *Donaldson v. Donaldson*, 111 Idaho 951, 729 P.2d 426 (Ct. App. 1986).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Attorney's Fee — Determination.

Evidence Admissible.

Recovery on Notes.

Unliquidated Damages.

Attorney's Fee — Determination.

What is reasonable attorney's fee to be allowed is question for judicial determination and not within ministerial authority conferred on clerk. *Gustin v. Byam*, 41 Idaho 538, 240 P. 600 (1925).

Evidence Admissible.

In action to quiet title to property, evidence concerning relationship of estate of defendant against whom a default was entered to said action was properly admitted under former

identical rule. *Smith v. Smith*, 95 Idaho 477, 511 P.2d 294 (1973).

Recovery on Notes.

Where action was upon certain notes held as collateral security, plaintiff must make proof of prior existing indebtedness in some amount, execution and delivery of notes as security, ownership and possession, and fact that notes have not been paid. *Portland Cattle Loan Co. v. Gemmell*, 41 Idaho 756, 242 P. 798 (1925).

Unliquidated Damages.

Where there is default in action for unliquidated damages, evidence must be submitted to court and amount of damages judicially ascertained. *Gustin v. Byam*, 41 Idaho 538, 240 P. 600 (1925).

RESEARCH REFERENCES

A.L.R. What amounts to "appearance" under statute or rule requiring notice, to party who has "appeared," of intention to take default judgment. 73 A.L.R.3d 1250.

What amounts to an "appearance" under Rule 55(b)(2) of the Federal Rules of Civil

Procedure, providing that if the party against whom a judgment by default is sought has "appeared" in the action he shall be served with written notice of the application for judgment. 27 A.L.R. Fed. 620.

Rule 55(c). Setting aside default judgment.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

STATUTORY NOTES

Cross References. Relief from default judgment, grounds for, rule 60(b).

See notes under Rule 60(b).

JUDICIAL DECISIONS

ANALYSIS

Appealability of Order.

Applicability.

Debt Collection.

Default Judgment.

—Grounds for Setting Aside.

—Improper.

—Requirements.

—Standard of Liberality.

—Voidable.

Discretion.

—Of Appellate Court.

—Of Trial Court.

Divorce.

Incompetent Party.

Withdrawal of Attorney.

Appealability of Order.

Default orders require distinction between entry of default and entry of judgment on the default. Entry of default, or refusal to enter default, are interlocutory. This is in sharp contrast to a default judgment which is a final disposition of the case and an appealable order. *Earth Resources Co. v. Mountain States Mineral Enters., Inc.*, 106 Idaho 864, 683 P.2d 900 (Ct. App. 1984).

Applicability.

District court's denial of a motion to deem timely a challenge to the special master's recommendations in a water rights proceeding was a proper exercise of discretion under Idaho R. Civ. P. 6(b) because no reasonable explanation was presented for the tardy filing; Idaho R. Civ. P. 55(c) did not govern because the ruling was not a default judgment. *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 237 P.3d 1 (2010).

Debt Collection.

In a debt collection action the trial court did not abuse its discretion in denying defendant's application to set aside a default judgment where the return of service indicated that defendant was duly served with process, but where defendant contended that she never received service and that she knew nothing of the action. *Credit Bureau, Inc. v. Harrison*, 101 Idaho 554, 617 P.2d 858 (1980).

Default Judgment.

Relief from a default judgment is favored in doubtful cases. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

—Grounds for Setting Aside.

Although a default judgment may be set aside on the basis of mistake, inadvertence, surprise or excusable neglect, a party seeking

to set aside a default judgment must, in addition to meeting the requirements of I.R.C.P., Rule 60(b), show a meritorious defense going beyond the mere notice requirements which would be sufficient if pled before default since it would be an idle exercise for a court to set aside a default if, in fact, there is no real justiciable controversy. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981).

Where counsel for defendant withdrew and defendant subsequently failed to appear either in person or through new attorney with the result that a default judgment was entered against defendant, defendant was entitled to have the default judgment set aside pursuant to this rule and I.R.C.P., Rule 60(b), in light of the fact that (1) the order of withdrawal failed to mention that default could be taken "without further notice" to the defendant as required by I.R.C.P., Rule 11(b)(3), (2) the defendant received no notice of the default proceedings, (3) the requirement in the order requiring defendant to appear in 20 days could have been interpreted as requiring an answer, which had already been filed, (4) the default was not sought for 27 months and (5) during that time plaintiff kept sending defendant various communications related to the case. *Omega Alpha House Corp. v. Molander Assocs.*, 102 Idaho 361, 630 P.2d 153 (1981).

A mistake sufficient to warrant setting aside a default judgment must be of fact and not of law; neglect must be excusable and, to be of that calibre, must be conduct that might be expected of a reasonably prudent person under the same circumstances. *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979).

A default judgment will not be set aside where in fact service has been made, and the moving party neither denies that fact nor shows substantial prejudice, but relies solely upon a ministerial defect in the proof of service. *Workman v. Brown*, 103 Idaho 945, 655 P.2d 462 (Ct. App. 1982).

Judgments by default are not favored, and the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Where a default judgment is set aside on grounds of mistake or inadvertence, the mistake alleged must be one of fact and not of law, and the inadvertence or neglect must be excusable, or in other words, conduct that might be expected of a reasonably prudent person. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

Where the bases alleged by the defendant for his failure to take action on the complaint consisted only of mistakes of law and a conclusory allegation that he had been suffering extreme emotional distress, there was no legal basis in those allegations to justify setting aside the default judgment. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

Under some circumstances the failure to file a proper pleading may be treated both as a mistake and as excusable neglect; this overlap between mistake and excusable neglect necessarily implies the existence of cases where an act or omission might be treated as a mistake of law but also could be treated as excusable neglect. *Stirm v. Puckett*, 107 Idaho 1046, 695 P.2d 431 (Ct. App. 1985).

The party moving to set aside a default judgment must not only meet the requirements of I.R.C.P. 60(b), but must also plead facts which, if established, would constitute a defense to the action. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

In determining whether a party's conduct constitutes excusable neglect, the courts must consider each case in light of its unique facts. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

To obtain relief from a default judgment on the ground of excusable neglect, the moving party must demonstrate that his conduct was of a type expected from a reasonably prudent person under the circumstances. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

Where the defendant was informed, mistakenly, that he should not file an answer because of his corporation's pending bankruptcy, the plaintiff's attorney may have contributed to the defendant's assumption that an answer should not be filed, and the defendant was reasonably diligent in his effort to set aside the default judgment, once he learned of it, the defendant demonstrated with particularity facts, which, if established, would constitute a meritorious defense, and the district judge's reasons for granting the motion to set aside followed logically from application of proper criteria to the facts, accordingly, the judge acted within his discretion in setting aside the default judgment against the defendant on the ground of excusable neglect. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

From the lower court's written order denying the motion to set aside a default judgment, it was unclear whether the court would have applied the more stringent I.R.C.P. Rule 60(b) standards or the more relaxed "good cause" criteria of this Rule, but this omission was not fatal to the motion's denial. The court

did not err in concluding that defendant failed to present a meritorious defense. In absence of a showing of a meritorious defense, defendant did not establish "good cause" for setting aside the default. *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993).

It is clear that Idaho case law requires a party seeking to set aside a default judgment to show a meritorious defense. The reason for the requirement in default judgment cases is that, it would be an idle exercise for the court to set aside a default judgment if there is in fact no real justiciable controversy. *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993).

Upon motion by plaintiff lender, the district court entered default against defendant borrowers for failing to timely answer the lender's complaint, the borrowers then filed a motion to have the default set aside and specified they would submit a brief in support of said motion within 14 days; however, the borrowers did not file a brief to support their motion to have the default set aside, nor did they notice their motion for hearing. The default was not set aside and the failure of the borrowers to have had the default set aside barred their appeal to the Supreme Court of Idaho. *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp.* Idaho, 139 Idaho 492, 80 P.3d 1093 (2003).

Where defendants failed to demonstrate a meritorious defense in seeking to have a default set aside, defendants were not entitled to rely upon an ordinary pleading to prove a meritorious defense because, once the default was entered, the pleading of a defensive matter must go beyond the mere notice requirements that would be sufficient if pled before default. *Bach v. Miller*, 148 Idaho 549, 224 P.3d 1138 (2010).

—Improper.

Where court, by stipulation, ordered that defendant in a civil action be ordered withdrawn as a defendant and the answer filed by such defendant stricken, no valid default judgment can be entered against that party and jurisdiction must be reestablished before judgment can be granted. *Morton v. Rugg*, 107 Idaho 886, 693 P.2d 1088 (Ct. App. 1984).

—Requirements.

The requirements for setting aside a default judgment are two-fold: first, the moving party must satisfy at least one of the criteria of Rule 60(b)(1); second, he must allege facts, which, if established, would constitute a meritorious defense to the action. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

Attorneys for injured parties attempted

twice to serve the other driver involved in a car accident by publication, but did not comply with the mailing requirements of Idaho R. Civ. P. 4(e)(1); although the attorneys maintained that they did not have an address for the other driver, and there was some evidence that the other driver's attorney refused to disclose her whereabouts, this did not excuse the non-compliance with the mailing requirement. *McGlooin v. Gwynn*, 140 Idaho 727, 100 P.3d 621 (2004).

—Standard of Liberality.

In determining whether to set aside a default judgment, the Court of Appeals must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

—Voidable.

In Idaho, when a default judgment is predicated upon an erroneously entered default, the judgment is voidable. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

Discretion.

—Of Appellate Court.

A motion for setting aside a default judgment because of mistake, inadvertence, surprise or excusable neglect presents questions of fact to be determined by the trial court; however, where the motion was heard on the written record only and without oral testimony, the appellate court may exercise its own discretion in passing on the matter. *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979).

A trial court decision on a motion for relief from a default judgment will not be disturbed on appeal unless it represents an abuse of discretion. Where oral testimony has been received, the Court of Appeals will give due regard to the trial judge's special opportunity to evaluate the credibility of the witnesses. Where the evidence is entirely in writing, the Court of Appeals may draw its own impressions from the record, but the Court of Appeals will not substitute its impressions for findings of fact by the trial judge unless the Court of Appeals is convinced that those findings are clearly erroneous. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983).

Where judge does not make any findings in ruling of motion to vacate default judgment as he is permitted to do by I.R.C.P., Rule 52(a), the appellate court has no meaningful way to review the decision to determine whether the lower court has properly applied correct legal

principles to the facts. Consequently, it is at liberty to form its own impression from the record and exercise its own discretion in deciding whether the default judgment should have been set aside. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

On review of the trial court's application of law to the facts found on a motion to set aside a default judgment upon the grounds set forth in I.R.C.P. 60(b)(1), the reviewing court will consider whether appropriate criteria were applied and whether the result is one that logically follows; thus, if (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under I.R.C.P. 60(b)(1) (tempered by the policy favoring relief in doubtful cases), and (c) the trial court's decision follows logically from the application of such criteria to the facts found, then the trial court will be deemed to have acted within its sound discretion, and its decision will not be overturned on appeal. *Shelton v. Diamond Int'l Corp.*, 108 Idaho 935, 703 P.2d 699 (1985).

—Of Trial Court.

The decision whether to grant a motion to set aside a default judgment, pursuant to this rule and I.R.C.P., Rule 60(b), is committed to the sound discretion of the trial court. Such a decision will not be disturbed on appeal absent an abuse of discretion. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

Where defendant, in his motion to vacate and set aside a default judgment entered in an action on a promissory note, alleged that he was a resident of Michigan with no contacts with the state of Idaho sufficient to establish jurisdiction, the question raised as to whether the court had jurisdiction was a sufficient showing of a meritorious defense and thus the trial court did not abuse its discretion in setting aside the default and judgment. *Marco Distrib., Inc. v. Biehl*, 97 Idaho 853, 555 P.2d 393 (1976).

Divorce.

Where husband and wife had been married for three years, and separated with the husband moving to Idaho, where the husband sued for divorce with the wife being served at her home in Colorado; where the wife failed to appear and a default decree of divorce was entered dissolving the marriage, dividing the community property, granting wife custody of their child, husband visitation rights and ordering husband to pay \$175.00 per month child support; and where the wife moved to set aside the decree pursuant to this rule and

I.R.C.P. 60(b) which was granted, that portion of the decree relying upon in personam jurisdiction was properly set aside, but since a divorce action is in rem the trial court had jurisdiction to dissolve the marriage, and that portion of the order setting aside dissolution of the marriage would be reversed. *Wood v. Wood*, 100 Idaho 387, 597 P.2d 1077 (1979).

Incompetent Party.

Where substantial doubt exists as to the mental capacity of the party against whom a default judgment has been taken, the better course is to set aside the judgment and to decide the case upon its merits. *Stirm v. Puckett*, 107 Idaho 1046, 695 P.2d 431 (Ct. App. 1985).

Withdrawal of Attorney.

Where district court granted defense counsel's motion to withdraw pursuant to I.R.C.P. 11(b)(3), which precludes any action in the proceeding that would adversely affect the

withdrawing attorney's client for a period of twenty days, and district court mistakenly entered plaintiff's motion for default judgment under this rule, only 10 days after the order for withdrawal of defendant's attorney, Court of Appeals granted defendant's motion to set aside the default judgment. Defendant demonstrated that his inaction following withdrawal of his attorney was the product of excusable neglect pursuant to I.R.C.P. 60(b)(1) and further, pleaded a meritorious defense, and the Court of Appeals noted that the district court had erred in refusing to grant defendant's motion as defendant was misled by the improper entry of judgment which dissuaded him from making a new appearance in the case. *State, Dep't of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

Cited in: *Hawkes v. Sparks*, 108 Idaho 917, 702 P.2d 1377 (Ct. App. 1985).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Abuse of Discretion.
Clerical Defect in Complaint.
Discretionary with Court to Open.
Excusable Neglect.
Extension of Time to Plead.
Grounds for Setting Aside.
In General.
Purpose.
Removal to Federal Court.
Service.
Showing Required.
Stranger Not Entitled to Relief.
Trial on Merits Is Favored.

Abuse of Discretion.

Since plaintiffs in condemnation proceeding had actual knowledge of appellants' interest in property, it was incumbent on them to join appellants as parties defendant so that the latter might present their case to the trial court; upon their failure to do so, it was abuse of discretion for the trial court to refuse to set aside appellants' default, reopen the case and permit appellants to submit proof, including presentation of evidence as to severance damages. *Rich v. Wylie*, 84 Idaho 58, 367 P.2d 763 (1962).

Clerical Defect in Complaint.

An obvious clerical defect in the complaint in a divorce action in the allegation of the marriage of the parties being amendable is not such a defect as would render the complaint insufficient after a default judgment

has been entered and will withstand a subsequent motion to set aside the judgment after the statutory time for vacating it has run out. *Rice v. Rice*, 46 Idaho 418, 267 P. 1076 (1928).

Discretionary with Court to Open.

An application to vacate a default judgment is entrusted to the discretion of the trial court and such discretion will not be reviewed unless abused. *Baker v. Knott*, 3 Idaho 700, 35 P. 172 (1893); *Pease v. Kootenai County*, 7 Idaho 731, 65 P. 432 (1901); *Western Loan & Sav. Co. v. Smith*, 12 Idaho 94, 85 P. 1084 (1906); *Culver v. Mountain Home Elec. Co.*, 17 Idaho 669, 107 P. 65 (1910); *Green v. Kandle*, 20 Idaho 190, 118 P. 90 (1911); *Richards v. Richards*, 24 Idaho 87, 132 P. 576 (1913); *Leonard v. Brady*, 27 Idaho 78, 147 P. 284 (1915); *Domer v. Stone*, 27 Idaho 279, 149 P. 505 (1915); *Nuestel v. Spokane Int'l Ry.*, 27 Idaho 367, 149 P. 462 (1915); *Franklin County v. Bannock County*, 28 Idaho 653, 156 P. 108 (1916); *Dellwo v. Petersen*, 34 Idaho 697, 203 P. 472 (1921); *Peters v. Walker*, 37 Idaho 195, 215 P. 845 (1923); *Atwood v. Northern Pac. Ry.*, 37 Idaho 554, 217 P. 600 (1923); *Mortgage Co. Holland Am. v. Yost*, 39 Idaho 489, 228 P. 282 (1924); *Nielson v. Garrett*, 55 Idaho 240, 43 P.2d 380 (1935); *Voellmeck v. Northwestern Mut. Life Ins. Co.*, 60 Idaho 412, 92 P.2d 1076 (1939); *Kingsbury v. Brown*, 60 Idaho 464, 92 P.2d 1053 (1939).

In determining the question of discretion, the power of the court should be freely and liberally exercised under the statute to mold and direct its proceedings, so as to dispose of

cases upon their substantial merits. *Pittock v. Buck*, 15 Idaho 47, 96 P. 212 (1908); *Humphreys v. Idaho Gold Mines Dev. Co.*, 21 Idaho 126, 120 P. 823 (1912); *Hamilton v. Hamilton*, 21 Idaho 672, 123 P. 630 (1912); *Sessions v. Walker*, 34 Idaho 362, 201 P. 709 (1921).

Where the defendant has not been personally served and an application to set aside a default is made within a year, it is within the legal discretion of the court to grant such application and to open the default and permit the defendant to file an answer on the merits. *Brooks v. Orchard Land Co.*, 21 Idaho 212, 121 P. 101 (1912).

Defendant having had two years before entry of default judgment within which to have answered, and having failed for 3½ months after the notice of the application for default to move to set it aside, the trial court did not abuse its discretion in refusing to set it aside. *Nielson v. Garrett*, 55 Idaho 240, 43 P.2d 380 (1935).

If discretion of the court is exercised in passing upon motion to set aside default after consideration of statutes involved, and discretion is not arbitrarily exercised, the appellate court will not disturb the determination reached by the trial court. *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951).

Trial court did not abuse its discretion in setting aside a default judgment on the ground of excusable neglect where the evidence showed that the files of the insurance company were in great confusion due to a change of office from Salt Lake to Phoenix, and the company had been enjoined from transacting business in Idaho for a period of time. *Mead v. Citizens Auto. Inter-Insurance Exch.*, 78 Idaho 63, 297 P.2d 1042 (1956).

Whether or not a default or a default judgment should be set aside under the provisions of former section depends upon the showing made in support of the application. Each case must be examined in the light of the facts presented and the circumstances surrounding the same. *Johnson v. McIntyre*, 80 Idaho 135, 326 P.2d 989 (1958).

Where a party sought relief under the provisions of former § 5-905 of the Idaho Code from a default or a default judgment on the ground of excusable neglect, the application was judged by the showing made in support of same. Each application was examined and determined in the light of the facts presented and the circumstances in connection with same. *Straub v. Straub*, 80 Idaho 221, 327 P.2d 358 (1958).

The setting aside of a default judgment is a matter, in the first instance, in the sound legal discretion of the trial court. *Crumley v. Minden*, 80 Idaho 391, 331 P.2d 275 (1958).

Application to set aside a default judgment is addressed to the sound legal discretion of the trial court and order of the court will not be reversed unless it clearly appears that the court abused its discretion; in determining the question of discretion the power of the court should be freely and liberally exercised under the statute to mold and direct its pleadings so as to dispose of cases on their substantial merits. *Swanson v. State*, 83 Idaho 126, 358 P.2d 387 (1960).

Excusable Neglect.

Neglect of appellant to appear within prescribed time constituted excusable neglect where appellant with reasonable promptitude forwarded summons and complaint served by substituted service to his insurance carrier who in turn acted without delay though under wrong impression as to time service was completed and where appellant acted promptly on learning of the default in moving to set the same aside. *Johnson v. McIntyre*, 80 Idaho 135, 326 P.2d 989 (1958).

Extension of Time to Plead.

An order extending time to plead entered after entry of default operates ipso facto to vacate default. Default judgment entered while cause is at issue is void. *Vincent v. Black*, 30 Idaho 636, 166 P. 923 (1917).

Grounds for Setting Aside.

Where a petitioner seeks to intervene in a pending action, and the court inquires of counsel for plaintiff as to the time required to intervene, and is advised by the petitioner of the time required, and the petitioner relies upon the statements made by the court as to the time during which no further proceedings will be taken in said suit, such facts are sufficient to authorize a judgment, entered by default before such time expires, to be set aside. *Pittock v. Buck*, 15 Idaho 47, 96 P. 212 (1908).

In an action against a city, the fact that the mayor of the city did not know of the pendency of the action due to the confusion of papers or the mistake and inadvertence of a clerk in placing the summons and complaint in a file where the mayor did not see them was not ground for setting aside default. *Boise Valley Traction Co. v. City of Boise City*, 37 Idaho 20, 214 P. 1037 (1923).

Motion to vacate a default, made upon the record and files of the cause and supported by affidavit of attorney of moving party that default was taken through negligence of attorney and without fault of defendant, when not controverted, is sufficient, standing alone to sustain order vacating default. *Weaver v. Rambow*, 37 Idaho 645, 217 P. 610 (1923).

Where, in proceeding in probate court (now district court) the contest for the property was between the decedent's husband and the children, showing by children that they did not know of the pendency of the father's proceeding to recover the property until after decree was entered was sufficient to set aside the default. *Snow v. Probate Court*, 60 Idaho 611, 95 P.2d 844 (1939).

Appellant wife in divorce action was neither guilty of deliberate neglect nor of indifference and was entitled to have default judgment set aside where she was in a foreign land, her residence was foreign to that of her husband, she was handicapped by her ignorance of the English language, she acted with reasonable promptitude in having divorce papers translated to her and retaining an attorney to represent her, a telegraphic statement was sent to clerk on court for filing on February 20, but the default judgment was taken anyway on February 23. *Straub v. Straub*, 80 Idaho 221, 327 P.2d 358 (1958).

In General.

Judgments by default are not favored and the tendency is to incline toward granting relief from the default and bringing about a judgment on the merits. *Garren v. Saccomanno*, 86 Idaho 268, 385 P.2d 396 (1963).

Absent a showing that a judgment-debtor did not or could not comply with former identical rule and Rule 60(b) of I.R.C.P., a default judgment entered without the three-day requisite notice was not irregularly obtained, is not voidable and not subject to collateral attack. *Acker v. Mader*, 94 Idaho 94, 481 P.2d 605 (1971).

Purpose.

Purpose of former provision in providing for the setting aside of a default judgment was to relieve against imposition of default merely upon lapse of time requirement in making an answer to complaint. *Stoner v. Turner*, 73 Idaho 117, 247 P.2d 469 (1952).

Removal to Federal Court.

Where a defendant has been sued in a state court and summons has been served, and prior to the expiration of the time allowed by statute for him to answer, but without appearing or answering, he files a petition for removal to the federal court and the removal is ordered and the cause is thereafter remanded by the federal court on the ground that it was not removable from the state court, and in the meanwhile the defendant has allowed his time to elapse in which to appear or answer and he makes no appearance in the state court, and the clerk thereupon enters his default for failure to appear

or answer, he cannot thereafter move to have the default vacated and the judgment set aside on the ground of his mistake, inadvertence and excusable neglect. *Morbeck v. Bradford-Kennedy Co.*, 19 Idaho 83, 113 P. 89 (1910); *State ex rel. Mills v. American Sur. Co.*, 26 Idaho 652, 145 P. 1097 (1914).

One who moves a state case to the federal court and makes no appearance in the state court prior to the time of removal and entry of default cannot have such default vacated. *Kingsbury v. Brown*, 60 Idaho 464, 92 P.2d 1053 (1939).

Service.

Judgment by default entered without proof of service is void. *Vermont Loan & Trust Co. v. McGregor*, 5 Idaho 510, 51 P. 104 (1897).

Motion by one of several codefendants to set aside default judgment need be served only on party in whose favor judgment runs. *Consolidated Wagon & Mach. Co. v. Housman*, 38 Idaho 343, 221 P. 143 (1923).

Defendants are entitled to service of notice of motion to set aside default judgment. *Occidental Life Ins. Co. v. Niendorf*, 55 Idaho 521, 44 P.2d 1099 (1935).

Default judgment against corporation was error where it received no notice of service and made no appearance in the case. *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951).

Showing Required.

Affidavits on motion to set aside a default judgment must show that the default occurred through mistake, inadvertence, surprise or excusable neglect. *Western Loan & Sav. Co. v. Smith*, 12 Idaho 94, 85 P. 1084 (1906). They must also set forth facts from which the court can judge whether or not the defendant has a meritorious defense. *Holland Bank v. Lieuellen*, 6 Idaho 127, 53 P. 398 (1898); *D. Holzman & Co. v. Henneberry*, 11 Idaho 428, 83 P. 497 (1905); *Beck v. Lavin*, 15 Idaho 363, 97 P. 1028 (1908); *Council Imp. Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909); *Culver v. Mountain Home Elec. Co.*, 17 Idaho 669, 107 P. 65 (1910); *Harr v. Kight*, 18 Idaho 53, 108 P. 539 (1910); *Hall v. Whittier*, 20 Idaho 120, 116 P. 1031 (1911).

A defendant against whom a default judgment has been taken must, for relief therefrom, set forth facts showing he has a good and meritorious defense to the cause of action stated in the complaint. *Voellmeck v. Northwestern Mut. Life Ins. Co.*, 60 Idaho 412, 92 P.2d 1076 (1939).

Even when the ground for setting aside the default is neglect of the attorney and not the litigant, facts must be set forth showing a meritorious defense. *State ex rel. Sweeley v. Braun*, 62 Idaho 258, 110 P.2d 835 (1941).

Stranger Not Entitled to Relief.

The default for which relief is provided must be that of a party litigant and not of a stranger to the proceeding. *Hanson v. Rogers*, 54 Idaho 360, 32 P.2d 126 (1934).

Trial on Merits Is Favored.

Courts almost universally favor trial on merits and where there has been reasonable excuse shown for default there should be no objection to such trial to those who are reasonably diligent. *Dellwo v. Petersen*, 34 Idaho 697, 203 P. 472 (1921).

The general rule favors the granting of

relief from default judgments so as to bring about a judgment on the merits. *Mead v. Citizens Auto. Inter-Insurance Exch.*, 78 Idaho 63, 297 P.2d 1042 (1956).

In determining whether or not a motion to set aside a default should be granted, each case must be examined and considered in the light of the facts presented and the circumstances surrounding the case. In doubtful cases the general rule is to incline towards granting release in order to bring about judgment on the merits. *Davis v. Rathbun*, 79 Idaho 482, 321 P.2d 609 (1958).

RESEARCH REFERENCES

A.L.R. Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers. 21 A.L.R.3d 1255.

What constitutes "good cause" allowing federal court to relieve party of his default under Rule 55(c), of Federal Rules of Civil Procedure. 29 A.L.R. Fed. 7.

Rule 55(d). Plaintiffs, counterclaimants, cross-claimants covered by default judgment rule.

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

STATUTORY NOTES

Cross References. Demand for default judgment, Rule 54(c).

JUDICIAL DECISIONS**Effect of Rule 55(a)(3).**

Rule 55(a)(3) deals only with actions placed "at issue" by responsive pleadings as any broader reading would eliminate the efficacy

of Rule 55(b)(2) and this rule. *Goodtimes, Inc. v. IFG Leasing Co.*, 117 Idaho 452, 788 P.2d 853 (Ct. App. 1990).

Rule 55(e). Judgment against the state.

No judgment by default shall be entered against the state of Idaho, an officer, agency or political subdivision thereof, unless the claimant establishes the claimant's claim or right by evidence satisfactory to the court.

JUDICIAL DECISIONS

Cited in: *Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987).

DECISIONS UNDER PRIOR RULE OR STATUTE

Necessary Parties.

Since plaintiffs in condemnation proceeding had actual knowledge of appellants' interest in property, it was incumbent on them to join appellants as parties defendant so that the latter might present their case to the trial court; upon their failure to do so, it was an

abuse of discretion for the trial court to refuse to set aside appellants' default, reopen the case and permit appellants to submit proof, including presentation of evidence as to severance damages. *Rich v. Wylie*, 84 Idaho 58, 367 P.2d 763 (1962).

Rule 56(a). Summary judgment — For claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the service of process upon the adverse party or that party's appearance in the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court. (Amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987.)

STATUTORY NOTES

Cross References. Affidavits made in bad faith, Rule 56(g).

Affidavits unavailable, when, Rule 56(f).

Case not fully adjudicated on motion, Rule 56(d).

Defending party, for, Rule 56(b).

Defense required, Rule 56(e).

Defenses, how presented, failure to state claim cause for, Rule 12(b).

Findings of fact and conclusions of law unnecessary, Rule 52(a).

Form of affidavits, Rule 56(e).

Further testimony, Rule 56(e).

Motion and proceedings thereon, Rule 56(c).

Process or summons, issuance, Rule 4(a).

JUDICIAL DECISIONS

ANALYSIS

ADA and Rehabilitation Act Claims.

Amendment Denied.

Brief.

Construction with Other Laws.

Genuine Issue of Material Fact.

Immunity Defense As Basis for Motion.

Judgment at Court's Discretion.

Summary Disposition.

Unsworn Statements.

Verified Complaint.

ADA and Rehabilitation Act Claims.

When a trial court granted partial summary judgment in favor of a hospital who was sued by a doctor under the Americans with Disabilities Act of 1990, 42 U.S.C.S § 12101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C.S. § 701 et seq., for terminating his

hospital privileges due to his bipolar illness diagnosis, finding that the doctor had no disability, the trial court may have erred in finding that the doctor's illness was not a protected disability under this legislation. *Levinger v. Mercy Med. Ctr.*, 139 Idaho 192, 75 P.3d 1202 (2003).

Amendment Denied.

Trial court did not err in denying an employee's motion to amend after the trial court made its findings on summary judgment against the employee because the employee had already failed to show that an implied contract changed the employee's at-will status and the covenant of good faith and fair dealing did not prohibit the private employer from terminating the employee. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 75

P.3d 733 (2003), cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004).

Brief.

Appellate court did not consider a claim that summary judgment was improperly granted under Idaho R. Civ. P. 56(c) in a case against a city that alleged tortious interference with a prospective advantage because the issue was not properly briefed. *Plummer v. City of Fruitland*, 140 Idaho 1, 89 P.3d 841 (2003).

Construction with Other Laws.

Summary dismissal of an application pursuant to § 19-4906 is the procedural equivalent of summary judgment under this rule. *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

Genuine Issue of Material Fact.

Where petitioner's claim that the commission of pardons and parole violated the law by failing to grant petitioner a parole hearing to consider his eligibility for institutional parole at any time during the service of his first two sentences was not moot, his allegations were sufficient to state a claim for relief, and the evidence was sufficient to raise genuine factual issues precluding summary judgment and the magistrate erred in dismissing his petition. *Lake v. Newcomb*, 140 Idaho 190, 90 P.3d 1272 (Ct. App. 2004).

Immunity Defense As Basis for Motion.

Trial court did not err by dismissing passenger's claim against the Division of Motor Vehicle Services (DMV) on immunity grounds, and therefore the DMV was properly granted summary judgment, because the DMV's reinstatement of the drunk driver's license was not grossly negligent or reckless, willful, and wanton. *Cafferty v. Dep't of Motor Vehicle Serv.*, 144 Idaho 324, 160 P.3d 763 (2007).

Judgment at Court's Discretion.

Even though plaintiff did not move for a summary judgment, the district court was nevertheless empowered to grant it, therefore, the district court should have ruled as a matter of law that plaintiff was a third-party beneficiary of contract between local improvement district and defendant construction company and should have granted the plaintiff a partial summary judgment on the issue of its allegation of a third-party beneficiary contract. *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978).

Summary judgment may be rendered for any party, not just the moving party, and on any or all of the causes of action involved, under the rules of civil procedure; flexibility

in designing summary judgment orders is clearly the intent of the drafters of the civil rules. *Brummett v. Ediger*, 106 Idaho 724, 682 P.2d 1271 (1984).

In an action in which the Industrial Commission sought injunctive relief and imposition of a civil penalty against a church because the church failed to obtain worker's compensation insurance for its pastor, the district court properly affirmed a magistrate's decision granting summary judgment in favor of the church; the church did not receive remuneration for services or operate for the sake of pecuniary gain. *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003).

Summary Disposition.

Summary disposition under § 19-4906(b) is the procedural equivalent of summary judgment under this rule. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Summary dismissal of an application pursuant to § 19-4906 is the procedural equivalent of summary judgment under this rule and like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

Summary judgment quieting title in favor of the claimant was affirmed because the lot number exception to Idaho Code § 5-210 applied to the claimant's cause where his property was described by a lot number for tax purposes, and the claimant provided evidence he paid taxes on his lot from 1996 to 2001; the neighbor did not demonstrate that the county assessor assessed taxes on the neighbor's farm according to a metes and bounds description, but instead, the assessor used a government survey description from which the precise quantity of land being assessed could not be determined. *Roark v. Bentley*, 139 Idaho 793, 86 P.3d 507 (2004).

Unsworn Statements.

In passing on motions for summary judgment unsworn statements are entitled to no probative weight; mere denials unaccompanied by fact admissible in evidence and affidavits of counsel based upon hearsay rather than personal knowledge are insufficient to raise genuine issues of fact. *Camp v. Jimenez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Verified Complaint.

A verified complaint may be presented to the court in support of a motion for summary judgment and it will be accorded the probative force of an affidavit if it meets the re-

quirements of I.R.C.P. Rule 56(e). *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

In a motion for summary judgment supported by a verified complaint under I.R.C.P. Rule 56(e) the nonmoving party must timely object to a nonconforming verified complaint or its nonconformity is waived. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Allegations in the verified complaint — the existence of the promissory note and the fact that the creditor had, or had not, received certain payments — were not general or conclusory; they plainly were within the creditor's personal knowledge. Therefore, the verified complaint was entitled to be treated as an affidavit in support of the motion for summary judgment. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Cited in: *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977); *Brockman Mobile Home Sales v. Lee*, 98 Idaho 530, 567 P.2d 1281 (1977); *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982); *Glacier Gen. Assurance Co. v. Hisaw*, 103 Idaho 605, 651 P.2d 539 (1982); *Murr v. Odmark*, 112 Idaho 606, 733 P.2d 827 (Ct. App. 1987); *Werner v. American-Edwards Labs., Inc.*, 113 Idaho 434, 745 P.2d 1055 (1987); *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987); *GME*,

Inc. v. Carter, 120 Idaho 517, 817 P.2d 183 (1991); *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995); *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995); *Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996); *AgAmerica v. Westgate*, 129 Idaho 621, 931 P.2d 1 (Ct. App. 1997); *Powder Basin Psychiatric Assocs. v. Ullrich*, 129 Idaho 658, 931 P.2d 652 (Ct. App. 1996); *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 45 P.3d 816 (2002); *Hardy v. McGill*, 137 Idaho 280, 47 P.3d 1250 (2002); *Zattiero v. Homedale Sch. Dist. No. 370*, 137 Idaho 568, 51 P.3d 382 (2002); *Hagy v. State*, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 48 P.3d 1256 (2002); *Primary Health Network v. State*, 137 Idaho 663, 52 P.3d 307 (2002); *Meikle v. Watson*, 138 Idaho 680, 69 P.3d 100 (2003); *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003); *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 112 P.3d 838 (Ct. App. 2005); *Baker v. State*, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005); *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 115 P.3d 751 (2005); *Potts Constr. Co. v. N. Kootenai Water Dist.*, 141 Idaho 678, 116 P.3d 8 (2005); *Muchow v. State*, Idaho, 128 P.3d 938 (January 24, 2006); *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006); *Goodman v. Lothrop*, 143 Idaho 622, 151 P.3d 818 (2007).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Matter Properly Before Court.
Purpose of Rule.

Matter Properly Before Court.

Appellant's assignment of error to the entry of the summary judgment, claiming the matter was not properly before the court, was without merit where the trial court certified that records, papers and files in addition to the pleadings were used by him on the hearing of said motion, such procedure being authorized under Rule 12(b) and former identical rule, and the deposition of an attorney also used was regularly taken under direct and

cross-examination pursuant to Rule 30, counsel for respective parties having agreed in open court to treating motion to dismiss as a motion for summary judgment. *Allen v. Moyle*, 84 Idaho 18, 367 P.2d 579 (1961).

Purpose of Rule.

The position that summary judgment should not be granted if there is the slightest doubt as to the facts has been rejected; the purpose of the former identical rule was to allow the court to pierce the pleadings in order to eliminate groundless denials and paper issues in cases which would end in directed verdicts or other rulings of law. *Hall v. Bacon*, 93 Idaho 1, 453 P.2d 816 (1969).

RESEARCH REFERENCES

A.L.R. Proceeding for summary judgment as affected by presentation for counterclaim. 8 A.L.R.3d 1361.

Reviewability of order denying motion for summary judgment. 15 A.L.R.3d 899.

Sufficiency of evidence to support grant of

summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

Application of local district court summary judgment rules to nonmoving party in federal courts—Statements of facts. 8 A.L.R. Fed. 2d 611.

Rule 56(b). Summary judgment — For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court. (Amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS**ANALYSIS**

Affidavits.
Collateral Estoppel.
Concert Injury.
Discretion of Court.
Failure to State Claim.
Genuine Issue of Material Fact.
Ineffective Assistance of Counsel.
Judicial Estoppel.
—Lack.
Medical Malpractice.
Motion in Limine.
Order Dismissing Application.
Partial Summary Judgment.
—Proper.
Summary Judgment.
Wrongful Death.

Affidavits.

The claimant insured's president's affidavit was properly excluded because it contained unsupported allegations and was filled with rambling, nonspecific, inaccurate, and unsupported statements, Idaho R. Civ. P. 56(c); the expert's affidavit was also properly excluded because it relied on the president's affidavit. *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 85 P.3d 667 (2004).

Collateral Estoppel.

Idaho Magistrate division's orders constituted final orders regarding the enforceability of a Florida divorce decree as it related to defendant's real property located in Idaho which plaintiff sought to attach, and the doctrine of collateral estoppel precluded plaintiff with a Florida judgment against dissolved corporation in which defendant had an interest from relitigating the issue, and therefore, summary judgment for defendant was proper. *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 55 P.3d 298 (2002).

Concert Injury.

Where there was no evidence upon which a jury could reasonably find that defendant was

a sponsor of the concert at which plaintiff sustained injury, nor was there any evidence that plaintiff relied on the alleged apparent authority of concert organizers as employees of defendant, since the defendant established that plaintiff was unable to prove one or more elements of a claim upon which the plaintiff would bear the burden of proof at trial, defendant was entitled to summary judgment. *Landvik ex rel. Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997).

Discretion of Court.

Summary judgment may be rendered for any party, not just the moving party, and on any or all of the causes of action involved, under the rules of civil procedure; flexibility in designing summary judgment orders is clearly the intent of the drafters of the civil rules. *Brummett v. Ediger*, 106 Idaho 724, 682 P.2d 1271 (1984).

Failure to State Claim.

Summary judgment for respondent was proper where plaintiff failed to state a claim, and any procedural issues related to plaintiff's DUI trial were not an appropriate basis for writs because plaintiff had an adequate remedy at law — a direct appeal. *Ackerman v. Bonneville County*, 140 Idaho 307, 92 P.3d 557 (Ct. App. 2004).

Genuine Issue of Material Fact.

The grant of summary judgment in favor of the State Tax Commission was proper even though the Commission had filed no affidavit in support of its motion for summary judgment, where there was no genuine issue of material fact. *V-1 Oil Co. v. State Tax Comm'n*, 112 Idaho 508, 733 P.2d 729 (1987).

In a case regarding a settlement agreement, a company was entitled to summary judgment as a matter of law because there was no genuine issue of material fact; settlement agreement unambiguously stated a company's operating agreement would determine any rights an accountant had in com-

pany, therefore, the accountant was entitled to payment in the amount of the balance in his capital account, not the fair market value of his interest in the company. *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 75 P.3d 743 (2003).

Ineffective Assistance of Counsel.

In prosecution for lewd conduct with a minor and child abuse where in application for post-conviction relief defendant moved for summary judgment on the issue of whether defendant received ineffective assistance of counsel when his counsel failed to object to the testimony of a therapist who had counseled one of the victims, where court assumed that therapist's testimony was objectionable and counsel was deficient in not objecting to it but defendant did not show how he was prejudiced by the testimony, the district court did not err in denying defendant's motion for summary judgment. *Matthews v. State*, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

Judicial Estoppel.

In legal malpractice based on medical malpractice action court did not err in granting defendant attorney motion for summary judgment based on doctrine of judicial estoppel where in medical malpractice action plaintiff clearly agreed to a settlement without objection and then in the legal malpractice action alleged that she never really meant to approve the settlement and always intended to file the legal malpractice action. *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997).

—Lack.

Trial court properly granted summary judgment for landowners, determining that there was an easement by necessity and by prescription crossing over appellant property owners' respective properties, providing access to property owned by plaintiff landowners. The landowners established that the only way into their residential property from the public road was by the road over the property owners' land, and the property owners did not present evidence otherwise; therefore, an easement by necessity for residential purposes existed and there was no disputed material issue of fact. *Brown v. Miller*, 140 Idaho 439, 95 P.3d 57 (2004).

Medical Malpractice.

In medical malpractice suit, summary judgment on the grounds that the action was barred by the statute of limitations was properly granted where a woman discovered that an intrauterine device (IUD) which should have been removed had not been removed. The IUD was a foreign object and suit for the injury had to commence within two years of

discovery. *Ogle v. DeSano*, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984).

Summary judgment in a medical malpractice suit was properly granted in favor of defendant hospital where the record established that the standard of care applicable to hospital personnel regarding a ventilator extubation was simply to follow the attending physician's orders, and established that the standard was met, and where plaintiffs' primary witness recognized that the standard of care was met but criticized the staff for not going beyond their authority by questioning the attending doctor's orders. *Sparks v. St. Luke's Regional Medical Ctr., Ltd.*, 115 Idaho 505, 768 P.2d 768 (1988).

Summary judgment in a medical malpractice suit was properly granted in favor of the defendant hospital where the record established that during thoracic surgery, hospital personnel met the applicable standard of care for measuring urinary output where a nurse measured the output every one-quarter hour during the critical cross-clamping phase of the surgery and verbally announced the measurements every time they registered zero, and where the plaintiffs were only able to put into the record that the surgeons did not remember the audible announcement. *Sparks v. St. Luke's Regional Medical Ctr., Ltd.*, 115 Idaho 505, 768 P.2d 768 (1988).

Summary judgment dismissing a medical malpractice action was properly granted where the patient failed to show a causal connection between an error in a prescription for antibiotics (which resulted in the patient taking enormous doses) and a subsequent heart attack; neither the patient's proffered experts nor the written materials they claimed to rely on established any causal connection between the antibiotic and heart attacks. *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003).

Motion in Limine.

Softball player, who brought suit against an opposing player for injuries sustained in a softball game, argued that the opposing player's attempt to preclude ordinary negligence evidence in a motion in limine should have been brought in a summary judgment motion. Nevertheless, former Idaho R. Civ. P. 12(h)(2) (now Idaho R. Civ. P. 12(g)(2)) allowed such a defense to be brought as late as the time of trial. *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (Ct. App. 2004).

Order Dismissing Application.

An order summarily dismissing an application for post-conviction relief is functionally equivalent to a summary judgment in a civil

case under this rule. *Dyer v. State*, 115 Idaho 773, 769 P.2d 1145 (Ct. App. 1989).

Partial Summary Judgment.

—Proper.

District court properly granted partial summary judgment in favor of recording parties, finding that the subsequent purchaser of land had constructive notice of the covenants, conditions and restrictions (CC&R's) placed upon a ten-acre tract where the county officials improperly recorded the CC&R's under the name of a ranch instead of the individual names of the recording parties. *Miller v. Simonson*, 140 Idaho 287, 92 P.3d 537 (Ct. App. 2004).

Summary Judgment.

Idaho Tax Commission's motion for summary judgment was properly granted in a case involving corporate taxation because the Commission met its burden of showing that the standard apportionment formula did not accurately reflect the business activities of a taxpayer inside of Idaho, and the double counting of certain sales constituted an "unusual fact situation" under Idaho Tax Comm'n R. 27, 4.18; an alternative apportion-

ment formula that excluded certain sales was upheld as appropriate. *Union Pac. Corp. v. Idaho State Tax Comm'n*, 139 Idaho 573, 83 P.3d 116 (2004).

Denial of summary judgment for police on civil rights violation was reversed because the law did not put the police officers on notice that their actions were clearly unlawful; therefore, summary judgment based on qualified immunity was proper. *Rosenberger v. Kootenai County Sheriff's Dep't*, 140 Idaho 853, 103 P.3d 466 (2004).

Wrongful Death.

In a wrongful death action filed against defendant county by plaintiff parents for the death of their two minor sons, because the boys who were crushed to death when a wall of a county-owned landfill collapsed on them were trespassers on the county's property, the trial court correctly dismissed on summary judgment the parents' attractive nuisance claim, but it improperly dismissed the parents' statutory claims. *O'Guin v. Bingham County*, 139 Idaho 9, 72 P.3d 849 (2003).

Cited in: *Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995); *Bagshaw v. State*, 142 Idaho 34, 121 P.3d 965 (Ct. App. 2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Applicability of Motion.

Failure to State a Claim.

Judgment.

Limitations.

Medical Malpractice.

Prior Workmen's Compensation Award.

Time for Making Motion.

Applicability of Motion.

On trial de novo, when there is no genuine issue as to any material fact, motion for summary judgment is applicable. *Yribar v. Fitzpatrick*, 87 Idaho 366, 393 P.2d 588 (1964).

Failure to State a Claim.

When a motion under Rule 12(b) for failure to state a claim is made, supported by affidavits and other materials which the court chooses to consider, the motion then is properly treated as one for summary judgment. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

Motion to dismiss for failure to state a claim upon which relief could be granted was treated as a motion for summary judgment, where affidavits and briefs setting forth the contention of the parties were also filed. *Ja-*

coby v. Capaldi, 93 Idaho 39, 454 P.2d 602 (1969).

In an action by purchasers against vendors where, on vendors' motion to dismiss the complaint for failure to state a claim, the court took judicial notice of the proceedings in purchasers' prior action for rescission and thus treated vendors' motion as one for summary judgment, joinder of vendors' affirmative defense of res judicata with the motion to dismiss was proper. *Green v. Gough*, 96 Idaho 927, 539 P.2d 280 (1975).

Judgment.

In a declaratory judgment action, the decree granting defendant summary judgment using the word "decreed," but in no way specific as to the declaration rights of the parties, was legally sufficient. *City of Boise City v. Idaho Bd. of Hwy. Dirs.*, 94 Idaho 302, 486 P.2d 1015 (1971).

Limitations.

In an action by a corporation to recover a subscription for stock, payable in two installments, where it appeared that the first installment was barred by the statute of limitations, summary judgment for the defendant as to such instalment was proper. *Cassia Creek Reservoir Co. v. Harper*, 91 Idaho 488, 426 P.2d 209 (1967).

The affirmative defense of the statute of limitation may be raised in a motion for summary judgment. *Stewart v. Hood Corp.*, 95 Idaho 198, 506 P.2d 95 (1973).

Medical Malpractice.

Where all expert medical evidence of defendant doctors and hospital in malpractice suit was to effect that there was no negligence, and such evidence was refuted only by lay opinions of plaintiffs, summary judgment for defendants was proper. *Hall v. Bacon*, 93 Idaho 1, 453 P.2d 816 (1969).

Prior Workmen's Compensation Award.

Summary judgment for defendants was

proper where an employee of State Hospital South, injured by a truck owned by the hospital and operated by a patient on state business, first received workmen's compensation and then sued the state and the patient as third party tortfeasors. *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

Time for Making Motion.

Responsive pleading need not necessarily be filed before a movant may seek summary judgment. *Bradbury v. Voge*, 93 Idaho 360, 461 P.2d 255 (1969).

RESEARCH REFERENCES

A.L.R. Proceeding for summary judgment as affected by presentation of counterclaim. 8 A.L.R.3d 1361.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

Rule 56(c). Motion for summary judgment and proceedings thereon.

The motion, affidavits and supporting brief shall be served at least twenty eight (28) days before the time fixed for the hearing. If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least 14 days prior to the date of the hearing. The moving party may thereafter serve a reply brief not less than 7 days before the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Such judgment, when appropriate, may be rendered for or against any party to the action. The court may alter or shorten the time periods and requirements of this rule for good cause shown, may continue the hearing, and may impose costs, attorney fees and sanctions against a party or the party's attorney, or both. (Amended March 28, 1986, effective July 1, 1986; amended June 14, 1987, effective November 1, 1987.)

STATUTORY NOTES

Cross References. Dismissal of action without prejudice before motion for summary judgment, Rule 41(a)(1).

Motion for judgment on the pleadings, Rule 12(c).

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion.
 Alternative Theories.
 Appeals.
 —Agency Determination.
 —Partial Judgment.
 —Summary Judgment.
 Breach of Contract.
 —Third Party Beneficiary.
 Child Abuse Cases.
 Conflicting Inferences.
 Conflicting Property Classifications.
 Construction with Other Laws.
 Conversion from Motion to Dismiss.
 Credibility of Parties.
 Department of Water Resources Reports.
 Depositions.
 Factual Basis.
 Failure to Amend Answer.
 Failure to Object.
 Fiduciary Duty.
 Findings of Fact.
 Fraud.
 Genuine Issue of Material Fact.
 —Burden.
 —Evidence.
 —Issue.
 —Lack.
 Immunity Defense As Basis for Motion.
 In General.
 Inferences in Favor of Nonmoving Party.
 Intent of Parties as a Question of Fact.
 Issue of Material Fact.
 Jurisdiction.
 —Lack over Subject Matter.
 Medical Malpractice.
 Motions.
 —Cross.
 —Determination.
 —Dismissal.
 —Evidence.
 —Habeas Corpus.
 —Procedural Deficits.
 —Renewed.
 Negligence.
 —Economic Loss.
 —Immunity.
 Nonappealable Order.
 Nonjury Trials.
 Objections.
 One-Party Proceedings.
 Pleading.
 Post-Conviction Relief.
 Privity.
 Public Contract.
 Service by Mail.
 Summary Judgment.
 —Evidence.

—Improper.
 —Proper.
 —Sua Sponte.
 Time Limitations.
 Tort Liability.
 Waiver of Untimeliness Objection.
 Witnesses.
 —Credibility.
 —Expert.

Abuse of Discretion.

Where there was no showing of good cause for failure to comply with the time limits for submission of a supplemental affidavit in support of a motion for summary judgment, and where the opposing party thereby was placed at a disadvantage in responding to the motion, the district court judge abused his discretion in considering the affidavit. *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999).

Alternative Theories.

While in some factual situations, a failure to consider other possible theories than the one argued and attending unresolved questions of fact may compel the conclusion that the trial court erred in granting the motion for summary judgment, in an action to quiet title where the plaintiffs failed to show that city had vacated a strip of land in dispute, the only other possible theory was that of adverse possession, which was clearly inapplicable since adverse possession is impossible against a public highway, the trial judge did not err in granting summary judgment for the city. *Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979).

Appeals.

In granting summary judgment for the company, whose manager engaged in sexual intercourse with a minor employee, the district court had concluded that the minor suffered an injury, a broken hymen, caused by an accident at work. However, the Idaho Supreme Court noted a ruptured hymen was not "an unexpected, undesigned, and unlooked for mishap, or untoward event"; it was something that typically occurred when a virgin engaged in sexual intercourse. Consequently, the supreme court held that since there was no accident as defined by § 72-102, the minor did not suffer a personal injury as defined by § 72-102, and her tort claims were not preempted by the exclusivity provisions of the Idaho Worker's Compensation Act. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

—Agency Determination.

Use of a summary judgment procedure is permissible on an appeal from a ruling by the director of the Department of Water Resources. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

—Partial Judgment.

If the lower court had adjudicated the issue of liability on a motion for partial summary judgment, the issue of damages still remaining undecided, a final judgment would be necessary prior to an appeal. *Twin Falls County v. Knievel*, 98 Idaho 321, 563 P.2d 45 (1977).

Partial summary judgment ruling that wrongful eviction had occurred disposed of less than all claims of the parties and was not certified as final under I.R.C.P. 54(b); therefore, it was interlocutory and arguably subject to later revision under that rule. *Galindo v. Hibbard*, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984).

Where there were material facts in dispute concerning the commercial reasonableness of the disposition, as required by I.C. § 28-9-504(3), such as the effect of the lapse of time before disposition on the value of the collateral between the default and the sale, the reasons, if any, for the delay, the actual date of default, and the amount due under the contract, the order granting partial summary judgment was inappropriate. *CIT Fin. Servs. v. Herb's Indoor RV Ctr.*, 108 Idaho 820, 702 P.2d 858 (Ct. App. 1985).

Although an appeal from a partial summary judgment could have been dismissed as having been prematurely taken where the judgment had been entered as to two counts but was not certified as final, the summary judgment became final for the purpose of appeal when the other two remaining counts in the complaint were dismissed with prejudice. *Wilson v. Hambleton*, 109 Idaho 198, 706 P.2d 87 (Ct. App. 1985).

—Summary Judgment.

In ruling on an appeal from summary judgment the supreme court will only determine: (1) whether there is a genuine issue as to any material fact; and (2) whether the moving party is entitled to judgment as a matter of law; and this determination is to be based on the "pleadings, depositions, and admissions on file, together with the affidavits, if any;" however, the court should liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *Mitchell v. Siqueiros*, 99 Idaho 396, 582 P.2d 1074 (1978).

On appeal from summary judgment, the

Court of Appeals will determine whether a genuine issue of material fact remains to be decided, based on the pleadings and affidavits; in making this determination, the court will construe all allegations of fact in the record, and all reasonable inferences from the record, in the light most favorable to the party opposing the motion. Upon the facts thus viewed the court will determine whether either party was entitled to judgment as a matter of law. *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984).

In evaluating the record on appeal from a summary judgment, the facts, and the inferences to be drawn from the facts, are to be construed in the light most favorable to the party opposing the motion. *Bunker Hill Co. v. United Steelworkers*, 107 Idaho 155, 686 P.2d 835 (1984).

The scope of appellate review is limited to determining only whether there exists genuine issues of material fact and whether the prevailing party is entitled to judgment as a matter of law. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

The Supreme Court, upon review, is to liberally construe the facts in the existing record in favor of the nonmoving party and to draw all reasonable inferences from the record in favor of the nonmoving party; in this process, the Court must look to the totality of the motions, affidavits, depositions, pleadings, and attached exhibits, not merely to portions of the record in isolation. *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

Review by supreme court of a district court's ruling on a motion for summary judgment is the same as that required of the district court when ruling on the motion. On review, as when the judgment is initially considered by the trial court, the court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion must be denied. However, if the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this court exercises free review. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 887 P.2d 29 (1994).

The appellate court reviews the record and construes all facts in favor of the non-moving party to determine whether there are material issues of fact at issue which would preclude a grant of summary judgment. *Hilbert v. Hough*, 132 Idaho 203, 969 P.2d 836 (Ct. App. 1998).

While the trial court properly granted summary judgment to the teacher and the school district on the parent's claims and most of the daughter's claims, based on a consensual sexual relationship between the 18-year-old daughter and the teacher, genuine issues of material fact existed as to the daughter's Title IX and negligence claims against the school district so that summary judgment on those claims was improper. *Hei v. Holzer*, 139 Idaho 81, 73 P.3d 94 (2003).

Breach of Contract.

—Third Party Beneficiary.

Where the owners entered into a contract with the general contractor for the design of a cabin and the supply of construction materials, the owners were not permitted to directly sue the subcontractors for breach of contract as a third party beneficiary since the benefits the owners received from the subcontractors' performance were merely incidental; therefore, the subcontractors were entitled to summary judgment as a matter of law. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Child Abuse Cases.

The traditional summary judgment standard applies in the context of liability of persons reporting instances of suspected child abuse. Thus, where the substance of some of the allegations of child abuse to the department, as well as the timing of those reports, raises genuine issues of material fact regarding the reporter's motivation, summary judgment should not be granted. *Davidson v. Davidson*, 150 Idaho 455, 248 P.3d 242 (2011).

Conflicting Inferences.

Standards applicable to summary judgment require the district court and Supreme Court upon review, to liberally construe facts in the existing record in favor of the party opposing the motion, and to draw all reasonable inferences from the record in favor of the nonmoving party. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

Motions for summary judgment should be granted with caution. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991).

Usually, when ruling on a motion for summary judgment, the court is not permitted to weigh the evidence or to resolve controverted factual issues. However, if the court will be the ultimate fact finder and if both parties

move for summary judgment, basing their motions on the same evidentiary facts, theories, and issues, then summary judgment is appropriate even though conflicting inferences are possible, so long as all the evidence is confined entirely to the record. *AID Ins. Co. (Mut.) v. Armstrong*, 119 Idaho 897, 811 P.2d 507 (Ct. App. 1991).

Conflicting Property Classifications.

Idaho Tax Commission was required to first determine if property should be classified as operating property. Then, and only then, could an assessor either petition for a writ of review to dispute the classification or assess the property, if it was non-operating property, depending upon the Commission's definition of operating property. Therefore, a district court properly granted summary judgment in favor of a taxpayer in a case where a county assessor assessed property as non-operating after the same property had already been assessed as operating by the Commission. *Union Pac. Land Res. Corp. v. Shoshone County Assessor*, 140 Idaho 528, 96 P.3d 629 (2004).

Construction with Other Laws.

Summary disposition of a post-relief application under § 19-4906(c) is the procedural equivalent of summary judgment under this Rule. *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994); *Martinez v. State*, 125 Idaho 844, 875 P.2d 941 (Ct. App. 1994).

Summary dismissal of an application pursuant to section 19-4906 is the procedural equivalent of summary judgment under this rule. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct. App. 1998).

Conversion from Motion to Dismiss.

In a case involving alleged sexual molestation of children by their father, his motion to dismiss for failure to state a claim was converted to a motion for summary judgment because the trial court considered the affidavits of his daughters in making its decision. *Glaze v. Deffenbaugh*, 144 Idaho 829, 172 P.3d 1104 (2007).

Credibility of Parties.

It is not the place of the trial judge to assess the credibility of the parties and then to rule based on that determination; therefore, it was error for the district court to grant a summary judgment based on the doctrine of *in pari delicto*, where the credibility of the parties was the determining issue. *Sohn v. Foley*, 125 Idaho 168, 868 P.2d 496 (Ct. App. 1994).

Department of Water Resources Reports.

Reports compiled by personnel at the Idaho Department of Water Resources and signed

by supervisory personnel or the director are not inadmissible because they are not made on the personal knowledge of the signatory. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Depositions.

With the 1988 amendment to IRCP Rule 30(f)(4) depositions are no longer physically filed with the clerk and the trial court is not required to review the entire deposition on a motion for summary judgment; only those portions of the deposition that are applicable to the existence or nonexistence of a genuine issue of material fact need be submitted to the court. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 801 P.2d 37 (1990).

Factual Basis.

Motions for summary judgments are decided upon facts shown, not upon facts that might have been shown. *Verbills v. Dependable Appliance Co.*, 107 Idaho 335, 689 P.2d 227 (Ct. App. 1984).

On a motion for summary judgment, all factual inferences are drawn in favor of the nonmoving party. *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986).

Although the affidavit of the witness for the corporation, in support of a motion for summary judgment, stated that the affidavit was based upon his own personal knowledge, the statement was conclusory absent any foundation showing his participation in the transaction, or personal knowledge of the facts to which he attested; insofar as the documents were offered to show the truth of assertions contained within them, the documents were hearsay for which no hearsay rule exception was established. *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 111 P.3d 162 (Ct. App. 2005).

Failure to Amend Answer.

Where defendant admitted all elements necessary to establish plaintiff's right to relief and failed to amend answer to set forth affirmative defense of fraud as ordered by court, trial court properly granted summary judgment proper for trial court to condition denial of summary judgment upon defendant amending answer within ten days and since record did not indicate that the failure to amend the answer was due to inadvertence or excusable neglect. *McKee Bros. v. Mesa Equip., Inc.*, 102 Idaho 202, 628 P.2d 1036 (1981).

Failure to Object.

Although wastebasket manufacturer only addressed proximate cause as to one count of state's claims in its opening memorandum, state waived its right to object on procedural

grounds to the district court's ruling on proximate cause as it related to all five counts in the complaint because the state had not requested a continuance pursuant to this rule nor submitted additional affidavits to contest the issues raised in manufacturer's reply memorandum pursuant to Rule 56(f) and had missed every opportunity to object before the district court. *State v. Rubbermaid Inc.*, 129 Idaho 353, 924 P.2d 615 (1996).

Fiduciary Duty.

In action against former wife and business associate concerning agreement whereby defendant who had purchased plaintiff's interest in the business, alleged breach of contract based on plaintiff's allegations that he had not been paid amount of share of the profits agreed to, that defendant's allegation that the corporation had not made a profit were fraudulent and that defendant had breached her fiduciary duty as majority stockholder, director, and president when she misrepresented the corporation's well being, statement of plaintiff that he had not been permitted to examine corporate records while at facility run by corporation and thus defendant may have breached her fiduciary duty to provide truthful information as to the value of the plaintiff's stock and as to the corporation's true cash flow indicated that a material issue of fact existed regarding whether plaintiff and defendant dealt on equal terms and whether defendant breached her fiduciary duty and thus summary judgment was not proper. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Grant of summary judgment in favor of an attorney pursuant to I.R.C.P. 56(c) was improper where the attorney breached a fiduciary responsibility toward plaintiff trustee, and although plaintiff trustee might not have specified why he wanted defendant trustee's signature on the documents, the attorney breached a fiduciary responsibility toward plaintiff trustee, not only to tell him that he was not representing him but also in failing to advise him that he was representing the owner and that the owner and defendant trustee's interests were very much opposed to those of plaintiff trustee. *Blickenstaff v. Clegg*, 140 Idaho 572, 97 P.3d 439 (2004).

Findings of Fact.

Findings of fact are not necessary to support decisions of summary judgment motions under I.R.C.P., Rule 56, or to support a decision relating to any other motion, except with respect to motions for involuntary dismissal under I.R.C.P., Rule 41(b). *Bank of Idaho v. Nesseth*, 104 Idaho 842, 664 P.2d 270 (1983).

The facts are drawn from a review of the

record, consisting of the motion, pleadings, affidavits, depositions, and admissions on file. *Ambrose ex rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1994).

Fraud.

For purposes of summary judgment it is not the burden of the non-moving party to prove a fraud claim by clear and convincing evidence. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

In action alleging statements made by defendant that corporation's financial statements were fraudulent upon motion for summary judgment when the moving party established the absence of a non-moving party's case, the burden shifted to the non-moving party; however to the extent that district court held the non-moving party to a clear and convincing evidence standard after moving party established the absence of non-moving party's fraud claim, the district court erred. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Genuine Issue of Material Fact.

A triable issue of genuine fact existed in a legal malpractice case as to whether there was an individual attorney-client relationship between individual who was shareholder in former corporation and attorney representing former corporation and thus the case was remanded to the district court. *Wick v. Eismann*, 122 Idaho 698, 838 P.2d 301 (1992).

In action by building owner's insurer against tenant for damages as result of fire caused to building due to negligence of tenant's employees, where there was an issue of which party agreed to bear the risk of loss for fire damage, including who should bear the risk if the damage is determined to be caused by the negligent acts of the tenant, and there was substantial disagreement between parties regarding what was discussed or not discussed, regarding fire insurance at the time they entered into the oral month-to-month lease, there were issues of material fact and summary judgment should have been denied. *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994).

On a motion for summary judgment, all facts and inferences must be drawn in favor of the nonmoving party, and summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Thompson v. City of Idaho Falls*, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994).

Summary judgment in favor of employer was improper in a suit by employee for disability discrimination where employee raised

a sufficient factual dispute by asserting that she could have done the work that employer required of her if they had listened to her and provided the help she requested, and by reinforcing that assertion with affidavits from a professional counselor and a consulting physician to the Department of Health and Welfare. *Stansbury v. Blue Cross of Idaho Health Serv., Inc.*, 128 Idaho 682, 918 P.2d 266 (1996).

District court exceeded the boundaries of its discretion in excluding the supplemental affidavit of the state's expert witness; had the affidavit not been excluded, it would have raised material factual issues rendering summary judgment improper. *State v. Rubbermaid Inc.*, 129 Idaho 353, 924 P.2d 615 (1996).

Where an affidavit placed before the court a factual issue as to whether or not the defendant represented the plaintiff on partnership matters, the defendant was not entitled to summary judgment in his favor. *Blough v. Wellman*, 132 Idaho 424, 974 P.2d 70 (1999).

The district court erred in granting summary judgment where a material issue of fact existed as to whether a sorority voluntarily assumed a duty of reasonable care to supervise and protect the plaintiff until she was out of danger of harm due to her intoxication. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999).

—Burden.

When a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party, thus, it follows that if the moving party fails to challenge an element of the nonmovant's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 887 P.2d 1034, 1994 Ida. LEXIS 138 (1994). (Set out to correct citation error in bound volume).

On a motion for summary judgment, the burden is always upon the moving party to prove the absence of a genuine issue of material fact. If, however, the basis for a properly supported motion is that no genuine issue of material fact exists with regard to an element of the non-moving party's case, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yokum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

Once an ex-employee met her burden on summary judgment by providing the court with affidavits that established the absence of any genuine issues of material facts that there was misappropriation of her ex-employer's trade secrets, the burden shifted to ex-

employer to create a genuine issue of material fact to survive summary judgment. *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 41 P.3d 263 (2002).

—Evidence.

While a genuine issue may appear on the face of the pleadings and affidavits, it does not necessarily follow that the evidence introduced at trial sustains that position; accordingly, where, at the end of the trial, the court concluded that a third party complaint was without reasonable foundation, the fact that it had previously found for the party on summary judgment did not necessarily establish that the complaint was reasonable and well-founded and the award of attorney fees to the prevailing party was not an abuse of discretion. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982).

Where an evidentiary conflict arises concerning the credibility of a party, a determination should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

In action against owner and builder of residential duplexes by purchaser for damages suffered when walls of duplexes cracked around the windows and doors would not properly close and foundation cracked, where genuine issues of material fact existed as to whether the nondisclosure of soil problems, coupled with assurance that the duplexes were quality constructed amounted to a misrepresentation, it was error to grant summary judgment motion. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987).

The fact that both parties move for summary judgment does not demonstrate there is no disputed material issue of fact. *Currie v. Walkinshaw*, 113 Idaho 586, 746 P.2d 1045 (Ct. App. 1987).

In a medical malpractice action against a board-certified pediatrician and a board-certified surgeon, the affidavit of a doctor who was not board-certified in either pediatrics or surgery was sufficient to raise a genuine issue of material fact and to defeat the motion for summary judgment of the defendants where he demonstrated that he was judging the defendants in comparison with similarly trained and qualified physicians in the same community, taking into account their training, experience, and fields of medical specialization, he was a knowledgeable, competent expert witness, he actually held an opinion about the applicable standard of practice and the failure of the defendants to meet the standard, his opinion was rendered with reasonable medical certainty, and he possessed

professional knowledge and expertise coupled with actual knowledge of the applicable community standard to which his expert opinion testimony was addressed. *Pearson v. Parsons*, 114 Idaho 334, 757 P.2d 197 (1988).

If a party moving for summary judgment raises issues in his motion but then fails to provide any evidence showing a lack of any genuine issue of material fact with respect to those issues, the nonmoving party has no burden to respond with supporting evidence. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 887 P.2d 1034, 1994 Ida. LEXIS 138 (1994). (Set out to correct citation error in bound volume).

The party responding to a summary judgment motion is not required to present evidence on every element of his or her case at that time, but rather must establish a genuine issue of material fact regarding the element or elements challenged by the moving party's motion. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 887 P.2d 1034, 1994 Ida. LEXIS 138 (1994). (Set out to correct citation error in bound volume).

Summary judgment dismissing a claim is appropriate when the plaintiff fails to submit evidence to establish an essential element of the claim. In such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Ambrose ex rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1994).

Summary judgment dismissal of a claim is appropriate where the plaintiff fails to submit evidence to establish an essential element of the claim. *Nelson ex rel. Nelson v. City of Rupert*, 128 Idaho 199, 911 P.2d 1111 (1996).

Because the damages in a case between a personal representative and a nursing home did not arise from a tort, but instead were contractual and not on account of bodily injury, death, or damage to property, the evidence of the nursing home insurer's payments was admissible for the purpose of showing the existence of a settlement agreement between the insurer and the personal representative and was not barred by I.C. § 41-1840(1); the trial court erred in granting the nursing home summary judgment under I.R.C.P. 56(c) because issues of fact existed regarding whether the insurer and personal representative reached a common understanding that the personal representative agreed not to sue if the insurer agreed to pay the decedent's excess expenses caused by the nursing home's alleged negligence and whether there was consideration. *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 65 P.3d 519 (2003).

—Issue.

In action brought by insurer seeking declaratory judgment that its automobile liability policy containing an omnibus clause and issued to defendant did not provide coverage of accident involving car owned by defendant's daughter and driven by defendant's son, where there were genuine issues of material fact as to the type of permission given by owner to defendant to use the car, trial court erred in granting a summary judgment. *Farmer's Ins. Co. v. Brown*, 97 Idaho 380, 544 P.2d 1150 (1976).

Where school superintendent had advised school board that plaintiff "was incompetent as a school teacher and not doing a competent job," plaintiff's allegation that superintendent knew that his statement concerning incompetence was false presented material issues of fact which precluded summary judgment in plaintiff's action for damages for defamation. *Gardner v. Hollifield*, 97 Idaho 607, 549 P.2d 266 (1976).

In a wrongful death action material issue of fact existed as to whether claim against county filed more than 120 days after date of accident was filed within 120 days from date claim reasonably should have been discovered which rendered issue inappropriate for determination on a motion for summary judgment. *Trosper v. Raymond*, 99 Idaho 54, 577 P.2d 33 (1978).

Summary judgment should be granted only if there is no genuine issue of material fact after the pleadings, depositions, admissions and affidavits have been construed in a light most favorable to the opposing party. *Palmer v. Idaho Bank & Trust*, 100 Idaho 642, 603 P.2d 597 (1979).

In determining whether an issue of material fact is in dispute, facts should be liberally construed in favor of the party against whom summary judgment is sought and all doubts are to be resolved against the moving party. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

Upon motion for summary judgment all facts and inferences must be construed most favorably toward that party against whom summary judgment is sought, and if any genuine issue of material fact remains unresolved summary judgment is improper. *McKinley v. Fanning*, 100 Idaho 189, 595 P.2d 1084 (1979).

Upon motion for summary judgment, it is axiomatic that all facts and inferences arising are construed most favorably towards the party against whom summary judgment is sought, and if any genuine issue of material fact remains unresolved, summary judgment is improper. *Nielsen v. Provident Life & Acci-*

dent Ins. Co., 100 Idaho 223, 596 P.2d 95 (1979).

Where there were still genuine issues of material fact as to whether the plaintiffs entered into possession of the disputed property as that term is defined in § 5-208; whether they acted in good faith so as to assert their adverse possession claim upon a claim of title under § 5-207; and whether they, if they were in possession, possessed the property exclusively and continuously after 1961, summary judgment was improper. *Pincock v. Pocatello Gold & Copper Mining Co.*, 100 Idaho 325, 597 P.2d 211 (1979).

A trial judge should not grant a motion for summary judgment if the evidence, construed in the light most favorable to the party opposing the motion, presents a genuine issue of material fact or shows that the respondent is not entitled to judgment as a matter of law. *Pincock v. Pocatello Gold & Copper Mining Co.*, 100 Idaho 325, 597 P.2d 211 (1979).

Summary judgment should be granted only if there is no genuine issue as to any material fact after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the party opposing summary judgment. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979).

Where the lower court overlooked the genuine factual issue of whether the insurer's agent, in fact, made any material representations to the insured, and if so, the nature of those representations, and since the basis of the insured's case was that the alleged representations of the agent created coverage under the policy, this question of fact as to the representations precluded a finding of summary judgment as a matter of law. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979).

Where a contractor, who completed the construction of the defendant's house after the first contractor defaulted, sought to foreclose a mechanic's lien against the property when his final bill was not paid, a material issue of fact existed as to whether the bondsman, who was liable for the failure of the first contractor to perform and who contracted for the completion of the house with the contractor, was an agent of the property owner at the time of the contractor's agreement to complete the structure so as to bind the homeowner, thereby precluding summary judgment. *Loomis, Inc. v. Cudahy*, 101 Idaho 459, 615 P.2d 128 (1980).

Where, in an action by plaintiff residents of an unincorporated area of a county to have certain roads declared public highways and to require the county to maintain the roads, the evidence showed that the county had regularly maintained the roads for approximately

nine years, that the roads had been extensively used by the general public, and that the sales of several lots within the area had been made with particular reliance upon several written representations made by various members of the board of county commissioners that the roads would be maintained by the county, the trial court erred in granting summary judgment for the county because a substantial fact issue existed as to whether the county had accepted the roads. *Pugmire v. Johnson*, 102 Idaho 882, 643 P.2d 832 (1982).

Where genuine issues of material fact existed regarding whether written memorandum agreements between buyer and seller had been orally modified, thereby creating an enforceable purchase agreement, summary judgment was precluded. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982).

When terms of a contract are ambiguous, their interpretation presents a question of fact. *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982).

In an action by a commercial hauler of grain and coal seeking a declaratory judgment that insurance policy covered accident involving his truck, where the policy contained a "radius endorsement" excusing the insurer from liability if the hauler made "regular or frequent" business trips to locations more than 300 miles from his residence, the question of whether 13 trips outside the 300 mile limit during the 10 months that the policy was in effect involved a material issue of fact, and was inappropriate for resolution on motion for summary judgment. *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982).

Summary judgment is appropriate if there is no genuine issue of material fact after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the opposing party. *Bennett v. Bliss*, 103 Idaho 358, 647 P.2d 814 (Ct. App. 1982).

It was improper for the district court to make determination by summary judgment as to whether certain streets dedicated to the public had been accepted, because such determination involved a genuine issue of material fact to be decided at trial. *Pullin v. Victor*, 103 Idaho 879, 655 P.2d 86 (Ct. App. 1982).

Where a trier of fact could determine from record that defendant encouraged third party to commit arson, that his encouragement actually initiated third party's wrongful conduct, and that but for his encouraging remarks, such party would not have burned down the plaintiffs' house, genuine issues of material fact existed which precluded summary judgment. *Smith v. Thompson*, 103

Idaho 909, 655 P.2d 116 (Ct. App. 1982); *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

Summary judgment on ground that action was barred by statute of limitations was improperly granted in medical malpractice action where there was an issue of material fact as to the date on which plaintiff was informed by surgeon that the foreign body appearing in X rays was not an undissolved suture but was a piece of a surgical drain which had not been removed after surgery. *Reis v. Cox*, 104 Idaho 434, 660 P.2d 46 (1982).

In action seeking to enforce right of first refusal of property, there were genuine issues of material fact as to terms of right of refusal and as to whether there was express or implied waiver of right and, accordingly, summary judgment was inappropriate. *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n*, 105 Idaho 509, 670 P.2d 1294 (1983).

Where the evidence appeared to reflect unresolved issues of material fact concerning the contractual obligations and duties of the parties, the trial court improperly granted a summary judgment against the defendants on their counterclaim. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983).

No dispute of fact is deemed "material" within this rule unless it relates to an issue disclosed by the pleadings. *Argyle v. Sleemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

Summary judgment is proper only where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law;" the record should be construed in a light most favorable to the nonmoving party. *Ulery v. Routh*, 107 Idaho 797, 693 P.2d 443 (1984).

Circumstantial evidence might be sufficient to refute direct evidence and raise a genuine issue of material fact. *Riggs v. Colis*, 107 Idaho 1028, 695 P.2d 413 (Ct. App. 1985).

Summary judgment was improperly granted in an action by an insurance company to recover money paid to a landlord as a result of a fire caused by a commercial tenant's negligence since there was a material issue of fact as to whether the parties intended in their oral lease to have the landlord provide insurance or not. *Aetna Ins. Co. v. Craftwall of Idaho, Inc.*, 757 F.2d 1030 (9th Cir. 1985).

In an action to recover on an insurance policy, where the destruction of the potatoes could, under the circumstances, be covered by the vandalism and malicious mischief endorsement in the policy, and such coverage was dependent upon disputed facts, summary judgment for the insurer was inappropriate.

Burgess Farms v. New Hampshire Ins. Group, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985).

Where terms of a contract are ambiguous, their interpretation presents a question of fact, which question ordinarily should not be determined by summary judgment. *Altman v. Arndt*, 109 Idaho 218, 706 P.2d 107 (Ct. App. 1985).

Where, in an action for injuries sustained in a slip and fall, there were several questions of material fact in controversy; the trial court improperly granted summary judgment in favor of the defendant landlord. *McKinley v. Lyco Enters., Inc.*, 111 Idaho 792, 727 P.2d 1220 (1986).

Summary judgment is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, and on appeal the Court of Appeals exercises free review in determining whether a genuine issue of material fact exists. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

Where, in an action against the manufacturer of a mobile home destroyed by fire, the record contained no evidence upon which a jury reasonably could rely in finding that a defect in the mobile home produced the fire, nor did the rapid spread of the fire, by itself, rise above a mere scintilla of evidence to support an inference that the mobile home was defective, the district court properly ruled that the plaintiffs had failed to establish a genuine issue concerning the existence of a defective product. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

To withstand a motion for summary judgment, the plaintiff's case must be anchored in something more solid than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

Circumstantial evidence can create a genuine issue of material fact. *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

Where, in a medical malpractice action against a pediatrician and surgeon, there was no dispute that patient died from acute gangrenous appendicitis, but there was a genuine issue of material fact as to whether the alleged negligence of the defendants was the proximate causation of her death, the motion for summary judgment against the plaintiffs should have been denied. *Pearson v. Parsons*, 114 Idaho 334, 757 P.2d 197 (1988).

In a wrongful death action, where a review of the record raised genuine issues of material fact regarding whether the defendants acted negligently in their capacity as decedent's

landlords, the trial court erred in granting the defendants' motion for summary judgment. *Stevens v. Fleming*, 116 Idaho 523, 777 P.2d 1196 (1989).

On appeal from issuance of summary judgment the court exercises free review in determining whether a genuine issue of material fact exists. *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

There was sufficient evidence in the record of attorney-defendant's alleged fraudulent concealment of his dual representation of the land purchaser and the heirs to the land, at the time of the sale of the heirs'-plaintiffs' property, and of fraudulent concealment of the appraised value of the property sold, to raise genuine issues of material fact to foreclose granting summary judgment. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991).

Statements from both parties raised a genuine issue of material fact whether the parties intended an oral settlement to be a binding contract or whether they intended that the written release would be the binding contract. Therefore, the trial court should not have granted summary judgment on the basis of § 5-219. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992).

There was a triable disputed factual issue as to whether insurance agent breached his duty to insured when he informed them that, because of their previous uninsured motorist claim, their insurance company had declined to increase their uninsured and underinsured motorist coverage, but allegedly did not inform them that he represented four other insurance companies and that none of them would issue such increased coverage. There was further evidence in an affidavit of another agent with twenty years' experience in the insurance business that insured's agent's duty in procuring the increased insurance was broader than they argued. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 887 P.2d 1034, 1994 Ida. LEXIS 138 (1994).

In an action by real estate brokers against sellers which terminated their listing agreement after the brokers produced a buyer, the court properly refused to grant summary judgment for the sellers where the parties disagreed as to who the intended parties to the listing agreement were, as there was a genuine issue of material fact. *Lunders v. Estate of Snyder*, 131 Idaho 689, 963 P.2d 372 (1998).

—Lack.

In wrongful death action arising from fatal shooting of decedent while he was attending a party at defendant's home, there were no unresolved issues of material fact concerning decedent's status as an invitee or concerning

defendant's warning that the uninvited guest who was brandishing a handgun had been drinking earlier in the day, for decedent was in as good a position as defendant to appreciate the danger that the gun posed and thus summary judgment in defendant's favor was not erroneous. *Joyner v. Jones*, 97 Idaho 647, 551 P.2d 602 (1976).

Summary judgment should be granted only when the pleadings, depositions, admissions, and affidavits, liberally construed in favor of the party opposing the summary judgment, show that no genuine issue as to any material fact exists. *State Tax Comm'n v. Western Electronics, Inc.*, 99 Idaho 226, 580 P.2d 72 (1978).

The fact that both sides moved for summary judgment does not in itself establish that there is no genuine issue of fact. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979).

When the trial court considers the evidence, it is well recognized that the facts are to be liberally construed in favor of the party opposing the motion for summary judgment and he is given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *McNeil v. Gisler*, 100 Idaho 693, 604 P.2d 707 (1979).

Where the facts indicating that a property owner was operating a commercial kennel were uncontroverted, and where there were no material issues of fact in dispute regarding the mobile homes being located upon the property even though the zone classification specifically excluded mobile homes from the definition of permitted dwelling, the issuance of summary judgment enjoining the property owner's improper use of her property was correct. *Wyckoff v. Board of County Comm'rs*, 101 Idaho 12, 607 P.2d 1066 (1980).

On appeal from the magistrate's court to the district court, a motion for summary judgment is applicable on trial de novo when there is no genuine issue as to any material fact. *Beker Indus., Inc. v. Georgetown Irrigation Dist.*, 101 Idaho 187, 610 P.2d 546 (1980).

The moving party has the burden of showing the absence of any genuine issue of material fact and evidence must be viewed in the light most favorable to the nonmoving party. *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980).

There were no facts presented as to a doctor's negligence which would withstand a motion for summary judgment in a malpractice suit, where affidavits indicated that the doctor had performed an inner ear operation within the standard of care of the community, and where nothing was offered to refute this testimony other than the facts that a bone

fragment was dropped into the ear and that the operation was not a success. *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980).

The fact that opposing parties both file motions for summary judgment does not in itself establish that there is no genuine issue of material fact, and this is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues or theories. However, where opposing parties both move for summary judgment based on the same evidentiary facts and on the same theories and issues, the parties effectively stipulate that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

Where the facts clearly established that the parties mutually consented to a rescission of a land sale prior to the filing of suit, the district court properly determined as a matter of law that there was a rescission and that the sellers were therefore entitled to summary judgment. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

Where the opposing parties have moved for summary judgment based upon the same evidentiary facts, and same theories and issues, they effectively have stipulated that there is no genuine issue of material fact. The question then becomes whether the party seeking relief upon a particular theory has made a sufficient factual showing in support of that theory. *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 681 P.2d 1010 (Ct. App. 1984).

Generally, summary judgment should be granted only if — after construing the pleadings, affidavits, depositions and admissions in a light most favorable to the opposing party — there is no genuine issue of material fact; the appellate court must construe the record in favor of the party opposing summary judgment and accord to such party the benefit of all reasonable inferences. *McCasland v. Floribec, Inc.*, 106 Idaho 841, 683 P.2d 877 (1984).

Creating only a slight doubt as to the facts will not defeat a summary judgment motion; a summary judgment will be granted whenever, on the basis of the evidence before the court, a directed verdict would be warranted, or whenever reasonable minds could not disagree as to the facts. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984).

Where after buyer defaulted on payment of installment on contract of sale and did not

cure the default, the parties entered into an amendment to the contract and as part of this amended agreement, the buyer issued the seller a deed in lieu of foreclosure and both parties agreed that the deed would be recorded in the event the buyer defaulted on the land sale contract as amended and an affidavit issued by the buyer in conjunction with the deed stated, as did the deed itself, that the deed was not intended as a mortgage, trust conveyance, or security of any kind, when the buyer defaulted on the amended contract, and the seller filed a complaint in district court seeking ejectment of the buyer from the property, since the precise wording of the amended contract and deed eliminated any potential ambiguity regarding the intent of the parties and there was no genuine issue of material fact otherwise existing, the seller was entitled to a partial summary judgment. *Kerr Land & Livestock, Inc. v. Glaus*, 107 Idaho 767, 692 P.2d 1199 (1984).

Summary judgment is appropriate where the pleadings, depositions and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Sewell v. Neilsen, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

The mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact; however, where both parties have moved for summary judgment based upon the same evidentiary facts and the same issues and theories, they have effectively stipulated that there is no genuine issue of material fact and summary judgment is therefore appropriate. *Kromrei v. Aid Ins. Co.*, 110 Idaho 549, 716 P.2d 1321 (1986).

Where the opposing parties both have moved for summary judgment on the same evidentiary facts and on the same theories and issues, the parties effectively have stipulated that there is no genuine issue of material fact. *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987).

Summary judgment is appropriate only when there are no genuine issues of material fact and the case can be decided as a matter of law. *Ambrose ex rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1994).

Trial court did not err in granting summary judgment to a lender where the borrower's argument that the lender's assurances were misrepresentation in the inducement were, at best, promises of future performance and as such, did not raise a genuine issue of material

fact precluding summary judgment. *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp. Idaho*, 139 Idaho 492, 80 P.3d 1093 (2003).

Immunity Defense As Basis for Motion.

In ruling on a motion for summary judgment based upon an immunity defense under the Idaho Tort Claims Act (ITCA), a trial judge should first determine whether the plaintiffs' allegations and supporting record generally state a cause of action for which a private person or entity would be liable for money damages under the laws of the State of Idaho; the court must then determine whether an exception to liability under the ITCA shields the alleged misconduct from liability. *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 775 P.2d 640 (1989).

Because a property owner was not in the business of construction or roof installation and did not employ individuals who were trained in these areas, nor did it own materials or equipment necessary to engage in these areas, the owner was not a statutory employer under Idaho Code § 72-102 of the Idaho Workers Compensation Act and thus was not exempt from liability under Idaho Code § 72-223 in connection with a roof installation employee's third party negligence action; thus, the trial court erred in granting the owner summary judgment under Idaho R. Civ. P. 56(c). *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Trial court correctly determined that a general contractor was immune from third-party tort liability pursuant to Idaho Code § 72-223 of the Idaho Workers Compensation Act as a general contractor, given the definitions of employer under Idaho Code §§ 72-216, 72-102(12)(a), and thus summary judgment under Idaho R. Civ. P. 56(c) was properly granted in the contractor's favor. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

In General.

Summary judgment should be granted if no genuine issue as to any material fact is found to exist after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the party opposing the summary judgment. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975); *Farmer's Ins. Co. v. Brown*, 97 Idaho 380, 544 P.2d 1150 (1976).

Summary judgment is appropriate only when there is no genuine issue of material fact after the pleadings, depositions, admissions, and affidavits have been construed most favorably to the opposing party and the moving party is entitled to a judgment as a

matter of law. *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982).

Summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact. The facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982).

In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Smith v. Idaho State Univ. Fed. Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238, 60 A.L.R.4th 225 (1986).

If the court determines, after a hearing on a motion for summary judgment, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. Thus, in appropriate circumstances, the court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

In reviewing a lower court's decision on summary judgment, the standard of review is whether there are any genuine issues of material fact and, if not, whether the prevailing party was entitled to judgment as a matter of law. *Wells v. United States Life Ins. Co.*, 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991).

In an appeal from an order of summary judgment, the Supreme Court standard of review is the same as the standard used by the district court in ruling on the motion for summary judgment; summary judgment shall be granted if the court determines that the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995).

When considering an appeal from the granting of a motion for summary judgment, the Supreme Court's standard of review is the same as that used by the district court in passing on the motion; this standard requires the district court, and the Supreme Court on appeal, to construe liberally the facts in favor of the nonmoving party and determine

whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 898 P.2d 43 (1995).

When the Supreme Court reviews a district court's decision on summary judgment, it employs the same standard as that properly employed by the trial court when originally ruling on the motion. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

The moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000).

Inferences in Favor of Nonmoving Party.

Standards applicable to summary judgment require the district court and Supreme Court upon review, to liberally construe facts in the existing record in favor of the nonmoving party, and to draw all reasonable inferences from the record in favor of the nonmoving party. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991).

Where a jury has been requested, the nonmoving party is entitled to the benefit of reasonable inference drawn from the evidentiary facts. *Ambrose ex rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1994).

Intent of Parties as a Question of Fact.

When the district court determined that the trust instrument was ambiguous, interpretation of the document presented a question of fact which focused on the intent of the parties, and the court erred in granting summary judgment. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999).

Issue of Material Fact.

Facts in dispute cease to be "material" facts when the plaintiff fails to establish a *prima facie* case; in such a situation, there can be "no genuine issue of material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v. Barkley*, 121 Idaho 771, 828 P.2d 334 (Ct. App. 1992).

Where both parties have moved for summary judgment on the same evidentiary facts and on the same theories and issues, the parties have effectively stipulated that there is no genuine issue of material fact, and the judge is entitled to draw all reasonable infer-

ences from the facts presented. *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 990 P.2d 1224 (Ct. App. 1999).

Genuine issues of material fact precluded summary judgment on an injured passenger's claim that the Idaho Division of Motor Vehicle Services was grossly negligent in reinstating the drunk driver's unrestricted license because a reasonable jury could find that a person with seven DUI convictions was a habitual drunkard and that he would be harmful to the public if allowed to drive. *Cafferty v. Dep't of Motor Vehicle Serv.*, 144 Idaho 324, 160 P.3d 763 (2007).

Jurisdiction.

The court had jurisdiction to decide the motion for summary judgment, even though the motion and notice of hearing did not allow the minimum time set by the rules for the responsive affidavits. *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (Ct. App. 1986).

—Lack over Subject Matter.

In a wrongful death action, the trial court's denial of defendant's motions to dismiss and for summary judgment, both of which were made upon the ground that the industrial commission had exclusive jurisdiction of the matter, did not remove the question of the applicability of workmen's compensation law from the proceedings, and thus the trial court did not err in carrying that issue forward to trial. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

Medical Malpractice.

The standard for considering the grant of a motion for summary judgment is the same in a medical malpractice action, as in other actions. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

Motions.

If the movant for summary judgment does not challenge an aspect of the nonmovant's case in that party's motion, the nonmovant is not required to address it at the summary judgment stage of the proceedings. *State v. Coby*, 128 Idaho 90, 910 P.2d 762 (1996).

—Cross.

The rules do not contemplate the transformation of the court, sitting to hear a summary judgment motion, into the trier of fact when cross motions for summary judgment have been filed. *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982).

—Determination.

Where on February 27 teacher advised school board in writing that he would decline

to accept employment during the next year, but where on March 30 teacher advised the board of his desire to withdraw the declination of future employment, teacher, whose contract was not renewed, was precluded by board's defenses of estoppel and waiver from obtaining a reinstatement of employment and lost wages and therefore summary judgment for the school board was proper. *Gardner v. Hollifield*, 97 Idaho 607, 549 P.2d 266 (1976).

Facts are to be liberally construed in favor of the party opposing the motion for summary judgment and he is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Jones v. Jones*, 100 Idaho 510, 601 P.2d 1 (1979).

Where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

On an appeal from summary judgment, the court will determine whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. In making these determinations, it will construe all facts in the record, together with all reasonable inferences from the evidence on file, in the light most favorable to the party opposing the motion for summary judgment. *Smith v. Thompson*, 103 Idaho 909, 655 P.2d 116 (Ct. App. 1982); *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

In ruling on a summary judgment motion, the facts are to be liberally construed in favor of the party opposing the motion; he is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Reis v. Cox*, 104 Idaho 434, 660 P.2d 46 (1982).

In action for conversion of inventory of debtor against supplier, by bank who held perfected security interest in inventory, where record showed that transfer of inventory was not authorized by the express terms of the security agreement that permitted sale or disposal of inventory only in the ordinary course of business and where bank denied any knowledge or notice of the dealings between the debtor and the supplier and supplier did not show that bank had had such knowledge, since reasonable persons would not reach different conclusions from the record made on motion for summary judgment, court did not

err in granting summary judgment. *First Sec. Bank v. Absco Whse., Inc.*, 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983).

When a trial judge passes upon a motion for summary judgment and when the Supreme Court reviews the grant of a motion for summary judgment, the standard is the same: all facts and inferences are to be construed in a light most favorable to the nonmoving party and summary judgment is inappropriate if any genuine issue of material fact remains unresolved. *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n*, 105 Idaho 509, 670 P.2d 1294 (1983).

A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983).

The pleadings, depositions, and affidavits must be construed in a light most favorable to the party resisting summary judgment. *IBM Corp. v. Lawhorn*, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984).

A motion for summary judgment must be decided upon the pleadings, depositions, admissions, affidavits and answers to interrogatories on file; on appeal, those materials will be viewed most favorably to the party opposing summary judgment. *Galindo v. Hibbard*, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984).

When the defendant makes a motion for summary judgment the pleadings and affidavits must be construed in a light most favorable to plaintiffs since they are the party opposing the motion. *Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 107 Idaho 275, 688 P.2d 1180 (1984), review denied, *Heidemann v. A.M.R. Corp.*, 113 Idaho 924, 750 P.2d 378 (1988).

The facts are to be liberally construed in favor of the party opposing the summary judgment motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Thomas v. Campbell*, 107 Idaho 398, 690 P.2d 333 (1984).

When a judge exercises the power to choose inferences or to resolve a conflict in wholly documentary evidence, the appropriate standard of review is whether the record is sufficient to support the district court's findings; this standard is equivalent to the standard of clear error prescribed by I.R.C.P. 52(a). *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

The trial judge in nonjury cases may grant summary judgment on undisputed evidentiary facts, despite conflicting inferences, because the court alone will be responsible for choosing those inferences; thus, where the

evidence was entirely confined to a written record, there was no additional, in-court testimony to be obtained, and the trial judge alone was responsible for choosing the evidentiary facts he deemed most probable, such a choice could be made on summary judgment. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

When ruling on summary judgment in a case without a jury, the judge is required to view conflicting evidentiary facts in favor of the losing party, but not necessarily to draw inferences from uncontroverted facts in the losing party's favor; rather, the judge can draw those inferences which he deems most probable. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

When a judge exercises the power to choose inferences on summary judgment, findings of fact should be made; otherwise, the reviewing court cannot identify the judge's choices of evidence or of inferences, in order to determine whether they were clearly erroneous. Absent such a finding, summary judgment on this issue cannot be upheld. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984).

Even though there are no genuine issues of material facts between the parties a motion for summary judgment must be denied, when the case is to be tried by a jury, if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions. *Riggs v. Colis*, 107 Idaho 1028, 695 P.2d 413 (Ct. App. 1985).

If an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982); *Blackmon v. Zufelt*, 108 Idaho 469, 700 P.2d 91 (Ct. App. 1985); *Sewell v. Neilsen, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

If a genuine issue of material fact remains unresolved, or if the record contains conflicting inferences and if reasonable minds might reach different conclusions from the facts and inferences presented, summary judgment should not be granted. *Sewell v. Neilsen, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

In ruling on a summary judgment motion, the facts are to be liberally construed in favor of the party opposing the motion, and that party is to be accorded the benefit of all favorable inferences which might reasonably

be drawn from the evidence. *Sewell v. Neilsen, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

If the pleadings, admissions, depositions and affidavits raise any question of credibility of witnesses or weight of the evidence, the motion for summary judgment should be denied. *Altman v. Arndt*, 109 Idaho 218, 706 P.2d 107 (Ct. App. 1985).

On summary judgment, the district court is not permitted to weigh the evidence or to resolve controverted factual issues. *Altman v. Arndt*, 109 Idaho 218, 706 P.2d 107 (Ct. App. 1985).

In general, a party opposing summary judgment is entitled to favorable inferences from the underlying facts; however, when the evidentiary facts are not disputed and the judge rather than a jury will be the ultimate trier of fact, the judge may draw the inferences he or she deems most probable since the judge alone would be responsible for drawing such inferences from the same facts at trial. *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987).

—Dismissal.

If a trial court considers factual allegations outside the pleading on a motion pursuant to IRCP, Rule 12(b)(6), it errs if it fails to convert the motion to one for summary judgment. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

If a court considers matters outside pleadings on a Rule 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment and the proceedings thereafter must comport with the hearing and notice requirements of IRCP Rule 56. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

The magistrate erred in granting the respondents' motion for dismissal without first explicitly determining the propriety of petitioner's discovery request: rather, respondent's motion should have been treated as one for summary judgment. *Merrifield v. Arave*, 128 Idaho 306, 912 P.2d 674 (Ct. App. 1996).

—Evidence.

The general provision in IRCP 43(e) is inapplicable to summary judgment proceedings. *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990).

Trial court properly refused to address an employee's claim regarding the employee's at-will status because the claim was not raised in the pleadings and thus was not subject to being addressed under Idaho R. Civ. P. 56(c). *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 75 P.3d 733 (2003),

cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004).

—Habeas Corpus.

Pursuant to the Idaho Rules of Civil Procedure applicable to habeas corpus actions, the magistrate was required to treat the respondents' motion as one for summary judgment upon considering matters outside the pleadings. *Merrifield v. Arave*, 128 Idaho 306, 912 P.2d 674 (Ct. App. 1996).

Magistrate judge properly dismissed a prisoner's petition for a writ of habeas corpus on summary judgment because there was no genuine issue of material fact; although the prisoner argued that a change in parole reconsideration rules constituted an ex post facto violation, the eligibility standards for parole were the same for the prisoner as they were when he was originally incarcerated. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

Summary judgment was improperly granted in favor of the prison warden in the inmate's habeas corpus petition where the inmate's allegation that he was informed of the Idaho Commission of Pardons and Paroles' parole decision in a summary fashion while being ushered from the room after the conclusion of his Sentence 1 parole revocation hearing was sufficient to raise factual issues as to whether the commission deprived the inmate of the right to notice and an opportunity to participate in a parole hearing on Sentence 2; these factual issues precluded summary judgment on the inmate's claim for relief with respect to his Sentence 2 parole proceeding. *Acheson v. Klausner*, 139 Idaho 156, 75 P.3d 210 (Ct. App. 2003).

—Procedural Deficits.

The district court properly disregarded procedural defects in a notice for hearing on union's motion for summary judgment where employee failed to object that such procedure violated his substantial rights. *Heer v. J.R. Simplot Co.*, 123 Idaho 889, 853 P.2d 634 (Ct. App. 1993).

There was no error in the magistrate's decision to conduct a hearing on a summary judgment motion in a probate proceeding even though the motion carried an incorrect case number, it bore the correct case name which differed from that of the probate case. The motion also referred to a complaint and a counterclaim which existed only in the summary judgment action, not in the probate case. *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994).

Although sanctions could be imposed on a party who did not file a memorandum in opposition to a motion for summary judgment,

ment, that party was not precluded from participating at oral argument. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007).

—Renewed.

The court's power to enter summary judgment is not diminished by the mere fact that a prior motion for summary judgment has been denied since a denial of summary judgment does not reach the merits of the case, and is not final. The court may consider motions for summary judgment on more than one occasion, and may be persuaded to grant relief formerly denied. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

Negligence.

—Economic Loss.

Where the owners entered into a contract for the design and the supply of construction materials for a cabin, which was later determined to contain structural defects, the owners were not permitted to recover damages for economic loss from defendants, an architect and two suppliers where under Idaho law, there is no recovery for pure economic loss in a negligence action; therefore, defendants were entitled to summary judgment. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

—Immunity.

Where the county issued a permit to allow the owners to build a cabin according to certain plan specifications that were approved by the county building inspector, neither the county nor the building inspector was liable for negligence when it was later determined that the cabin structure did not meet snow load requirements. The Idaho Tort Claims Act, §§ 6-901 to 6-929, provided the county and the building inspector immunity for negligent acts arising from issuing a permit; therefore, they were entitled to summary judgment. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Nonappealable Order.

An order denying a motion for summary judgment is not an appealable order. *Smith v. Idaho State Univ. Fed. Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

Nonjury Trials.

When an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be

drawn from uncontroverted evidentiary facts. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

If an action will be tried by the court without a jury, a judge is not required to draw inferences in favor of the party opposing a motion for summary judgment. *Kaufman v. Fairchild*, 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991).

When an action will be tried before the court without a jury, the trial court, as the trier of fact, is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences. *Bauchman-Kingston P'ship, LP v. Haroldsen*, 149 Idaho 87, 233 P.3d 18 (2008).

Objections.

Although insured made no objection until oral argument to affidavit testimony submitted in support of insurer's motion for summary judgment, and did not file a motion to strike the allegedly inadmissible evidence, the objection had to be considered by the court absent a scheduling order limiting the time for making objections. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007).

One-Party Proceedings.

In one-party subcases where the claimant alleges facts which differ from those contained in report, summary judgment is an inappropriate procedure. An evidentiary hearing must be conducted. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Pleading

District court erred in dismissing prisoner's pro-se civil complaint for failure to file within the statute of limitations. Although document filed by prisoner within the limitations period was mis-captioned as a "claim" rather than a "complaint," it sufficiently alleged essential facts to state a claim for relief, and sufficed as a complaint. *Hauschulz v. State*, 143 Idaho 462, 147 P.3d 94 (Ct. App. 2006).

Post-Conviction Relief.

Summary disposition under § 19-4906(b) is the procedural equivalent to summary judgment under I.R.C.P. 56. *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987); *Carsner v. State*, 132 Idaho 235, 970 P.2d 28 (Ct. App. 1998).

Order for summary disposition of a post-conviction relief application under § 19-4906(c) is the procedural equivalent of summary judgment under I.R.C.P. 56. *Newman v. State*, 140 Idaho 491, 95 P.3d 642 (Ct. App. 2004).

Privity.

Where defendant physicians, who attempted to establish privity by showing their partnership with doctor named in a previous suit, failed to put on any proof that plaintiffs had sued doctor in his capacity as a partner or that physicians were exposed to any potential liability through their association with him, reasonable minds could have differed on the nature and extent of the relationship that might create privity; accordingly, the district court should have denied physicians' motion for summary judgment. *Gubler ex rel. Gubler v. Brydon*, 125 Idaho 107, 867 P.2d 981 (1994).

Public Contract.

Although a public agency's invitation to bid was flawed, an unsuccessful bidder could not prevail on its claim that it was the lowest responsible and responsive bidder within the meaning of § 67-5711C(2) because it waived its right to contest the bidding process by failing to follow either the objection process set forth in the bidding documents or the statutory appeal process set forth in § 67-5733. *Fieldturf, Inc. v. State*, 140 Idaho 385, 94 P.3d 690 (2004).

Service by Mail.

When a motion for summary judgment and supporting documentation are served by mail, they must be mailed at least 31 days in advance of the hearing. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Although plaintiff mailed its summary judgment motion about six weeks in advance of the hearing, it did not mail its supporting affidavit and brief until 28 days before the hearing. Therefore, plaintiff did not allow the minimum time for responsive affidavits and briefing mandated by Rule 56(c). *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Summary Judgment.

Grant of summary judgment in favor of the employer in the employee's wrongful termination action was proper where his actions were not protected under the Idaho Protection of Public Employees Act, Idaho Code § 6-2101 et seq.; further, the district court did not abuse its discretion in striking a letter regarding the Attorney General's investigation into Correctional Industries' operation because it was excluded from the hearsay exception of Idaho R. Evid. 803(8). *Mallonee v. State*, Dep't of Corr., 139 Idaho 615, 84 P.3d 551 (2004).

Where an employee resigned due to her perception that there was a hostile working environment because of an inappropriate romantic relationship between her supervisor

and another employee, her constructive discharge claim was time barred. Moreover, the affair, and any favoritism arising from it was not objectively proven to have created a hostile environment. *Patterson v. State Dep't of Health & Welfare*, — Idaho —, 256 P.3d 718 (2011).

—Evidence.

When evidence presented in opposition to a motion for summary judgment is challenged as being inadmissible, the trial court must determine the admissibility of the evidence before ruling on the motion. *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992).

Lender with a junior deed of trust was not required to look beyond the face of the beneficiaries' prior deed of trust to determine the full extent of the beneficiaries' interests; therefore, his junior deed of trust had priority over the beneficiaries' prior unrecorded interests. *Kalange v. Rencher*, 136 Idaho 192, 30 P.3d 970 (2001).

—Improper.

Where, in construing the record in the light most favorable to driver who brought claims against arresting police officers for assault and battery, the circumstances showed that the police officers failed to act in accordance with clearly established Idaho law and failed to act in accordance with clearly established constitutional principles regarding the use of reasonable force in making a lawful arrest, the order of summary judgment in favor of the police officers was improper. *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985).

The court's dismissal with prejudice of the plaintiff's action on the plaintiff's failure to have an expert witness testify on the first day of trial could not be characterized as a summary judgment pursuant to this rule where the requisite notice was not given. Since the action was dismissed because the plaintiffs could not make out a prima facie case, the dismissal would be considered a directed verdict pursuant to I.R.C.P. 50(a); however, under that rule, a directed verdict would have only been proper after the plaintiffs had presented their case-in-chief, and thus the court's premature order of dismissal was error. *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987).

Where the pleadings, depositions, admissions and affidavits before the trial court demonstrated a genuine issue as to the material fact concerning whether a physician saw a patient pursuant to an ordinary physician/patient relationship or whether he only rendered emergency treatment or first aid services to that patient, the trial court erred in granting the physician's motion for summary

judgment. *Eby ex rel. Eby v. Newcombe*, 116 Idaho 838, 780 P.2d 589 (1989).

Since genuine issues of material fact existed regarding plaintiff's claim that parent manufacturer and subsidiary failed to disclose material information regarding the irrigation system prior to the purchase of the system by plaintiff, summary judgment was improperly granted. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991).

Where it was apparent that the purchase and sale agreement entered into by the parties was not clear and unambiguous and from the record it was impossible to determine what the parties contemplated in drafting and signing the purchase and sale agreement, the trial court erred in granting summary judgment. *Washington Fed. Sav. & Loan Ass'n v. Lash*, 121 Idaho 128, 823 P.2d 162 (1992).

Nonprofit corporation which supplied water to mobile home park asserted its claim to well lots under adverse possession pursuant to a written claim and/or an oral claim of right. However, the plaintiff's use of the well lots could have been consistent with use by permission rather than adverse possession. As a result, the trial court erred in granting summary judgment for the corporation. *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 837 P.2d 805 (1992).

Summary judgment barring medical claim based on statute of limitations was vacated, where time at which plaintiff was "damaged" could not be determined with medical certainty because the record was devoid of evidence establishing that mere progressive growth of plaintiff's tumor damaged plaintiff during the relevant time period. *Hawley v. Green*, 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993).

In action by insured against insurance agent for negligence for failing to secure an increase in insured's uninsured and underinsured motorist coverage, where not only was there evidence showing a lack of proximate cause, but no argument was even offered on this element of negligence by the insurance agent, but the district court improperly seized upon the proximate cause issued sua sponte, the burden never shifted to insured to provide evidence of proximate cause because the insurance agent never raised the issue in the first place, thus, the district court erred granting the insurance agent motion for summary judgment on the basis that expert witness' affidavit was insufficient to establish proximate cause. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 887 P.2d 1034, 1994 Ida. LEXIS 138 (1994).

District court erred in granting summary

judgment on the basis that the tenant parties were implied co-insureds under building owner's fire policy because there was no agreement to the contrary. *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994).

Reasonable minds could conclude that there is something wrong with a teacher's performance when she is not reemployed due to the possibility of employing a better teacher and this deficiency appears more serious when a principal has identified performance-related concerns and has even stated that he would not want his own children to be taught by that teacher and such evidence is sufficient at least to raise a factual question as to whether the district's decision not to reemploy plaintiff was based on deficient or unsatisfactory performance and this court erred in granting summary judgment. *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 898 P.2d 43 (1995).

A school district cannot simply raise evaluations marked "satisfactory" as a shield to further inquiry into a decision not to reemploy a teacher. Where evidence is produced raising questions as to whether such a decision was in fact based on deficient performance, summary judgment is inappropriate notwithstanding the existence of satisfactory evaluations. *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 898 P.2d 43 (1995).

Summary judgment for a defendant insurance company was improper on the insured's claims of breach of contract and bad faith for failure to pay for medical treatment for injuries related to an automobile accident which the insurance company claimed were "fairly debatable" due to a possible pre-existing condition, as six doctors examined the insured and none could definitively state the insured's condition was preexisting, and one doctor unequivocally stated the insured's injuries were related to the accident. *Lucas v. State Farm Fire & Cas. Co.*, 131 Idaho 674, 963 P.2d 357 (1998).

Where a restrictive covenant barred the commercial use of property within the subdivision but the incorporated definitional reference, the uniform building code, considered residential use to include hotels, apartment buildings, and lodging houses, summary judgment was improperly granted to the subdivision's planning board in their breach of contract action against the homeowners, seeking a declaratory judgment that the homeowner's short-term rental of their home constituted commercial use prohibited by the covenants. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003).

Trial court erred in granting summary

judgment pursuant to Idaho R. Civ. P. 56(c) to a company in an action against customers to recover on a promissory note and an open account, because the trial court impermissibly ruled on the customers' credibility in granting the summary judgment motion. *Land O'Lakes, Inc. v. Bray*, 138 Idaho 817, 69 P.3d 1078 (Ct. App. 2003).

City did not have the implied power to grant an exclusive solid waste disposal franchise to one company because exclusive franchises were not indispensable to solid waste disposal; therefore, a trial court erred in granting summary judgment in favor of the city under Idaho R. Civ. P. 56(c). *Plummer v. City of Fruitland*, 140 Idaho 1, 89 P.3d 841 (2003).

City's act of prohibiting several competitors from collecting solid waste constituted anti-competitive conduct because the city did not have the authority to grant an exclusive franchise to one company; therefore, a trial court erred in granting summary judgment in favor of the city under Idaho R. Civ. P. 56(c). *Plummer v. City of Fruitland*, 140 Idaho 1, 89 P.3d 841 (2003).

Summary judgment in favor of the county and intervenors was improper where school endowment lands were not subject to local zoning laws; mineral leases on endowment lands were immune from local zoning regulations. *State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 79 P.3d 707 (2003).

District court erred in summarily denying an inmate's petition for writ of habeas corpus. The inmate stated a valid claim that the parole commission denied him parole in retaliation for his litigative activities. The case was remanded to the district court for further proceedings. *Drennon v. Craven*, 141 Idaho 34, 105 P.3d 694 (Ct. App. 2004).

Where a power company was improperly determined to be a third party beneficiary to a lease agreement executed by a buyer and a seller, under which the buyer agreed to pay the seller's arrearage to the power company, summary judgment was improperly granted to the power company in its action against the buyer to enforce the lease agreement as a third party beneficiary. *Idaho Power Co. v. Hulet*, 140 Idaho 110, 90 P.3d 335 (2004).

Grant of summary judgment in favor of the purchasers pursuant to I.R.C.P. 56(c) was improper where the seller was not in breach of the sale agreement because the first amended covenants were simply void and thus, the purchasers were not deprived of any benefits under the contract; further, the trial court's order granting specific performance of the sale agreement subject only to the original recorded covenants was in error because the

order eliminated the terms of the original recorded covenants with respect to future amendments. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 93 P.3d 685 (2004).

District court erred by granting summary judgment to contractor in employee's slip and fall action because the contractor affirmatively accepted the duty to replace the safety mats at the employer's facility; had the contractor not agreed to place the mats at the entry, the employer likely would have found another company to fulfill that duty; thus, the contractor induced the employer's reliance on the contractor's promise to replace the safety mats, which increased the risk that an employee could slip, fall, and sustain injury were the promise not kept. The employee's fall-related injury was surely the primary injury that the mats were intended to prevent, which meant that the injury was obviously foreseeable. *Baccus v. Ameripride Servs.*, 145 Idaho 346, 179 P.3d 309 (2008).

—Proper.

Where automobile driver's amended complaint alleged that arresting municipal police officers acted with malice and § 6-903(c) specifically exempts governmental entities from liability where their employees act with malice, as a matter of law the driver could not recover from the city; hence, the district court properly granted the city's motion for summary judgment as to the driver's state law claims against the city. *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985).

Where any conceivable jury verdict would have been based solely upon impermissible conjecture, the district court's award of summary judgment on the issue of lost profits was affirmed. *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985).

In an action brought by adjacent property owner to recover for damages sustained when a fire in defendants' building spread to plaintiffs' property, summary judgment on the issue of negligence per se was properly granted to the defendants where there was no showing of any violation of a particular statute, ordinance, or regulation. *Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 717 P.2d 1033 (1986).

A statement in a subordination agreement, that it was for the purpose of enabling a developer to obtain a loan for construction, did not avoid summary judgment establishing priority lien status to the lender, based on an argument that foreclosure should be limited to the extent of construction money actually expended or the value of improvements to the parcel. *Provident Fed. Sav. & Loan Ass'n v.*

Idaho Land Developers, Inc., 114 Idaho 453, 757 P.2d 716 (Ct. App. 1988).

Summary judgment is appropriate where a party is entitled to judgment as a matter of law after all facts and favorable inferences are drawn in the favor of the opposing party. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

Where property damage resulting from a defective product did not result from a calamitous event or dangerous failure of the product, but from the failure of the product to match the buyers' commercial expectations, the claim was for lost profits and consequential business losses, and the economic losses were properly addressed as predicated upon the contract claims, not in tort, and the district judge properly dismissed negligence and tortious strict liability claims. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

In action to quiet title and recover possession of real property, where (1) it was shown that there was an agreement between third parties and defendant for the conveyance of the property to defendant upon the completion of certain stipulated conditions; (2) the IRS attached a tax lien to the property because defendant allegedly failed to pay taxes owed to the federal government; (3) the plaintiff purchased defendant's interest in the property at a public sale; (4) the plaintiffs received a certificate of sale following the public auction; and (5) the time for redemption passed, and a quitclaim deed was issued to the plaintiffs by the IRS, there were no genuine issues of fact which needed to be resolved by a jury, and plaintiffs were entitled to summary judgment as a matter of law. *Gage v. Harris*, 119 Idaho 451, 807 P.2d 1289 (Ct. App. 1991).

Summary judgment was appropriate as the city owed no legal duty to plaintiff to protect him from illegal fireworks while attending city's fireworks display. *Lundgren v. City of McCall*, 120 Idaho 556, 817 P.2d 1080 (1991).

Where the record case did not present a clear and obvious answer to whether the facts relied upon by a fire investigator in forming his opinion were of a type and sufficiency which other experts in the field should reasonably rely on in forming an opinion on the cause of a building fire, the District Court erred in granting electrician's motion for summary judgment without ruling on the admissibility of the expert opinion testimony presented by insurer in opposition to the motion. *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992).

Plaintiffs cited no cases from Idaho or any other jurisdiction recognizing the tort of neg-

ligent investigation of a crime. On the other hand, recovery for negligence in investigating or prosecuting a crime has been specifically denied in a number of jurisdictions. Therefore, the summary judgment dismissing plaintiffs' claim of negligent investigation was proper and entitled the state to judgment as a matter of law. Summary judgment was also proper with respect to the plaintiffs' claim that the state was negligent in training fish and game officers. *Wimer v. State*, 122 Idaho 923, 841 P.2d 453 (Ct. App. 1992).

Judgment entered against plaintiff based on the arbitration award was a final judgment on the merits for the purposes of a collateral estoppel analysis and the elements of collateral estoppel have been met and thus the district court was correct in granting summary judgment on the basis of issue preclusion. *Western Indus. & Envtl. Servs., Inc. v. Kaldveer Assocs.*, 126 Idaho 541, 887 P.2d 1048 (1994).

In an unlawful detainer proceeding between a mortgage company and a defaulting purchaser of a one-acre house lot, where the mortgage company supported its motion for summary judgment with expert testimony which showed that the property had been surveyed and a valid legal description of the land existed but where the purchaser failed to produce evidence to support his claim that the legal description was flawed or that any genuine issue of material fact remained, summary judgment was properly granted for the company. *Nationsbank Mtg. Corp. v. Cazier*, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995), cert. denied, 519 U.S. 864, 117 S. Ct. 172, 136 L. Ed. 2d 113 (1996).

Where defendant failed to carry his burden under the nonpublic offer and limited offering exemptions and failed to establish that a genuine issue of material fact existed on the issue of securities fraud, summary judgment was properly granted to Idaho Department of Finance seeking a permanent injunction to prohibit defendant from selling said securities. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 899 P.2d 977 (1995).

A prescriptive easement existed in favor of certain homeowners as a matter of law making a grant of summary judgment proper, based on the evidence that the homeowners believed they had been given a permanent right to use a road across the defendant's property, the homeowners paid homeowners' association dues which were used in part to continuously repair and maintain the road, the grant of a permanent right was supported by additional evidence, and the defendant's did not present any evidence to the contrary, and thus the use of the road was under a

claim of right. *Walker v. Hollinger*, 132 Idaho 172, 968 P.2d 661 (1998).

Summary judgment was properly granted in favor of defendant where the undisputed facts established that a minor in the custody of an out-of-state child welfare agency was not a resident of a homeowner's household at the time of a shooting incident and was therefore not an insured person entitled to coverage under the homeowner's insurance policy. *All-state Ins. Co. v. Mocaby*, 133 Idaho 593, 990 P.2d 1204 (1999).

District court properly granted summary judgment to the land owners where their property squarely fit into an exception in the city's resolution for extension of water services outside its boundaries for properties under a refundable water extension contract; the imposition of attorney fees was proper since the city's denial was frivolous in light of its clearly expressed policy and exception. *Albee v. Judy*, 136 Idaho 226, 31 P.3d 248 (2001).

Grant of summary judgment in favor of the publication and against the individual in his action for invasion of privacy after the publication printed a photographic representation of a document from a court file accusing the individual of homosexual activity was proper where the publication published a document contained in a court record open to the public. *Uranga v. Federated Publs., Inc.*, 138 Idaho 550, 67 P.3d 29 (2003).

Trial court did not err in granting a motion for summary judgment in a case involving a petition for a writ of habeas corpus because appellant was unable to show that any substantive due process rights were violated when appellant was disciplined under a prison rule; the rule prohibiting prisoners from being in unauthorized places was sufficiently explicit to inform appellant that disciplinary action could have been taken when appellant decided to eat breakfast a second time rather than report to work. *Nelson v. Hayden*, 138 Idaho 619, 67 P.3d 98 (Ct. App. 2003).

Trial court properly granted summary judgment to lessee who had to lease other premises where the lease term began upon occupancy, an event that never occurred because the builder had failed to obtain financing or building permits in timely fashion. *Iron Eagle Dev. v. Quality Design Sys., Inc.*, 138 Idaho 487, 65 P.3d 509 (2003).

Court, in a landlord's suit against a tenant for a fire, did not err by granting summary judgment to the tenant where the lease did not require the tenant to have first-party fire insurance for the building. *J. R. Simplot Co. v. Rycair, Inc.*, 138 Idaho 557, 67 P.3d 36 (2003).

Grant of summary judgment in favor of the insurer in the insureds' action to enforce an uninsured motor vehicle provision was proper where the other driver was identified and was not uninsured; further, the accident was not a hit and run. *Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 66 P.3d 242 (2003).

Summary judgment under I.R.C.P. 56(c) was properly granted in favor of two clerks in an inmate's 42 U.S.C.S. § 1983 action because the inmate was unable to show an actual injury since the 1,800 pages of exhibits were unnecessary to the filing of the inmate's petition for post-conviction relief; moreover, the inmate did not establish that the petition in question was not frivolous because the petition was barred by the statute of limitations, and it was a successive petition. *Drennon v. Hales*, 138 Idaho 850, 70 P.3d 688 (Ct. App. 2003).

Summary judgment was properly granted to the insurer where the district court ruled that third parties, such as the vehicle owner, could not sue an insurer for bad faith and unfair dealing after the third party, the owner, had obtained a judgment against the policy holder; there was no right in Idaho of a third party to bring an action for the breach of good faith and fair dealing against the tortfeasor's insurance company. *Graham v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 611, 67 P.3d 90 (2003).

Summary judgment was properly granted in favor of property owners where the owners foreclosed their mortgage on the farm's property where the contracts did not require the owners to foreclose on other property first before foreclosing on the farm property. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 774, 69 P.3d 1035.

Where an inmate claimed in his pro se petition for habeas corpus relief that prison disciplinary proceedings were pursued against him in retaliation for his spoken threat of litigation against a prison guard, such claim was rendered moot by his subsequent release from prison; hence, the trial court properly granted summary judgment to the State under Idaho R. Civ. P. 56(c) and dismissed the inmate's habeas corpus petition. *Freeman v. Idaho Dep't of Corr.*, 138 Idaho 872, 71 P.3d 471 (Ct. App. 2003).

Trial court correctly granted summary judgment on a doctor's employment discrimination claims against a hospital under the Rehabilitation Act of 1973 and the Americans with Disabilities Act because the doctor was an independent contractor and not an employee of the hospital. *Levinger v. Mercy Med. Ctr.*, 139 Idaho 192, 75 P.3d 1202 (2003).

Trial court properly granted summary judgment

ment, pursuant to Idaho R. Civ. P. 56(c), to mining companies in their declaratory judgment action against the Idaho Department of Environmental Quality (DEQ), which claimed that the DEQ's total maximum daily load (TMDL) for a river basin was void; the TMDL was properly considered a rule under Idaho Code § 67-5201(19) because it (1) had wide coverage, (2) was applied generally and uniformly, (3) operated only in future cases, (4) prescribed a legal standard not provided by the enabling statute, (5) expressed new agency policy, and (6) implemented and interpreted existing law, and the rule was void under Idaho Code § 67-5231 because it was not adopted in substantial compliance with the requirements of the Idaho Administrative Procedures Act. *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003).

Summary judgment was properly granted in favor of a city under Idaho R. Civ. P. 56(c) in an action challenging Fruitland, Idaho, Ordinance No. 388 because whether or not the ordinance was void for vagueness was moot after it had been repealed. *Plummer v. City of Fruitland*, 140 Idaho 1, 89 P.3d 841 (2003).

While a home health care consultant argued that the Department of Health and Welfare (Idaho) violated I.C. § 20-525A by relying on internal records that reflected a conviction that was later expunged or sealed, it was not clear that the statute applied because it did not appear from the order that the conviction was actually expunged; nonetheless, the order was not conveyed to the Department, and it did not act unlawfully by maintaining the conviction in the consultant's file, which action did not result in an invasion of the consultant's privacy, and the Department was properly granted summary judgment under Idaho R. Civ. P. 56(c). *Jensen v. State*, 139 Idaho 57, 72 P.3d 897 (2003).

Former I.C. § 67-3515(2) did not apply to a home health care consultant because the consultant acted as an independent contractor; thus, the consultant's related due process claim failed and summary judgment pursuant to Idaho R. Civ. P. 56 was appropriate to dismiss the claim. *Jensen v. State*, 139 Idaho 57, 72 P.3d 897 (2003).

Employee does not have a cause of action against a private sector employer who terminates an employee because of the exercise of the employee's constitutional right of free speech pursuant to Idaho Const. art. I, § 9; thus, the trial court properly granted the private employer summary judgment under Idaho R. Civ. P. 56(c) in connection with the employee's wrongful termination claim that alleged discharge based on an exercise of the employee's free speech rights. *Edmondson v.*

Shearer Lumber Prods., 139 Idaho 172, 75 P.3d 733 (2003), cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004).

Trial court did not err in granting a private employer summary judgment under Idaho R. Civ. P. 56(c) and in rejecting an employee's claim of retaliatory discharge based on the employee's wife's involvement in a federal investigation related to the impoundment of logs on the employer's mill site because the evidence failed to show that there was any causal connection between the investigation and the employer's decision to discharge the employee. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 75 P.3d 733 (2003), cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004).

Trial court properly granted an employer summary judgment under Idaho R. Civ. P. 56(c) in connection with the employee's intentional infliction of emotional distress claim because the employer's conduct in discharging the employee for the employee's opposition to a project the employer supported did not amount to outrageous conduct. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 75 P.3d 733 (2003), cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004).

Legal malpractice action was barred by a two-year statute of limitations because "some damage" occurred when property was transferred to a trust to gain a tax advantage since two clients could have reformed the trust at that time to correct any defects; therefore, a district court did not err by granting summary judgment in favor of several lawyers. *Anderson v. Glenn*, 139 Idaho 799, 87 P.3d 286 (2003).

District court properly granted summary judgment in an easement dispute when the easement agreement was non-exclusive in nature, and did not prohibit the dominant estate from being subdivided, contrary to the argument presented by the neighboring, servient estate owners. *McFadden v. Sein*, 139 Idaho 921, 88 P.3d 740 (2004).

Summary judgment was properly awarded to an insurer, pursuant to Idaho R. Civ. P. 56(c), in an insured's action for breach of contract and breach of the duty of good faith and fair dealing; because there was no claim under the policy, the insurer did not breach the duty of good faith and fair dealing. *Treasure Valley Transit v. Phila. Indem. Ins. Co.*, 139 Idaho 925, 88 P.3d 744 (2004).

Summary judgment was properly granted in favor of the corporation on the company's breach of contract, fraudulent misrepresentation, and fraudulent concealment claims where the company's claim was properly characterized as a professional malpractice claim

and was barred by the statute of limitations, and because the company should have known of the corporation's alleged fraudulent concealment and misrepresentation no later than July 1990, its claims were barred by the three-year statute of limitations. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 140 Idaho 144, 90 P.3d 894 (2004).

Summary judgment was properly granted pursuant to I.R.C.P. 56(c) as to the worker's bad faith claim against the insurer where arbitrating the case prior to the workers' compensation hearing created a unique situation with obvious complications surrounding the offset provision, and the insurer did not act in bad faith in attempting to resolve the complications via a declaratory action. *Am. Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 94 P.3d 699 (2004).

Summary judgment was properly granted under I.R.C.P. 56(c) in favor of the Idaho Department of Administration, Division of Public Works where the business waived its right to contest the bidding process by failing to follow both the procedures for contesting ambiguities within the bidding documents, and by failing to follow the statutory appeal process to challenge the bid documents. *Fieldturf, Inc. v. State*, 140 Idaho 385, 94 P.3d 690 (2004).

Summary judgment was properly granted in favor of the school district on the family's negligence action where the school district did not have a duty to protect the child at the time of the accident; the school bus driver deposited the child in a safe place, and he had not left the area of safety, twenty feet from the highway, when the bus driver left. *Summers v. Cambridge Joint Sch. Dist. No. 432*, 139 Idaho 953, 88 P.3d 772 (2004).

Summary judgment was properly granted in favor of the attorney in the client's malpractice action where the attorney did not breach a duty to follow instructions from the client because he owed no duty to the client to memorialize the oral agreement, and the attorney was also entitled to summary judgment because the client failed to prove that she suffered damages. *McColm-Traska v. Baker*, 139 Idaho 948, 88 P.3d 767 (2004).

Grant of summary judgment in favor of the company was proper pursuant to I.R.C.P. 56(c) where the company did not enter into any agreement or make any representation to pay the wife her community property interest in the husband's shares in the event of divorce; in essence, the agreement was unambiguous with regard to the option given to the company in the event of divorce, and a careful reading by the wife would have revealed that. *Tolley v. THI Co.*, 140 Idaho 253, 92 P.3d 503 (2004).

Summary judgment was properly granted in favor of the county where the trial court did not rest its findings on a danger to public health, safety, and welfare analysis and specifically found that the landowners had not complied with the building code; the affidavits the landowners objected to were properly relied upon because they were sufficient evidence that the landowners had not complied with the appropriate provisions of the building code. *Ada County v. Fuhrman*, 140 Idaho 230, 91 P.3d 1134 (2004).

Summary judgment was properly granted in favor of the buyer where although the creditor argued that no appellate court had construed the language of § 11-402 governing redemptions or ruled on whether the sale of the property in separate parcels pursuant to § 11-304 necessarily dictated that redemption had to be in like manner for separate parcels; thus, invoking a six-month redemption period, the creditor's argument appeared to be premised upon an earlier description of the property as a single tract but, because the property was divided into tracts less than 20 acres, the 6-month redemption period, not the 1-year period for tracts larger than 20 acres, applied. *Nez Perce Tribe v. Little Hope Invs.*, 140 Idaho 219, 91 P.3d 1123 (2004).

Despite an investment company's argument that claims other than civil rights claims, which were excluded under the insurer's policy, might arise, trial court properly granted summary judgment in a declaratory relief action brought by the insurer to determine its duty to defend, as the complaint in this instance was narrowly pleaded, and limited to civil rights claims. *Amco Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 101 P.3d 226 (2004).

—*Sua Sponte*.

Summary judgment may be entered by a court *sua sponte* or on the grounds other than those raised by the moving party; however, in such event, the party against whom the judgment will be entered must be given adequate notice and an opportunity to demonstrate why summary judgment should not be entered. *Mason v. Tucker & Assocs.*, 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994).

Time Limitations.

Although a trial court has discretion to allow parties to supplement or oppose an affidavit submitted with a motion for summary judgment, this rule's time limitations still apply unless the court shortens the time for good cause shown. *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999).

Since the purpose of requiring the moving

party to serve its motion to strike and the supporting brief and affidavits not less than 28 days before the hearing is to give the opposing party an adequate and fair opportunity to support its case, the trial court may, in appropriate circumstances, shorten the time period for good cause shown. *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999).

Where an employee resigned due to her perception that there was a hostile working environment because of an inappropriate romantic relationship between her supervisor and another employee, her constructive discharge claim was time barred. The date the employee gave notice of her resignation was the date on which her claim accrued, not the date her resignation was effective. *Patterson v. State Dep't of Health & Welfare*, — Idaho —, 256 P.3d 718 (2011).

Tort Liability.

A youth ranch did not owe a duty that would create tort liability to a murder victim and his parents as the defendant was not in the care, custody and control of the youth ranch at the time of the murder, the youth ranch had complete discretion as to the defendant's release, and nothing in the record indicated that the youth ranch should have predicted the murder. *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 968 P.2d 215 (1998).

Waiver of Untimeliness Objection.

Where defendant's motion for summary judgment was not served at least ten days prior to the hearing, but the record does not reflect that any objection was made to the court's considering such motion, any error was thereby waived. *Bennett v. Bliss*, 103 Idaho 358, 647 P.2d 814 (Ct. App. 1982).

Where defendants did not list as an issue on appeal the district court's ruling that an expert's affidavit and report submitted on the day of a summary judgment motion hearing was untimely, nor did they cite any authority to support an argument that the district court improperly refused to consider the evidence, the issue was waived. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 979 P.2d 1174 (1999).

Witnesses.

—Credibility.

A determination of credibility should not be made on summary judgment if credibility can be tested in court before the trier of fact. *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989).

—Expert.

Since § 6-1013 requires an expert witness

to possess professional knowledge and expertise coupled with actual knowledge of the applicable community standard, and because the phrase "coupled with" denotes a contemporaneous relationship, awareness of the standard must exist when the expert testimony is given; if contemporaneous awareness is not demonstrated, the expert's testimony is subject to being excluded or stricken at trial, and such evidence is not entitled to evidentiary weight in summary judgment proceedings. *Kunz v. Miciak*, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

Cited in: *Stoddard v. AID Ins. Co. (Mut.)*, 97 Idaho 508, 547 P.2d 1113 (1976); *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978); *Argyle v. Slemaker*, 99 Idaho 544, 585 P.2d 954 (1978); *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978); *Harbaugh v. Myron Harbaugh Motor, Inc.*, 100 Idaho 295, 597 P.2d 18 (1979); *Farmers Ins. Group v. Sessions*, 100 Idaho 914, 607 P.2d 422 (1980); *Huyck v. Hecla Mining Co.*, 101 Idaho 299, 612 P.2d 142 (1980); *Idaho Quarterhorse Breeders Ass'n v. Ada County Fair Bd.*, 101 Idaho 339, 612 P.2d 1186 (1980); *Robinson v. Westover*, 101 Idaho 766, 620 P.2d 1096 (1980); *Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 625 P.2d 417 (1981); *LaChance v. Ross Mach. & Mill Supply, Inc.*, 102 Idaho 505, 633 P.2d 570 (1981); *Nicholson v. Nicholson*, 103 Idaho 437, 649 P.2d 396 (Ct. App. 1982); *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982); *Board of Dentistry ex rel. State v. Clark*, 104 Idaho 87, 656 P.2d 148 (Ct. App. 1982); *Bastian v. City of Twin Falls*, 104 Idaho 307, 658 P.2d 978 (Ct. App. 1983); *Christensen v. Idaho Land Developers, Inc.*, 104 Idaho 458, 660 P.2d 70 (Ct. App. 1983); *Keese v. Fetzek*, 106 Idaho 507, 681 P.2d 600 (Ct. App. 1984); *Bonner Bldg. Supply, Inc. v. Standard Forest Prods., Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984); *Ferrel v. Allstate Ins. Co.*, 106 Idaho 696, 682 P.2d 649 (Ct. App. 1984); *Brummett v. Ediger*, 106 Idaho 724, 682 P.2d 1271 (1984); *Johnson v. Sunshine Mining Co.*, 106 Idaho 866, 684 P.2d 268 (1984); *Lupis v. Peoples Mtg. Co.*, 107 Idaho 489, 690 P.2d 944 (Ct. App. 1984); *Keller v. Holiday Inns, Inc.*, 107 Idaho 593, 691 P.2d 1208 (1984); *Lockhart Co. v. B.F.K., Ltd.*, 107 Idaho 633, 691 P.2d 1248 (Ct. App. 1984); *Jones v. Maestas*, 108 Idaho 69, 696 P.2d 920 (Ct. App. 1985); *Snow's Auto Supply, Inc. v. Dormaier*, 108 Idaho 73, 696 P.2d 924 (Ct. App. 1985); *State, Idaho State Bd. of Accountancy v. League Servs., Inc.*, 108 Idaho 157,

697 P.2d 1171 (1985); *Laight v. Idaho First Nat'l Bank*, 108 Idaho 211, 697 P.2d 1225 (Ct. App. 1985); *Dursteler v. Dursteler*, 108 Idaho 230, 697 P.2d 1244 (Ct. App. 1985); *Heilesen v. Cook*, 108 Idaho 236, 697 P.2d 1250 (Ct. App. 1985); *Tomchak v. Walker*, 108 Idaho 446, 700 P.2d 68 (1985); *M & H Rentals, Inc. v. Sales*, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985); *Wood v. Simonson*, 108 Idaho 699, 701 P.2d 319 (Ct. App. 1985); *Daniels v. Byington*, 109 Idaho 365, 707 P.2d 476 (Ct. App. 1985); *Valley Bank v. Dalton*, 110 Idaho 87, 714 P.2d 56 (Ct. App. 1985); *Resource Eng'g, Inc. v. Nancy Lee Mines, Inc.*, 110 Idaho 136, 714 P.2d 526 (Ct. App. 1985); *Kaupp v. City of Hailey*, 110 Idaho 337, 715 P.2d 1007 (Ct. App. 1986); *Gardner v. Evans*, 110 Idaho 925, 719 P.2d 1185 (1986); *Green v. Bannock Paving Co.*, 111 Idaho 3, 720 P.2d 186 (1986); *Deal v. Cockrell*, 111 Idaho 127, 721 P.2d 726 (1986); *Sullivan v. Allstate Ins. Co.*, 111 Idaho 304, 723 P.2d 848 (1986); *Jones v. EG & G Idaho, Inc.*, 111 Idaho 591, 726 P.2d 703 (1986); *First Sec. Bank v. Woolf*, 111 Idaho 680, 726 P.2d 792 (Ct. App. 1986); *Herrold v. Idaho State Sch. for Deaf & Blind*, 112 Idaho 410, 732 P.2d 379 (Ct. App. 1987); *Rice v. Miniver*, 112 Idaho 1069, 739 P.2d 368 (1987); *Anderton v. Herrington*, 113 Idaho 73, 741 P.2d 360 (Ct. App. 1987); *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987); *Rook v. Trout*, 113 Idaho 652, 747 P.2d 61 (1987); *McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987); *Zumwalt v. Stephan, Balleisen & Slavin*, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987); *Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988); *Leppaluoto v. Warm Springs Hollow Homeowners Ass'n*, 114 Idaho 3, 752 P.2d 605 (1988); *Greene v. Truck Ins. Exch.*, 114 Idaho 63, 753 P.2d 274 (Ct. App. 1988); *NBC Leasing Co. v. R & T Farms, Inc.*, 114 Idaho 141, 754 P.2d 454 (Ct. App. 1988); *Bates v. Eastern Idaho Regional Medical Ctr.*, 114 Idaho 252, 755 P.2d 1290 (1988); *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988); *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988); *City of Rexburg v. Madison County*, 115 Idaho 88, 764 P.2d 838 (1988); *Davis v. First Interstate Bank*, 115 Idaho 169, 765 P.2d 680 (1988); *Dekker v. Magic Valley Regional Medical Ctr.*, 115 Idaho 332, 766 P.2d 1213 (1988); *Black v. Fireman's Fund Am. Ins. Co.*, 115 Idaho 449, 767 P.2d 824 (Ct. App. 1989); *White v. University of Idaho*, 115 Idaho 564, 768 P.2d 827 (Ct. App. 1989); *Stephan v. Hoops Constr. Co.*, 115 Idaho 894, 771 P.2d 912 (1989); *Fagundes v. State*, 116 Idaho 173, 774 P.2d 343 (Ct. App. 1989); *Markham v. Anderton*, 118 Idaho 856, 801 P.2d 565 (Ct. App. 1990); *Burgess v. Salmon*

River Canal Co., 119 Idaho 299, 805 P.2d 1223 (1991); *Idaho County Property Owners Ass'n v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 805 P.2d 1233 (1991); *Maselli v. Ginner*, 119 Idaho 702, 809 P.2d 1181 (Ct. App. 1991); *Bowen v. Heth*, 120 Idaho 452, 816 P.2d 1009 (Ct. App. 1991); *Perkins v. Highland Enters., Inc.*, 120 Idaho 511, 817 P.2d 177 (1991); *George v. University of Idaho*, 121 Idaho 30, 822 P.2d 549 (Ct. App. 1991); *Wooden v. First Sec. Bank*, 121 Idaho 98, 822 P.2d 995 (1991); *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993); *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 888 P.2d 383 (1994); *Crown v. State, Dep't of Agric.*, 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994); *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Ct. App. 1995); *Burlington N., Inc. v. Idaho State Tax Comm'n*, 126 Idaho 645, 889 P.2d 79 (1995); *Volco, Inc. v. Lickley*, 126 Idaho 709, 889 P.2d 1099 (1995); *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995); *Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995); *Sutheimer v. Stoltenberg*, 127 Idaho 81, 896 P.2d 989 (Ct. App. 1995); *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 899 P.2d 411 (1995); *Gordon v. Three Rivers Agency, Inc.*, 127 Idaho 539, 903 P.2d 128 (Ct. App. 1995); *Empire Fire & Marine Ins. Co. v. North Pac. Ins. Co.*, 127 Idaho 716, 905 P.2d 1025 (1995); *Kent v. Farm Bureau Mut. Ins. Co.*, 127 Idaho 776, 906 P.2d 146 (Ct. App. 1995); *Continental Cas. Co. v. Brady*, 127 Idaho 830, 907 P.2d 807 (1995); *Mutual of Enumclaw v. Box*, 127 Idaho 851, 908 P.2d 153 (1995); *Nationsbanc Mtg. Corp. v. Cazier*, 127 Idaho 879, 908 P.2d 572 (Ct. App. 1995); *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 912 P.2d 119 (1996); *Gumprecht v. Doyle*, 128 Idaho 242, 912 P.2d 610 (1995); *Higginson v. Wadsworth*, 128 Idaho 439, 915 P.2d 1 (1996); *TTX Co. v. Idaho State Tax Comm'n*, 128 Idaho 483, 915 P.2d 713 (1996); *Figuerola v. Merrick*, 128 Idaho 840, 919 P.2d 1041 (Ct. App. 1996); *Jones v. Micron Technology, Inc.*, 129 Idaho 241, 923 P.2d 486 (Ct. App. 1996); *Lamb v. Manweiler*, 129 Idaho 269, 923 P.2d 976 (1996); *Petersen v. Franklin County*, 130 Idaho 176, 938 P.2d 1214 (1997); *Roell v. Boise City*, 130 Idaho 199, 938 P.2d 1237 (1997); *Mugavero v. A-1 Auto Sales, Inc.*, 130 Idaho 554, 944 P.2d 151 (Ct. App. 1997); *Navarrete v. City of Caldwell*, 130 Idaho 849, 949 P.2d 597 (Ct. App. 1997); *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 956 P.2d 674 (1998); *Butters v. Hauser*, 131 Idaho 498, 960 P.2d 181 (1998); *West v. Sonke*, 132 Idaho 133, 968 P.2d 528 (1998); *Diamond v. Sandpoint Title Ins., Inc.*, 132 Idaho 145, 968 P.2d 240 (1998); *McGilvray v. Farmers New World Life Ins. Co.*, 136 Idaho 39, 28 P.3d

380 (2001); *Vincent v. Safeco Ins. Co. of Am.*, 136 Idaho 107, 29 P.3d 943 (2001); *Storm v. Spaulding*, 137 Idaho 145, 44 P.3d 1200 (Ct. App. 2002); *State, Dept. of Health & Welfare v. Estate of Elliott* (In re Estate of Elliott), 141 Idaho 177, 108 P.3d 324 (2005); *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005); *Freiburger v. J-U-B Eng'rs, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005); *State v. Estate of Kaminsky* (In re Estate of Kaminsky), 141 Idaho 436, 111 P.3d 121 (2005); *VanVooren v. Astin*, 141 Idaho 440, 111 P.3d 125 (2005); *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785 (2005); *Atwood v. Smith*, 143

Idaho 110, 138 P.3d 310 (2006); *Turner v. Cold Springs Canyon*, 143 Idaho 227, 141 P.3d 1096 (2006); *J-U-B Eng'rs, Inc. v. Sec. Ins. Co.*, 146 Idaho 311, 193 P.3d 858 (2008); *Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos.*, 147 Idaho 84, 205 P.3d 1220 (2009); *Lawrence v. Hutchinson*, 146 Idaho 892, 204 P.3d 532 (2009); *Jones v. Healthsouth Treasure Valley Hosp.*, 147 Idaho 109, 206 P.3d 473 (2009); *Matthews v. Jones*, 147 Idaho 224, 207 P.3d 200 (2009); *State v. Maybee*, 148 Idaho 520, 224 P.3d 1109 (2010); *T.J.T., Inc. v. Mori*, — Idaho —, 266 P.3d 476 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Accord and Satisfaction.

Appeal.

Conflict of Issues.

Damages.

Determination of Motion.

Failure to State Cause of Action.

Final Judgment.

In General.

Interlocutory Judgment.

Issue of Material Fact.

Judgment on Part of Issues.

Lack of Genuine Issue of Fact.

Lack of Jurisdiction over Subject Matter.

Negligence and Contributory Negligence.

Third Party Complaint.

Unresolved Questions.

Accord and Satisfaction.

Where the entire transaction looking to the liquidation of the debt and financial accounting was fraught with the uncertainty attendant to the lack of meeting of the minds as regards details, thus necessitating settlement upon the basis of accord and satisfaction, the record in such case showed no genuine issue as to any material fact nor did it raise the question of the credibility of the witnesses or weight of the evidence. *Rush v. G-K Mach. Co.*, 84 Idaho 10, 367 P.2d 280 (1961).

Appeal.

Assignment of error claimed by appellant to have been committed by the district court in granting respondent's motion for a summary judgment presented the question whether there was any genuine issue as to any material fact for determination de novo in the district court. *Killgore v. Killgore*, 84 Idaho 226, 370 P.2d 512 (1962); *Yribar v. Fitzpatrick*, 87 Idaho 366, 393 P.2d 588 (1964).

On appeal from order granting motion for summary judgment the review of its validity required that the allegations of fact contained

in appellant's defenses be considered as true. *Allen v. Ruby Co.*, 87 Idaho 1, 389 P.2d 581 (1964).

On appeal from an order granting summary judgment, Supreme Court must construe evidence liberally in favor of the party opposing the order and accord him the benefit of all inferences which might be reasonably drawn. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972).

In reviewing an order granting summary judgment, the Supreme Court will only determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Stewart v. Hood Corp.*, 95 Idaho 198, 506 P.2d 95 (1973).

Conflict of Issues.

Trial judge did not err in denial of appellant's motion for summary judgment where the motion was based upon affidavits of three of appellant's employees and the deposition of one respondent but was opposed by affidavit of the same respondent and the affidavit of the other respondent, such instruments showing definite conflict as regards the issues of fact involved in the case. *Anderson v. Smith Frozen Foods, Inc.*, 83 Idaho 494, 365 P.2d 965 (1961).

In an action on an insurance policy on the life of plaintiff's wife, a summary judgment for plaintiff was error where "the pleadings, depositions, and admissions on file, together with the affidavits" showed that prior to the application for the policy, physicians had discovered a malignant tumor on said wife's right kidney but had not disclosed such discovery to either the husband or the wife. *Malone v. Continental Life & Accident Co.*, 89 Idaho 77, 403 P.2d 225 (1965).

In an action for injury to plaintiff from being caught in a sprinkler operated by him for the defendant-employer, where the plain-

tiff alleged that he had warned the defendant that said sprinkler was dangerous without weights and continued to operate it in reliance on defendant's promise to install weights and defendant alleged that he had warned plaintiff against operating the sprinkler without weights and that plaintiff operated it in disregard of such warning, there was a genuine issue of fact which precluded the rendering of a summary judgment. *Deshazer v. Tompkins*, 89 Idaho 347, 404 P.2d 604 (1965).

It was error to render a summary judgment for the owner-defendant in an action for damages caused by the negligent operation of a motor vehicle where the pleadings and affidavits on file showed such defendant to be the owner of the vehicle and that, at the time of the alleged collision, it was operated by an employee of such owner-defendant, such situation creating an inference of permission and, therefore, a genuine issue of fact. *Steele v. Nagel*, 89 Idaho 522, 406 P.2d 805 (1965).

Where, in a suit upon a note given for the payment of the wife's attorney fee in a divorce action, the defendant claimed that he had signed a note in blank and plaintiff had filled it in for an amount larger than that agreed upon and that he had subsequently been discharged in bankruptcy in which he listed said note among his debts and plaintiff contended the note was a debt "for support of a wife" and, therefore, not dischargeable in bankruptcy, there was a genuine issue of fact so as to preclude a summary judgment for defendant. *Reeves v. Andersen*, 89 Idaho 512, 406 P.2d 812 (1965).

It was error to render a summary judgment under this rule for the defendant in an action by a subcontractor against the general contractor on a school building construction project for injuries sustained by the subcontractor from falling through a "buck hole" in the floor, where the evidence was that the fall occurred when the contractor and subcontractor were walking about the building discussing work to be done by the subcontractor, with the subcontractor looking at and pointing to the ceiling and it was disputed whether or not the contractor was negligent in failing to warn the subcontractor of the presence of the "buck hole." *Ottis v. Brough*, 90 Idaho 124, 409 P.2d 95 (1965), superseded by statute as stated in *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989).

In an action for personal injuries received by plaintiff's thirteen-year-old son from a pistol sold to him by defendant without plaintiff's knowledge or consent, summary judgment for defendant was improper where there was a question of fact as to whether plaintiff's wife had acquiesced in the boy's possession of

the pistol by failure to order it taken from him upon learning of his possession of it, and, if so, whether such acquiescence was an intervening, efficient cause of the injury, so as to deprive defendant's act of being the proximate cause. *Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966).

In a real estate broker's action to recover a commission, where the documents submitted in support of motions of the parties for summary judgment showed that the broker had not secured a buyer ready, willing, and able to purchase the property under the authorized terms or terms acceptable to the owner and there was dispute as to whether or not the owner had wrongfully withdrawn the broker's authority to sell, it was error to render a summary judgment for the plaintiff and not error to deny defendant's motion for summary judgment. *Central Idaho Agency, Inc. v. Turner*, 92 Idaho 306, 442 P.2d 442 (1968).

Where the record raised factual differences regarding certain issues, such differences could not be resolved on a motion for summary judgment. *Cohen v. Merrill*, 95 Idaho 99, 503 P.2d 299 (1972).

Motion for summary judgment was properly denied where affidavits filed relative to such motion conflicted concerning the material factual issue of the existence of a master-servant relationship at the time of the accident. *Holve v. Draper*, 95 Idaho 193, 505 P.2d 1265 (1973).

Damages.

Where the record shows no genuine issue as to any material fact other than a question of damages, a summary judgment was proper where the appellant did not show himself entitled to relief. *James v. State*, 88 Idaho 172, 397 P.2d 766 (1964).

Determination of Motion.

A motion for summary judgment should be denied if the pleadings, admissions, depositions and affidavits raise any question of credibility of witnesses or weight of the evidence. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

A motion for summary judgment must be denied if the evidence is such that conflicting inferences could be drawn therefrom, or if reasonable men might reach different conclusions. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

Where a sharp dispute existed between the parties as to whether their relationship was that of employer-employee or principal-independent contractor and reasonable minds could differ as to the inferences to be drawn from the facts shown, it was error to grant respondent's motion for summary judgment.

Merrill v. Duffy Reed Constr. Co., 82 Idaho 410, 353 P.2d 657 (1960).

Trial court when confronted by motion for summary judgment must determine if there are factual issues which should be resolved by the trier of facts; on such motion it is not the function of the trial court to weigh the evidence or determine the issues, and all doubts must be resolved against the party moving for a summary judgment. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960); *Killgore v. Killgore*, 84 Idaho 226, 370 P.2d 512 (1962); *Anderton v. Waddell*, 86 Idaho 220, 384 P.2d 675 (1963).

In suit by purchaser of land for damages because of inability of seller to furnish clear title, in which escrow agent was joined as a defendant, summary judgment dismissing the suit as to the escrow agent was proper. *Foreman v. Todd*, 83 Idaho 482, 364 P.2d 365 (1961).

Inasmuch as matters outside the pleadings in the form of affidavits and exhibits were presented to the trial court and considered, the motion for dismissal was properly treated as one for summary judgment and disposed of as provided in the former identical rule. *Rush v. G-K Mach. Co.*, 84 Idaho 10, 367 P.2d 280 (1961).

On appeal from grant of summary judgment dismissing action brought by a pedestrian, it is recognized that the evidence presented at the hearing upon a motion for a summary judgment must be liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Jack v. Fillmore*, 85 Idaho 36, 375 P.2d 321 (1962).

Where the affirmative defenses pleaded did not state a legal defense and alleged counterclaims were properly stricken, there being no issue of material fact remaining, the trial court was correct in granting its summary judgment. *Allen v. Ruby Co.*, 87 Idaho 1, 389 P.2d 581 (1964).

Summary judgment will be granted whenever on the basis of the evidence before the court a directed verdict would be warranted or whenever reasonable men could not disagree as to the facts. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

Nowhere does the rule require the filing of counter-affidavits merely because the motion may be supported by affidavits; what is critical is that support for and opposition to a motion for a summary judgment be based upon factual details of equal specificity regardless of whether the source is depositions or affidavits. *Vincen v. Lazarus*, 93 Idaho 145, 456 P.2d 789 (1969).

Motion for summary judgment should be denied if the pleadings, affidavits and depositions raise any question of credibility of witnesses. *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 460 P.2d 739 (1969).

Where affidavits submitted by plaintiff and his wife established that certain statements were made by insurance company's agent that an insurance policy would cover the costs of treatment of pre-existing medical conditions without regard to the contractual limits of the policy, a genuine issue of material fact was presented, so that the magistrate's court erred in granting summary judgment to the insurance company. *Ponsness v. New York Life Ins. Co.*, 96 Idaho 769, 536 P.2d 1119 (1975).

Summary judgment was properly granted where an earnest money agreement for the sale of land was too ambiguous to support the alleged buyers' demand for either specific performance or damages upon sellers' refusal to convey. *Matheson v. Harris*, 96 Idaho 759, 536 P.2d 754 (1975).

Implicit in the former rule was the requirement that there be a motion for summary judgment; therefore, the trial court's granting of summary judgment in favor of building contractor against subcontractor when there was no motion for summary judgment before the court was prejudicial error which was not cured by the subsequent filing of a motion for summary judgment by building contractor, where, in the later proceeding which affirmed summary judgment against subcontractor, the trial court did not appear to consider subcontractor's affidavit in opposition to the belated motion. *Idaho State Univ. v. Mitchell*, 97 Idaho 724, 552 P.2d 776 (1976).

Failure to State Cause of Action.

An action for interest alleged to be due on a contract, the copy of which filed with the complaint contained no provision for interest and which complaint showed that all payments of principal had been paid, was subject to dismissal with prejudice for failure to state a cause of action. *Linford v. Hunsaker*, 92 Idaho 505, 446 P.2d 627 (1968).

Final Judgment.

On appeal taken upon a determination that a child's death was the result of gross negligence on the part of defendant, defendant being liable as a matter of law and the only issue remaining to be resolved being the amount of damages, such judgment while having the character of finality was declared by rule to be interlocutory in character due to the amount of damages not being determined and while the negligence of defendant could be determined upon appeal from a final judg-

ment, it could not be upon the attempted appeal from the interlocutory judgment. *Clear v. Marvin*, 83 Idaho 399, 363 P.2d 355 (1961).

In General.

Where the record showed no genuine issue of material fact the trial court was correct, as a matter of law, in granting a summary judgment. *Yribar v. Fitzpatrick*, 87 Idaho 366, 393 P.2d 588 (1964); *Minidoka County ex rel. Detweiler Bros. v. Krieger*, 88 Idaho 395, 399 P.2d 962 (1964).

In passing on a motion under former identical rule or a motion under Rule 12(b)(6) treated as such, the court must not try issues of fact, but only determine if issues of fact exist and if the facts are material. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 446 P.2d 895 (1968).

A mere scintilla of evidence will not create an issue; there must be evidence upon which a jury can rely. *Jephson v. Ambuel*, 93 Idaho 790, 473 P.2d 932 (1970).

Summary judgment can be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Schaefer v. Elsworth Trailer Sales*, 95 Idaho 654, 516 P.2d 1168 (1973).

Interlocutory Judgment.

Since a summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages, appellant employee could be compensated for what he had parted with, his work already performed under an oral contract of employment and the expenses of moving his family to the place of his employment. *Allen v. Moyle*, 84 Idaho 18, 367 P.2d 579 (1961).

An interlocutory summary judgment is not appealable. *Lloyd v. Lloyd*, 95 Idaho 108, 503 P.2d 308 (1972).

Issue of Material Fact.

A motion for summary judgment should be denied where the matters submitted in support of and in opposition to the motion show a genuine issue as to any material fact, as where a lending corporation contracted to make payments from a construction loan direct to the contractor and defended against such obligation in a suit by the contractor on the ground of lack of consideration and the contractor contended he was induced by such agreement to contract with the owner-borrower. *H.A. Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 428 P.2d 524 (1967).

In an action for the balance due on a conditional contract of sale in which plaintiff

claimed acceleration because of default in payment of instalments, an affidavit by defendant that all payments due on the contract up to and including the time of the alleged default presented an issue of material fact and precluded the entry of a summary judgment for plaintiff. *Christiansen v. Rumsey*, 91 Idaho 684, 429 P.2d 416 (1967).

To forestall a summary judgment, factual disputes must concern an issue of material fact. *American Mach. Co. v. Fitzpatrick*, 92 Idaho 416, 443 P.2d 1013 (1968).

If a party moves for summary judgment on the basis of an affirmative defense which entitles him to judgment as a matter of law, and if there is no genuine dispute of material fact as to that defense, even though a dispute of fact may exist as to the merits of the plaintiff's claim, summary judgment should be granted. *Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535 (1969).

A summary judgment cannot be granted where there are any disputed issues of material fact. *D & M Dev. Co. v. Sherwood & Roberts, Inc.*, 93 Idaho 200, 457 P.2d 439 (1969).

Where a 3 ½ year old tenant of an apartment building sustained permanent injuries by placing her hand into the wringer assembly of a washing machine which should have released automatically when her hand was placed in the mechanism, a genuine issue of material fact existed as to whether the washing machine was attractive to children and whether the injured child was attracted to the machine. *Davis v. McDougall*, 94 Idaho 61, 480 P.2d 907 (1971).

Where the record showed unresolved genuine issues as to material facts in an action by law partnership for fees against county for representing judge in action against him for a writ of review of contempt order, the summary judgment was reversed. *Kramer v. Twin Falls County*, 94 Idaho 357, 487 P.2d 951 (1971).

In determining whether any issue of material fact is in dispute, it is well settled that the facts should be liberally construed in favor of the party against whom summary judgment is sought. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972); *First Piedmont Bank & Trust Co. v. Doyle*, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, *Yacht Club Sales & Serv., Inc. v. First Nat'l Bank*, 101 Idaho 852, 623 P.2d 464 (1980).

Summary judgment is improper when a conflict in affidavits respecting issues of fact exists or when the relevant pleadings, depositions and affidavits raise any question of credibility of witnesses, but a mere scintilla of

evidence will not create a genuine issue of material fact sufficient to preclude summary judgment. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972); *Hutchins v. Trombley*, 95 Idaho 360, 509 P.2d 579 (1973).

In action for specific performance of offer to buy where there was a question of whether the parties intended the writings involved to be offers, whether there was an effective revocation if there were valid offers and whether there was an unqualified acceptance of any valid offer, granting of summary judgment was error. *Turner v. Mendenhall*, 95 Idaho 426, 510 P.2d 490 (1973); *Hutchins v. Trombley*, 95 Idaho 360, 509 P.2d 579 (1973).

Where two of the allegations of opposing affidavits were made upon advice and belief and belief and information and one allegation was merely an assertion of what affiant hoped would be shown at trial there was no genuine issue as to any material fact and thus court did not err in granting motion for summary judgment. *Tapper Chevrolet Co. v. Hansen*, 95 Idaho 436, 510 P.2d 1091 (1973).

In action for malpractice against doctor in the use of X-ray treatments since in 1946 where there were factual issues as to whether X-rays were ionizing radiation so that action would be governed by limitation provision of law enacted in 1967, there were factual issues to be resolved by the triers of fact and thus it was error to grant motion for summary judgment. *Arnold v. Woolley*, 95 Idaho 604, 514 P.2d 599 (1973).

Where there were questions of fact as to whether any of the allegedly tortious acts were committed, whether the allegedly slanderous statements were uttered with malice and whether the alleged interference with contract was justified, all of which were jury questions, it was error to grant defendant's motion for summary judgment. *Barlow v. International Harvester Co.*, 95 Idaho 881, 522 P.2d 1102 (1974).

Where defendant moved for summary purchase for a specified amount and lessors refused to sell when lessee properly exercised the option, lessors claiming lack of consideration for the option, the trial court incorrectly granted summary judgment to lessee as there existed the material issue of consideration. *Vance v. Connell*, 96 Idaho 417, 529 P.2d 1289 (1974).

In an action by the state against a surety to enforce payment under a grain warehouse bond, where officers of the warehouseman had agreed to indemnify the surety for any loss but received no compensation for such agreement, the unresolved factual issue as to whether the officers were gratuitous sureties precluded rendition of a summary judgment.

State, Dep't of Agric. v. Millers Nat'l Ins. Co., 97 Idaho 323, 543 P.2d 1163 (1975).

Judgment on Part of Issues.

In action for a declaratory judgment to adjudge ownership of certain timber growing on land of respondents, where the evidence showed appellant's bill of sale for the timber was void as a matter of law and that the appellant had paid one of respondents \$600 for said timber, the trial court was correct in granting a summary judgment for respondents as to the ownership of the timber although the facts did not show as a matter of law that respondents were entitled to retain the \$600. *Fairchild v. Wiggins*, 85 Idaho 402, 380 P.2d 6 (1963).

Lack of Genuine Issue of Fact.

In an action by a real estate agent to recover a commission for the sale of real estate predicated on an acknowledgment in the contract of sale that the sellers had employed him and would pay any fee or commission to which he might be entitled and hold the buyers harmless from any liability therefor and without a written contract between the agent and the sellers, a summary judgment was proper. *Robertson v. Hansen*, 89 Idaho 107, 403 P.2d 585 (1965).

Summary judgment for defendants was proper where an employee of State Hospital South, injured by a truck owned by the hospital and operated by a patient on state business, first received workmen's compensation and then sued the state and the patient as third party tortfeasors. *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

Where deposition of plaintiff's son refuted the allegation of negligence, plaintiff made no counter showing to these statements by way of affidavit or deposition and defendant met the burden of showing the absence of any genuine issue of material fact, court did not err in entering summary judgment for respondent. *Albers v. Independent Sch. Dist. No. 302*, 94 Idaho 342, 487 P.2d 936 (1971).

In action involving contest of proceeds of life insurance policy, where divorced wife's interest as beneficiary of insurance policy was defeated by property settlement agreement incorporated into divorce decree awarding proceeds of policy to husband, there was no genuine issue of as to any material fact and thus summary judgment was proper. *Beneficial Life Ins. Co. v. Stoddard*, 95 Idaho 628, 516 P.2d 187 (1973).

Where defendant moved for summary judgment and plaintiff enumerated no disputed facts, nor were any apparent from a review of the record, the trial court properly granted

the motion. *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974).

Lack of Jurisdiction over Subject Matter.

Motion for summary judgment dismissing cause for lack of jurisdiction over subject matter could be more correctly viewed as a motion to dismiss for lack of jurisdiction over the subject matter pursuant to Rule 12(b). *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969).

Negligence and Contributory Negligence.

A child is held to that standard of care which could be expected from an ordinary child of the same age, experience, knowledge and discretion, and these factors vary so greatly among children, that it is preferable to submit the issue of their conduct to a jury.

Crane v. Banner, 93 Idaho 69, 455 P.2d 313 (1969).

Third Party Complaint.

In an action by the state against a surety where affidavits were submitted for and against motions to dismiss surety's third party complaint, the trial court's order dismissing the third party complaint was treated on appeal as one granting summary judgment. *State, Dep't of Agric. v. Millers Nat'l Ins. Co.*, 97 Idaho 323, 543 P.2d 1163 (1975).

Unresolved Questions.

The granting of the motion for summary judgment was error where there were unresolved questions of fact as to whether some of the claimants of the lands involved in a trusteeship might be bona fide purchasers without notice of the existence of the trust. *Jones v. State*, 85 Idaho 135, 376 P.2d 361 (1962).

RESEARCH REFERENCES

A.L.R. Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

Rule 56(d). Case not fully adjudicated on motion for summary judgment.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

JUDICIAL DECISIONS

ANALYSIS

Declaratory Action.
Divorce Decree.
Interrogation of Counsel.
Settlement.
Standard of Review.

Declaratory Action.

If a city does not follow the procedures set forth for altering a highway district, it does not obtain jurisdiction over streets located inside of the district; therefore, a district

court erred by granting a city's motion for partial summary judgment in a case where the city sought to obtain jurisdiction over streets in a highway district by merely establishing a functioning street department. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 72 P.3d 905 (2003).

Divorce Decree.

Where the plaintiff wife initially sought the divorce and argued that a divorce should be granted to her, and the entry of the partial summary judgment decree granting the di-

voiced but reserving additional issues for a later trial enabled the defendant husband to remarry, as he did, and the plaintiff took advantage of the favorable provisions of the decree of divorce, it was unconscionable for her to subsequently maintain an inconsistent position, and therefore, she was estopped from denying the validity of the decree of divorce. *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982), superseded on other grounds, *Stephens v. Stephens*, 138 Idaho 195, 61 P.3d 63 (Ct. App. 2002).

Interrogation of Counsel.

While this rule does refer to interrogating counsel, the interrogation is not a necessary prerequisite to determining what facts are without substantial controversy, as the statements of counsel upon interrogation could not create a genuine issue of material fact; only pleadings, depositions, and admissions on file, together with any affidavits, may be examined to determine if there are genuine issues of material fact. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

Settlement.

Where approximately one year and four months after parties involved in auto accident entered into a settlement regarding injuries

suffered in the accident, injured party discovered that she had incurred a herniated disc that required surgery which was unknown at the time the settlement was entered into, and by affidavits and medical records placed in evidence she successfully raised the factual question of whether the herniated disc was or should have been known at the time of settlement, there was a genuine issue for trial which precluded summary judgment. *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Ct. App. 1995).

Standard of Review.

When reviewing a grant of summary judgment, the Supreme Court employs the same standard as that used by the trial court when ruling on the motion. Summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Selkirk-Priest Basin Ass'n v. State ex rel. Batt*, 128 Idaho 831, 919 P.2d 1032 (1996).

Cited in: *Brummett v. Ediger*, 106 Idaho 724, 682 P.2d 1271 (1984); *Lockhart Co. v. B.F.K., Ltd.*, 107 Idaho 633, 691 P.2d 1248 (Ct. App. 1984); *CIT Fin. Servs. v. Herb's Indoor RV Ctr.*, 108 Idaho 820, 702 P.2d 858 (Ct. App. 1985); *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985).

DECISIONS UNDER PRIOR RULE OR STATUTE

Necessity for Further Proceedings.

Where the trial court in a summary judgment correctly adjudicated the ownership of certain timber in controversy, but failed to direct further proceedings to determine appellant's right to recover the money paid for

the timber, the cause was remanded with directions for the trial court to proceed with the cause on the issue of appellant's right to restitution of the moneys paid. *Fairchild v. Wiggins*, 85 Idaho 402, 380 P.2d 6 (1963).

RESEARCH REFERENCES

A.L.R. Reviewability of order denying motion for summary judgment. 15 A.L.R.3d 899.

Rule 56(e). Form of affidavits — Further testimony — Defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the

party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

JUDICIAL DECISIONS

ANALYSIS

Affirmative Defenses.
 Appellate Review.
 Disclosure in Pleadings.
 Discretion of Court.
 Exhibits.
 Expert Witnesses.
 —Compliance.
 —Familiarity with Community Standards.
 Failure to Object.
 General Denials.
 Genuine Issue of Material Fact.
 Hearsay.
 Lack of Affidavits.
 Medical Standard of Care.
 Motion.
 —Evidence for Summary Judgment.
 Opinion Evidence.
 Reviewability of Exhibits.
 Specific Facts Supporting Allegation.
 Sufficiency.
 — Affidavits.
 —Attachments.
 — Evidence.
 Summary Disposition.
 Timeliness.
 Verified Complaint.
 —Nonconforming.

Affirmative Defenses.

Nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment. *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (2009).

Appellate Review.

Where the trial court clearly informed plaintiff he would have to submit an "appropriate motion" in order to amend his expert's affidavit, and instead plaintiff chose to rely on the original affidavit, the trial court did not abuse its discretion in denying plaintiff's leave to amend. *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994).

The Supreme Court, upon review, is to liberally construe the facts in the existing record in favor of the nonmoving party and to draw all reasonable inferences from the record in favor of the nonmoving party; in this process, the Court must look to the totality of the motions, affidavits, depositions, pleadings, and attached exhibits, not merely to

portions of the record in isolation. *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

Although depositions were part of the record before appellate court by way of augmentation of the record after appeal, appellate court reviews only that portion of the record which was before the trial court at the time the summary judgment motion was presented. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 801 P.2d 37 (1990).

Disclosure in Pleadings.

To constitute a material issue of fact, a dispute concerning a matter which would determine the cause must be disclosed by the pleadings. *First Sec. Bank v. Absco Whse., Inc.*, 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983).

Discretion of Court.

A motion for an extension of time to file additional affidavits, depositions, and interrogatories in opposition to a motion for summary judgment lies within the discretion of the district court. *Bennett v. Bliss*, 103 Idaho 358, 647 P.2d 814 (Ct. App. 1982).

Idaho Rules of Civil Procedure, Rule 43(e), authorizes oral testimony at summary judgment proceedings, however, the court may exercise its discretion to request affidavits as the preferred method of presenting facts relevant in a summary judgment proceeding; and the court may limit any testimony tending to create a "mini-trial" on a summary judgment motion. *Johnson v. City of Homedale*, 118 Idaho 285, 796 P.2d 162 (Ct. App. 1990).

Exhibits.

Except when live testimony is allowed, exhibits must be mentioned in, or attached to, a party's verified complaint or affidavit. *Johnson v. City of Homedale*, 118 Idaho 285, 796 P.2d 162 (Ct. App. 1990).

Expert Witnesses.

The expert referred to sufficient facts contained in the record regarding the injuries sustained by the decedent to provide a foundation for the admissibility of his opinion. *Kessler v. Barowsky*, 129 Idaho 647, 931 P.2d 641 (1997).

In action alleging breach in agreement con-

cerning sale of plaintiff's shares of stock of corporation formed by plaintiff and defendant to defendant, upon motion for summary judgment action of district court in refusing to consider affidavit of plaintiff's expert witness in challenging the manner in which corporation was showing its profits and losses on reasoning that evidence presented was inadmissible because there was no foundation and based upon court's knowledge of accounting principles and the expert's basis for his opinion was flawed and fundamentally unsound, was improper because the court instead of determining the admissibility of evidence prepared by an expert witness by examining foundational issues before ruling on summary judgment used the term "foundation" to criticize the facts considered and opinions held by the expert, and this was nothing more than a weighing of evidence and a determination of a witness's credibility, which is improper in a motion for summary judgment. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

The trial court did not abuse its discretion in dismissing the claims against defendants, because the affidavits of the plaintiff's expert did not show that the expert had familiarized himself with the standard of care for those health care professionals. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

The district court abused its discretion in holding that plaintiff's expert in his third affidavit did not raise genuine issues of material fact; it referred to sufficient facts regarding the cause of plaintiff's torn rotator cuff to provide a foundation for the admissibility of his opinion that the injury to plaintiff's shoulder occurred during the surgical transfers of plaintiff's body. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

—Compliance.

Expert witness physician's affidavits did not comply with this rule because they did not affirmatively show that he possessed the professional knowledge and expertise to testify to the hospital's standard of care as affidavits did not state he was trained as hospital administrator or experienced in hospital management. *Dunlap ex rel. Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1995).

—Familiarity with Community Standards.

It is sufficient for the out-of-state expert to gain the requisite familiarity with the standards of the community by conferring with local authorized personnel and stating that the standard did not deviate from the na-

tional standard. *Dunlap ex rel. Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1995).

Failure to Object.

In a motion for reconsideration of a summary judgment in a slip and fall case, absent an objection to the admissibility of a store manager's affidavit, the court could consider the affidavit even if the manager lacked personal knowledge. *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, 251 P.3d 602 (2011).

General Denials.

If a motion for summary judgment is supported by a particularized affidavit, the opposing party may not rest upon bare allegations or general denials. *State ex rel. Dep't of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990).

Genuine Issue of Material Fact.

In an action to recover damages for injuries occurring more than two years before filing of plaintiff's complaint, where defendant foreign corporation's affidavit in support of motion for summary judgment that plaintiff had known defendant's address shortly after the injury and had mailed claim letter to that address, plaintiff's opposition affidavit which recited that plaintiff had diligently attempted to locate defendant did not controvert or present genuine issues as to material facts as set out in defendant's affidavits. *Lipe v. Javelin Tire Co.*, 97 Idaho 805, 554 P.2d 1302 (1976).

The grant of summary judgment in favor of the State Tax Commission was proper even though the Commission had filed no affidavit in support of its motion for summary judgment, where there was no genuine issue of material fact. *V-1 Oil Co. v. State Tax Comm'n*, 112 Idaho 508, 733 P.2d 729 (1987).

Affidavits of the expert witnesses offered in support of the motion for summary judgment were devoid of statements indicating actual knowledge of the standard of practice in the community; therefore, the burden never shifted to the plaintiffs to show that there was a genuine issue for trial. *Pearson v. Parsons*, 114 Idaho 334, 757 P.2d 197 (1988).

Even without an affidavit or other "opposing evidentiary matter" presented by the non-moving party, summary judgment is not "appropriate," as that term should be understood in the last sentence of this rule, if the motion for summary judgment fails to eliminate all genuine issues of material fact. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991).

Since the trial court did not err in striking the portion of witness' affidavit which attempted to state an expert opinion on the frequency of flooding, the remainder of witness' affidavit failed to establish that there

would be either "frequent and inevitably recurring inundation" of their lands or that there was a "future probability of flooding" of their lands. Without such evidence, plaintiffs failed to prove that there existed any evidence raising a genuine issue of material fact in inverse condemnation action. *Marty v. State*, 122 Idaho 766, 838 P.2d 1384 (1992).

Genuine issues of fact remained as to the defectiveness of warnings and the grain auger covers, and as to whether the alteration of the covers, as compared to the design of the covers proximately caused plaintiff's injuries; thus, granting of summary judgment was vacated. *Tuttle v. Sudenga Indus., Inc.*, 125 Idaho 145, 868 P.2d 473 (1994).

Testimony of a doctor that, in his opinion, an automobile's body panels were not designed to withstand any significant impact affecting the roof structure was not sufficient to create a genuine issue of material fact; doctor did not set forth any specific facts showing that the car had defectively weak body panels. *Oats v. Nissan Motor Corp.*, 126 Idaho 162, 879 P.2d 1095 (1994).

If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 918 P.2d 583 (1996).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 918 P.2d 583 (1996).

Where the record did not reflect that the Idaho Transportation Department (ITD) followed the statutory procedure to abandon highway where accident occurred killing plaintiff's son, even though it had not been used by the ITD for more than 30 years, a question of material fact as to whether the ITD properly abandoned such highway existed and trial court's erred in granting summary judgment for the ITD. *Dachlet v. State*, 130 Idaho 204, 938 P.2d 1242 (1997).

Hearsay.

An examination of the affidavit in the instant case established that it did not comply with this rule. The statements in certain paragraphs were not admissible at trial as they constituted hearsay. Although the statements could have constituted admissions by a party-opponent and thus not hearsay if offered against that party, the statements were not admissions when offered against a party-

opponent who did not make the statements. Though apparently conceding that the statements were hearsay and thus inadmissible at trial, the plaintiffs argued that an expert may rely on potentially inadmissible evidence in rendering an opinion, and while that was true in some cases, it was not true in the instant case. *Sammis v. MagneTek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997).

Lack of Affidavits.

Where plaintiff suing manufacturer of mobile home destroyed by fire stated he did not know how the fire started but declared that several individuals voiced opinions about the cause but presented no affidavits from such persons, since hearsay accounts of the opinions of witnesses could not be accorded evidentiary weight there was no material fact to support allegation that mobile home was defective. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

Medical Standard of Care.

Expert's affidavit did not present sufficient facts admissible in evidence to demonstrate affirmatively that expert was familiar with the local standard of care; because the trial court found expert's affidavit was not admissible evidence under this rule, the Supreme Court of Idaho did not reach the requirements imposed by § 6-1013. *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994).

The sworn statements of expert witness physician taken as true were sufficient to qualify him to express an expert opinion relative to the local area standard of care that was applicable and whether it was or was not adhered to by treating physician for purposes of summary judgment and the district court determination that expert witness physician's testimony was not admissible for purposes of summary judgment was in error. *Dunlap ex rel. Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1995).

While under I.R.E. Rules 701 and 702, a court has the discretion to determine whether to allow a lay witness to express an opinion relating to causation, a court should disregard lay opinion testimony relating to the cause of a medical condition as a lay witness is not competent to testify to such matters, and, therefore such testimony is inadmissible for purposes of summary judgment. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997).

In suit against pharmacy alleging that type of insulin substituted for plaintiff's regular type caused plaintiff's hypoglycemic seizures, district court correctly disregarded plaintiff's testimony concerning his seizures since a lay person is not qualified to give an opinion

about a medical diagnosis and thus plaintiff's testimony could not be considered for purposes of summary judgment; moreover, his testimony was not opinion testimony relating to causation because he simply testified to the nature and extent of the seizures from which he suffered after taking the substitute insulin, not to the cause of the seizures. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997).

In malpractice suit against optometrist, testimony of ophthalmologist was insufficient to comply with §§ 6-1012 and 6-1013 since ophthalmologist professed to have no knowledge of the community standard of care with respect to the practice of optometry and thus court's granting of summary judgment was proper. *Evans v. Griswold*, 129 Idaho 902, 935 P.2d 165 (1997).

Summary judgment in favor of the dentist was reversed because there was a genuine issue of material fact under the provisions of Idaho R. Civ. P. 56(e) as to whether the dentist failed to meet the standard of care in a dental malpractice action. *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105 (2002).

District court erred by striking the patient's experts' affidavits and granting summary judgment to the physician; because one expert's significant amount of experience demonstrated the requisite personal knowledge of the relevant standard of care in the area at the time of the patient's surgery, his affidavit was admissible, and the other expert's fourth affidavit was admissible, as it satisfied the requirement that an out-of-area expert obtain knowledge of the local standard of care by consulting with a doctor familiar with the local standard of care. *Shane v. Blair*, 139 Idaho 126, 75 P.3d 180 (2003).

Motion.

—Evidence for Summary Judgment.

The party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party. *Ambrose ex rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1994).

Opinion Evidence.

Affidavits supporting and opposing summary judgment shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, and husband's affidavit containing his lay opinion that certain events in question caused his wife's death 11 months following these events was not admissible. *Evans v. Twin Falls*

County, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

A lay opinion that there was not a safe way to access boilers was not sufficient to create a genuine issue about whether the boilers exposed users to an unreasonable risk of harm which could be reduced or avoided by adopting a reasonable alternative design. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 979 P.2d 1174 (1999).

Reviewability of Exhibits.

Where exhibits were not mentioned in, or attached to, a party's verified complaint or affidavits concerning a summary judgment motion, these items were not properly submitted and therefore were not cognizable under this rule. *Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 776 P.2d 469 (Ct. App. 1989).

Specific Facts Supporting Allegation.

Where third-party plaintiff made an allegation of fraud devoid of any particulars, while defendant filed an affidavit describing the financial difficulties experienced by the corporation before it discontinued business, which affidavit denied fraud by any officer or director, in the face of this affidavit and a motion for summary judgment, third-party plaintiff could not rest upon the mere allegation of fraud made in his third-party complaint, but was required to respond, by affidavit or otherwise under this rule, with specific facts showing that there was a genuine issue for trial, and as he submitted nothing summary judgment on the issue of fraud was proper. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

If a motion for summary judgment is supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings; he must set forth specific facts showing a genuine issue. *Verbills v. Dependable Appliance Co.*, 107 Idaho 335, 689 P.2d 227 (Ct. App. 1984).

Where occupation of claimant's predecessors in title to disputed land were blood relatives she was faced with a presumption of law that the occupation of the disputed strip was permissive and therefore it was incumbent upon her to, by affidavit or otherwise, oppose the motion for summary judgment setting forth specific facts that would controvert the presumption of permissive occupation; where the record was devoid of any specific facts controverting the presumption, summary judgment in action to quiet title was proper. *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984).

A court cannot hypothecate facts which are

absent from the record cognizable under this rule. *Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 776 P.2d 469 (Ct. App. 1989).

Sufficiency.

— Affidavits.

Where affidavit failed to specify factually what representations were made or when such statements were made and merely stated a conclusion that affiant relied upon the advice of the agent, such supporting affidavit was inadmissible to show the absence of a genuine issue of material fact. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979).

Where property owners failed to assert specific facts showing any basis for their claim that a public right of way across their property had been properly accepted, the trial court properly concluded that a 1919 resolution of the Twin Falls Highway District could not, itself, constitute a valid acceptance of a section line right-of-way because at the time the resolution was made, in 1919, the land had been in private ownership for some 13 years, and because the reference in the 1919 resolution to an unspecified acceptance by another public body of a right-of-way across "much of the public lands described" sometime prior to 1919 was itself not competent evidence upon which a finder of fact could conclude that there had been a valid acceptance of the right of way across the property by an appropriate government body prior to passage of the property into private ownership. *Roper v. Elkhorn at Sun Valley*, 100 Idaho 790, 605 P.2d 968 (1980).

Where debtors, doing business as a corporation, argued that there existed a genuine issue of material fact relating to the knowledge, or lack thereof, of judgment creditor concerning debtors' corporate existence, and the only evidence presented by debtors was contained in affidavits submitted as a part of their motion to vacate default, the affidavits were legally insufficient to avoid judgment and create a genuine issue of material fact. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

Where the exhibit, an itemization of all charges for labor and materials made to the defendant, was incorporated into an affidavit made upon the asserted personal knowledge of the affiant, and the charges were within the affiant's "personal and first hand knowledge" and were reflected by corporate records in the affiant's possession, the exhibit was cognizable under this rule. *Resource Eng'g, Inc. v. Nancy Lee Mines, Inc.*, 110 Idaho 136, 714 P.2d 526 (Ct. App. 1985).

In a products liability action, a brief affida-

vit by a safety engineer, conclusory in nature, which merely repeated allegations contained in the plaintiff's complaint and did not establish specific facts going to any design defect, was precisely the type of flawed affidavit contemplated by this rule and failed to establish facts sufficient to create a material issue of fact on the issues of defective design, manufacture, and inspection. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 730 P.2d 1005 (1986).

Where an "affidavit" filed by plaintiff in opposition to a motion for summary judgment, while in partial affidavit form, was not subscribed and sworn to as an oath or affirmation as required pursuant to § 51-109, but rather, where the signature of plaintiff was merely acknowledged by a notary public in the manner required for the acknowledgment of signatures on deeds for recording under § 55-710, the facts stated in the "affidavit" were not under oath as required by this rule. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

The trial court expressly found that no foundation had been established which would permit the court to consider witness' opinion that the frequency of flooding in mud basin in the future could be expected to occur once every seven (7) years. Such opinion related to the science of hydrology. However, witness' affidavit demonstrated no qualifications which he might have relating to hydrology. *Marty v. State*, 122 Idaho 766, 838 P.2d 1384 (1992).

Statements made by operations manager of mining company in affidavit with regard to negotiations with another mining company were conclusory and did not provide the kind of specific, admissible facts that would either support or prevent the entry of summary judgment. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992).

Petitioner's affidavit asserting ineffective assistance of counsel did not satisfy this rule, as it was based on hearsay and was conclusory. Specifically, petitioner's affidavit alleged, but did not support with personal knowledge, that petitioner's attorney permitted perjured testimony, and that petitioner's attorney failed to adequately investigate by refusing to contact certain allegedly exculpatory defense witnesses. These bare insinuations could only be the product of hearsay, as petitioner had been incarcerated since indictment. *Ivey v. State*, 123 Idaho 77, 844 P.2d 706 (1992).

Because affidavit submitted by plaintiff's

attorney, which contained reports of workers' compensation claims for injuries suffered by truck drivers at defendant's warehouses, contained nothing to establish that the attorney had any personal knowledge of either the accidents discussed or the preparation and maintenance of the records nor contained any facts that would be admissible at trial, the affidavit could not be considered in opposition to defendant's motion for summary judgment. *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995).

Because affidavits submitted by truck drivers, which stated that defendant company did not unload or assist in unloading deliveries and that this policy was not the custom in the industry, did not affirmatively establish that the affiants had personal knowledge of the corporate policies discussed in the affidavits, the affidavits could not be considered in opposition to defendant's motion for summary judgment. *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995).

Because the affidavits of defendant accused of improperly selling securities were not based on personal knowledge, were insufficient and conclusory in nature, and contained statements of hearsay that would not be admissible into evidence, the trial court properly rejected the affidavits when ruling on the Idaho Department of Finance's motion for summary judgment. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 899 P.2d 977 (1995).

A trial court properly refused to consider a "declaration" filed in support of a cross-motion for summary judgment where the declaration was unsworn and made no showing or statement that the information contained therein was based upon personal knowledge and which counsel indicated contained hearsay information. *Tri State Land Co. v. Roberts*, 131 Idaho 835, 965 P.2d 195 (Ct. App. 1998).

Although affidavits of inmates were deficient in several respects, where portions of those affidavits were based on personal knowledge and established that the inmates worked in a shop with a civilian supervisor who was a state employee, a reasonable inference could be drawn that the supervisor knew of the removal of safety guards from saws and that sufficient admissible evidence existed from which a jury could find that the state's conduct was reckless, willful and wanton, and thus summary judgment to the state should have been denied. *Smith v. Board of Corr.*, 133 Idaho 519, 988 P.2d 1193 (1999).

—Attachments.

This rule requires that items offered in support of or opposition to a motion for sum-

mary judgment must be attached to the party's affidavit verifying the items' authenticity. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 979 P.2d 1174 (1999).

— Evidence.

A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 730 P.2d 1005 (1986).

In an adverse possession claim, where the court was faced with factual allegations by the nonmoving party which actually supported the motion for summary judgment, while the moving party's allegations tended to supply the missing element of the claim for adverse use, the allegations fell far short of showing that the nonmoving party used waste water during any five consecutive years when prior appropriators of the water actually needed it and were deprived of it, and the court did not err in granting summary judgment on this basis. *Boise-Kuna Irrigation Dist. v. Gross*, 118 Idaho 940, 801 P.2d 1291 (Ct. App. 1990).

As long as the nonmoving party in a motion for summary judgment relies on statements that are based on personal knowledge, such as their own depositions in the record, and which would be admissible as evidence at trial and does more than rest on mere allegations or denials in his pleading, it will be considered sufficient to comply with this rule. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991).

There is nothing in this rule which precludes the plaintiffs from relying on their own depositions, which were part of the record, to refute the arguments of the moving party based on those same depositions, because all that this rule requires is that the nonmoving party not rest solely upon the bare allegations contained in the pleadings, the sworn statements contained in the amended verified complaint, the numerous exhibits attached thereto and the heirs' depositions satisfy the requirements of this rule. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991).

Where nothing in the record verified that an operating manual or pictures, as submitted to the court by the defendants, were authentic, the court declined to consider them. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 979 P.2d 1174 (1999).

Summary Disposition.

Motions for summary disposition pursuant to § 19-4906 are procedurally equivalent to motions for summary judgment under this rule and they are therefore subject to similar

notice standards. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

Summary judgment was properly granted in favor of the Idaho Department of Agriculture where, although the affidavit submitted by the department evidencing the requisite notice of the claims was conclusory, the record revealed that the business did not present any evidence to contradict the affidavit, nor was there any objection made to the conclusory nature of the affidavit; therefore, the summary judgment evidence showed that the business received the notice required by statute. *State v. Curry Bean Co.*, 139 Idaho 789, 86 P.3d 503 (2004).

Timeliness.

Where plaintiff moved for summary judgment in December, defendant filed opposing motion in February, supported only by his own and his attorney's affidavits, and defendant moved for an extension of time, in March, in which to file additional affidavits, it was no abuse of discretion to grant summary judgment and deny the extension of time, since I.R.C.P. 11(c), prior to the 1976 amendment, forbade attorney affidavits in connection with motions for summary judgments, and there was no explanation presented to the trial court as to why information that plaintiff had actual knowledge of defendant having filed a petition in bankruptcy so as to discharge his earlier judgment against defendant could not have been sooner found. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

Although a trial court has discretion to allow parties to supplement or oppose an affidavit submitted with a motion for summary judgment, this rule's time limitations still apply unless the court shortens the time for good cause shown. *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999).

Verified Complaint.

Allegations in the verified complaint — the existence of the promissory note and the fact that the creditor had, or had not, received certain payments — were not general or conclusory, they plainly were within the creditor's personal knowledge; therefore, the verified complaint was entitled to be treated as an affidavit in support of the motion for summary judgment. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

A verified complaint may be presented to the court in support of a motion for summary judgment and it will be accorded the probative force of an affidavit if it meets the requirements of this rule. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

—Nonconforming.

In a motion for summary judgment supported by a verified complaint under this rule the nonmoving party must timely object to a nonconforming verified complaint or its nonconformity is waived. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984).

Cited in: *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975); *First Piedmont Bank & Trust Co. v. Doyle*, 97 Idaho 700, 551 P.2d 1336 (1976); *Southern Idaho Realty of Twin Falls, Inc. v. Larry J. Hellhake & Assocs.*, 102 Idaho 613, 636 P.2d 168 (1981); *Makin v. Liddle*, 102 Idaho 705, 639 P.2d 3 (1981); *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982); *Gulf Chem. Employees Fed. Credit Union v. Williams*, 107 Idaho 890, 693 P.2d 1092 (Ct. App. 1984); *Therault v. A.H. Robins Co.*, 108 Idaho 303, 698 P.2d 365 (1985); *M & H Rentals, Inc. v. Sales*, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985); *Daniels v. Byington*, 109 Idaho 365, 707 P.2d 476 (Ct. App. 1985); *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985); *Keeven v. Wakley (In re Estate of Keeven)*, 110 Idaho 452, 716 P.2d 1224 (1986); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238, 60 A.L.R.4th 225 (1986); *Gardner v. Evans*, 110 Idaho 925, 719 P.2d 1185 (1986); *Green v. Bannock Paving Co.*, 111 Idaho 3, 720 P.2d 186 (1986); *Wylie v. Patton*, 111 Idaho 61, 720 P.2d 649 (Ct. App. 1986); *Jones v. EG & G Idaho, Inc.*, 111 Idaho 591, 726 P.2d 703 (1986); *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987); *Arnold v. Diet Ctr., Inc.*, 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987); *NBC Leasing Co. v. R & T Farms, Inc.*, 114 Idaho 141, 754 P.2d 454 (Ct. App. 1988); *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988); *Holmes v. Union Oil Co.*, 114 Idaho 773, 760 P.2d 1189 (Ct. App. 1988); *Locey v. Farmers Ins. Co.*, 115 Idaho 24, 764 P.2d 101 (Ct. App. 1988); *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989); *Flemmer v. Tammany Elementary Sch. Dist. No. 343*, 116 Idaho 204, 774 P.2d 914 (Ct. App. 1989); *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 837 P.2d 805 (1992); *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993); *Sutheimer v. Stoltenberg*, 127 Idaho 81, 896 P.2d 989 (Ct. App. 1995); *McCuskey v. Canyon County Comm'rs*, 128 Idaho 213, 912 P.2d 100 (1996); *Pocatello R.R. Fed. Credit Union v. Dairyland Ins. Co.*, 129 Idaho 444, 926 P.2d 628 (1996); *McVicker v. City of Lewiston*, 134 Idaho 34, 995 P.2d 804 (2000); *Clear Lakes Trout Co. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 106 P.3d 443 (2005); *Cuevas v. Barraza*, 146 Idaho 511, 198 P.3d 740 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Affidavits.
Applicability.
Contents.
Failure to Controvert.
Genuine Issue of Material Fact.
Opposing Affidavits.
Sufficiency.
—Affidavits.
Timeliness.

Affidavits.

While there was no intent of questioning the competency of either of the attorneys of record of the respective parties who had executed their affidavits respecting the motion for summary judgment, such affidavits as were involved in this case being entitled to equal dignity, the court found it prudent to call attention to the probability of an attorney under such circumstances being called to testify whereby his right to conduct the trial of his client's case after appearing as a witness may be questioned. *Sutton v. Brown*, 85 Idaho 104, 375 P.2d 990 (1962).

An affidavit not made on the affiant's personal knowledge but representing merely the affiant's conclusion is inadmissible to show absence of a genuine issue of material fact. *Matthews v. New York Life Ins. Co.*, 92 Idaho 372, 443 P.2d 456 (1968).

On a summary judgment motion, statements made "on information and belief" cannot be utilized but rather will be disregarded. *Tapper Chevrolet Co. v. Hansen*, 95 Idaho 436, 510 P.2d 1091 (1973).

Applicability.

In will contest action in district court, summary judgment could not be based on adverse party's failure to "answer in detail as specific as that of moving papers", as there was more than a complaint and answer, this was to be a trial de novo, and the district judge had before him not only the pleadings but also a complete transcript of the proceedings held in probate court. *Yribar v. Fitzpatrick*, 87 Idaho 366, 393 P.2d 588 (1964).

Contents.

The affidavit should be entitled in the proper cause and should set up facts in accord with the substantial requirements of the statute; while it is not required to be in the precise language of the statute, yet it cannot be so general in its terms as to make it impossible to convict the affiant for perjury if it is false. *Nelson v. Boise Petro. Corp.*, 54 Idaho 179, 32 P.2d 782 (1934).

Failure to Controvert.

Failure of plaintiff to controvert statements contained in defendant's deposition showing that defendant was not liable to plaintiff as a matter of law resulted in proper summary judgment against plaintiff. *Tafoya v. Fleming*, 94 Idaho 3, 479 P.2d 483 (1971).

Where the affidavit in support of a motion for summary judgment in an action to set aside a deed set forth fraud and raised it as an issue, summary judgment was properly granted upon the failure of the opposing party to counter or controvert. *Barton v. Cannon*, 94 Idaho 422, 489 P.2d 1021 (1971).

Summary judgment was proper on the ground that plaintiff's action was barred by the statute of limitations, and plaintiff failed to controvert by motion or affidavit that the action was barred by the statute and that defendant was entitled to a judgment as a matter of law. *Stewart v. Hood Corp.*, 95 Idaho 198, 506 P.2d 95 (1973).

Where appellee moved for summary judgment and appellant enumerated no disputed facts, nor were any apparent from a review of the record, the trial court properly granted the motion. *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974).

Genuine Issue of Material Fact.

The pleadings, answers to interrogatories herein show that there was a genuine issue as to the material fact of an actual positive and intentional fraud allegedly perpetrated by respondent by obtaining moneys by false pretenses or false representations without intent to apply the money toward any indebtedness, which required denial of summary judgment on the pleadings. *Weigand v. Furniss*, 85 Idaho 189, 377 P.2d 371 (1962).

Reading the former identical rule and Rule 56(c) together and construing them liberally in compliance with Rule 1, it was error for the trial court to sustain plaintiff's motion for a summary judgment where the totality of the motions, affidavits, depositions, pleadings, and attached exhibits indicated that genuine issues of fact appeared from the record. *Central Idaho Agency, Inc. v. Turner*, 92 Idaho 306, 442 P.2d 442 (1968).

In an action by one who had loaned money on the security of warehouse receipts against the warehouseman for deficiency in the quantity of logs and lumber on hand from the quantity called for in the warehouse receipts, counteraffidavits by the warehouseman alleging possible fraudulent acts by the depositor, dereliction of duty by the custodians, and possible collusion between the depositor and

the custodians do not establish the existence of material issues of fact as such issues are irrelevant to the action brought by the plaintiff. *Tri-State Nat'l Bank v. Western Gateway Storage Co.*, 92 Idaho 543, 447 P.2d 409 (1968).

Mere denials, assertions of what "might have been," of what one has "been told" or "advised," of matters not stated from personal knowledge, of numerous legal conclusions, (especially by laymen), and of what one hopes "will be shown at the trial" are not enough to create a "genuine issue". *Tri-State Nat'l Bank v. Western Gateway Storage Co.*, 92 Idaho 543, 447 P.2d 409 (1968).

If circumstantial evidence submitted by affidavit in response to defendant's motion for summary judgment tends to prove defendant was responsible for fire, thus creating a genuine issue over the cause of the fire, it would be sufficient to defeat the motion for summary judgment. *Petricевич v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

Where plaintiff failed to answer defendant's sworn statement as to his truck, except to attempt to establish the speed of truck by circumstantial evidence when such circumstantial evidence was insufficient to prove speed, summary judgment was proper. *Stucki v. Loveland*, 93 Idaho 253, 460 P.2d 388 (1969).

Motion for summary judgment should be denied where definite conflict is shown by the instruments upon which the motion was granted. *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 460 P.2d 739 (1969).

Opposing Affidavits.

Summary judgment for defendants was proper in an action charging the defendants with wrongfully causing a corporation to be adjudged bankrupt where defendants' motion was supported by copies of the findings and conclusions of the bankruptcy proceedings showing findings that the corporation was in fact bankrupt and that its liabilities exceeded its assets and plaintiff failed to either file opposing affidavits or file an affidavit showing why he was unable to file such affidavits. *Prather v. Industrial Inv. Corp.*, 91 Idaho 682, 429 P.2d 414 (1967).

It was not necessary for plaintiff to file a counter-affidavit in opposition to a summary judgment motion where admissions on file were sufficient to controvert the facts stated in defendant's affidavit. *Eckels v. Johnson*, 96 Idaho 264, 526 P.2d 1100 (1974).

Sufficiency.

—Affidavits.

Where affidavit stated affiant attended trial

in probate court and that contestants adduced no material, competent or relevant testimony to support allegations of amended complaint, such conclusions and opinions as to the evidence were insufficient on motion for summary judgment, such evaluation of evidence being for trier of facts in trial de novo in district court. *Yribar v. Fitzpatrick*, 87 Idaho 366, 393 P.2d 588 (1964).

Affidavit not setting forth facts admissible in evidence but stating affiant's conclusions and opinions as to significance of evidence presented in court below is insufficient under this rule. *Yribar v. Fitzpatrick*, 87 Idaho 366, 393 P.2d 588 (1964).

A counteraffidavit, stating appellant "was not acquainted with the marital status of the defendant, and assumed that the defendant was contracting in his own right and that he was a single man," did not constitute a denial of the marital status of respondent as stated in his affidavit. *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965).

Where the defenses of estoppel, laches and limitations were raised in the answer to a complaint and the defendant moved for a summary judgment supported by depositions and affidavits, plaintiff's deposition, filed by defendant in his motion to dismiss, foreclosed the possibility of plaintiff producing any witnesses upon a trial of the issues and did not raise any issue of material fact requiring a trial. *Clontz v. Fortner*, 88 Idaho 355, 399 P.2d 949 (1965).

In an action seeking to hold an individual for the contract of a corporation executed prior to the filing of its articles of incorporation with the secretary of state, under § 30-110 (now repealed), an affidavit that the individual represented himself as an incorporator, officer, and director of the corporation is not sufficient to defeat a motion for summary judgment filed by such individual. *Fike v. Bauer*, 90 Idaho 442, 412 P.2d 819 (1966).

In an action for the balance due on a conditional contract of sale in which plaintiff claimed acceleration because of default in payment of instalments, an affidavit by defendant that all payments due on the contract up to and including the time of the alleged default had been made was sufficient to satisfy the requirements of this rule and defeat a motion of plaintiff for summary judgment. *Christiansen v. Rumsey*, 91 Idaho 684, 429 P.2d 416 (1967).

In an action on a provisional insurance policy which required monthly reports of inventory by the policyholder to the insurer as a basis for premiums, defended by the insurer on the ground that the policyholder had

grossly undervalued the inventories, all of which was shown by affidavits in support of a motion for summary judgment, the plaintiff's affidavit that it had been advised by the insurer's agent that it need not report each individual item of inventory was insufficient to establish any genuine issue of material fact. *E.S. Harper Co. v. General Ins. Co. of Am.*, 91 Idaho 767, 430 P.2d 658 (1967).

Where, on motion for summary judgment, moving party unequivocally denied starting fire in question it was incumbent upon answering party to respond in detail as specific as that of the moving party, setting forth facts contradicting the evidence contained in the moving party's affidavit. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

The opinion of an affiant which was on its face inadmissible as evidence could not be considered in determining the propriety of a motion for summary judgment. *Openshaw v. Allstate Ins. Co.*, 94 Idaho 192, 484 P.2d 1032 (1971).

The allegation in an opposing affidavit that the party moving for summary judgment had created a nuisance without any statement as to what constituted the nuisance or other details was not sufficient to present an issue of fact and the granting of summary judgment was not erroneous. *Lewiston Pistol Club, Inc. v. Imthurn*, 94 Idaho 264, 486 P.2d 275 (1971).

Where a plaintiff answered interrogatories that he thought it would require four or five years to complete a certain contract and in the taking of his deposition refused to express an opinion as to the time required for completion on the ground that he lacked the knowledge to estimate such time, his statement in his affidavit that the contract could be completed within one year was not sufficient to

create an issue of material fact. *Remlinger v. Dravo Corp.*, 94 Idaho 292, 486 P.2d 1005 (1971).

In a negligence action against owners of store, where the affidavit was partially based on hearsay information, and also contained other statements made by affiant based on his own personal knowledge, consideration of hearsay facts was not an error since these facts did not affect the issues involved in the ultimate determination of the action. *Giles v. Montgomery Ward Co.*, 94 Idaho 484, 491 P.2d 1256 (1971).

Summary judgment based on statute of limitations was proper where plaintiff failed to establish a triable issue of material fact respecting fraudulent concealment of bullet in the body and his sole affidavit contained no reference to the time when the bullet was discovered, but merely a general statement that it was discovered within two years, and no time as to the feeling of pain was specified, nor was surgeon who found bullet identified, and no discussion of particulars as to alleged misleading by surgeon was given. *Johnson v. Gorton*, 94 Idaho 595, 495 P.2d 1 (1972).

Court did not err in granting motion for summary judgment where two of the allegations in opposing affidavit were made upon advice and belief and information and belief and one allegation was merely an assertion of what affiant hoped would be shown at trial. *Tapper Chevrolet Co. v. Hansen*, 95 Idaho 436, 510 P.2d 1091 (1973).

Timeliness.

An attempt to raise questions of fact on a motion for summary judgment is not within the purview of the former identical rule when raised some 18 months after the judgment. *Minidoka County ex rel. Detweiler Bros. v. Krieger*, 88 Idaho 395, 399 P.2d 962 (1964).

Rule 56(f). When affidavits are unavailable in summary judgment proceedings.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

JUDICIAL DECISIONS

ANALYSIS

Discovery.

Effect of Failure to File Opposing Affidavit.

Genuine Issue of Material Fact.

Discovery.

Plaintiffs should have been allowed to com-

plete discovery regarding the hospital's knowledge of the psychiatric history and sexual proclivities of a former employee accused of sexually abusing plaintiff before being required to respond to the hospital's summary judgment motion under this rule; the lower court's order granting summary judgment to the hospital must be vacated because the extent of an employer's knowledge of an employee's dangerous propensities is relevant not only to a determination of whether a duty of care was breached but also to the scope of the potential harm that was a reasonably foreseeable consequence of the breach i.e. proximate cause. *Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995).

Effect of Failure to File Opposing Affidavit.

Where plaintiff filed stockbroker's affidavit on afternoon of last day before date of summary judgment proceeding where defendant did not file opposing affidavits under this rule, did not file affidavits stating it could not present opposing affidavits because of the short notice given, raised no objection to the affidavit at the summary judgment proceeding but instead urged the court to proceed with summary judgment and where defendant failed to submit additional information following the summary judgment proceeding despite receiving the judge's permission to do so, defendant could not contend that it had no reasonable opportunity to respond to the stockbroker's affidavit. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981).

Although wastebasket manufacturer only addressed proximate cause as to one count of state's claims in its opening memorandum, state waived its right to object on procedural grounds to the district court's ruling on proximate cause as it related to all five counts in the complaint because the state had not requested a continuance pursuant to Rule 56(c) nor submitted additional affidavits to contest the issues raised in manufacturer's reply memorandum pursuant to this rule and had missed every opportunity to object before the district court. *State v. Rubbermaid Inc.*, 129 Idaho 353, 924 P.2d 615 (1996).

Genuine Issue of Material Fact.

When the party moving for summary judgment will not carry the burden of production or proof at trial, the "genuine issue of material fact" burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to establish, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under this rule. *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct. App. 1994).

Cited in: *Selkirk-Priest Basin Ass'n v. State ex rel. Andrus*, 127 Idaho 239, 899 P.2d 949 (1995); *Taylor v. AIA Servs. Corp.*, — Idaho —, 261 P.3d 829 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Continuance.

- Absence of Witness.
 - Admission or Stipulation.
 - Affidavit Not in Good Faith.
 - Affidavit Required.
 - Discretion of Court.
- Effect of Failure to File Opposing Affidavits.

Continuance.

—Absence of Witness.

It is not error for trial court to overrule a motion for a continuance on account of absence of a witness, where the only showing of diligence is that witness agreed to be present and there was no use of legal means to secure attendance of such witness. *Walsh v. Winston Bros. Co.*, 18 Idaho 768, 111 P. 1090 (1910).

It is proper to refuse a continuance where no showing has been made that legal means were used to procure the witnesses in court.

State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (1937).

—Admission or Stipulation.

Where adverse party admits, to avoid continuance, that if the absent witness were present, he would testify to the facts stated in the affidavit and that such evidence if proper could be considered as actually given, the affidavit then becomes evidence, but by no means conclusive, and it is not error under these circumstances to deny continuance. *Territory v. Guthrie*, 2 Idaho 432, 17 P. 39 (1888).

Parties litigant may agree to what the testimony of absent witness would be if present, called and sworn; and if they so agree, their stipulation may be used in lieu of such testimony. *Knight v. Younkin*, 61 Idaho 612, 105 P.2d 456 (1940).

—Affidavit Not in Good Faith.

Where affidavits are filed tending to show that an application for a continuance is not

made in good faith, it is proper to deny continuance. *Cox v. Northwestern Stage Co.*, 1 Idaho 376 (1871).

—Affidavit Required.

Even though case is proper one for postponement, showing by affidavit or otherwise than by oral statement is required. *Kerney v. Hatfield*, 30 Idaho 90, 162 P. 1077 (1917).

—Discretion of Court.

A motion for continuance is addressed to sound discretion of court and its ruling will not be disturbed unless such discretion has been abused. *Reynolds v. Corbus*, 7 Idaho 481, 63 P. 884 (1901); *Robertson v. Moore*, 10 Idaho 115, 77 P. 218 (1904), overruled on other grounds, *Dover Lumber Co. v. Case*, 31 Idaho 276, 170 P. 108 (1918); *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908); *Storer v. Heitfeld*, 17 Idaho 113, 105 P. 55 (1909); *Miller v. Brown*, 18 Idaho 200, 109 P. 139 (1910); *De Puy v. Peebles*, 24 Idaho 550, 135 P. 264 (1913); *Corey v. Blackwell Lumber Co.*, 27 Idaho 460, 149 P. 510 (1915); *Berlin Mach. Works v. Dehlbom Lumber Co.*, 32 Idaho 566, 186 P. 513 (1919); *Aumock v. Kilborn*, 53 Idaho 506, 25 P.2d 1047 (1933); *Pacific Coast Joint Stock Land Bank v. Security Prods. Co.*, 56 Idaho 436, 55 P.2d 716 (1936).

It is not an abuse of legal discretion vested in trial court to deny an application for a continuance upon the sole ground that applicant's counsel is ill, where no affidavit of merits is filed showing that applicant has a meritorious cause or defense and that other

counsel cannot be procured who are able to try said case. *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908).

Where case had been set and continued and reset, there was no abuse of discretion in denying application of a party for a continuance until certain depositions, then being taken in Ireland, were received. In re *O'Brien's Estate*, 44 Idaho 729, 262 P. 152 (1927).

Where application for continuance due to absence of material witness shows reasonable diligence to obtain presence of witness, shows what witness would testify to and that testimony is material, and shows a sufficient reason for absence of witness sworn to by one in a position to know the facts, then it is an abuse of discretion for trial court to deny continuance. *Pauley v. Salmon River Lumber Co., Inc.*, 74 Idaho 483, 264 P.2d 466 (1953).

Effect of Failure to File Opposing Affidavits.

Summary judgment for defendants was proper in an action charging the defendants with wrongfully causing a corporation to be adjudged bankrupt where defendant's motion was supported by copies of the findings and conclusions of the bankruptcy proceedings, showing findings that the corporation was in fact bankrupt and that its liabilities exceeded its assets; plaintiff failed to either file opposing affidavits or file an affidavit showing why he was unable to file such affidavits. *Prather v. Industrial Inv. Corp.*, 91 Idaho 682, 429 P.2d 414 (1967).

Rule 56(g). Affidavits in summary judgment proceedings made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused that party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.

(a) The procedure for obtaining a declaratory judgment pursuant to the statutes of this state, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

(b) In an action seeking declaratory judgment as to coverage under a policy of insurance, any person known to any party to have a claim against the insured relating to the incident that is the subject of the declaratory action shall be joined if feasible. (Amended April 4, 2008, effective July 1, 2008.)

STATUTORY NOTES

Cross References. Advisory jury, Rule 39(c).
Jury trial of right, Rules 38(a)-38(d), 39(a).
General verdict accompanied by jurors' answer to interrogatories, Rule 49(b).

JUDICIAL DECISIONS

ANALYSIS

Actual and Existing Controversy.
Adequate Remedy.
Avoiding Multiplicity of Suits.
Dismissal Proper.

Actual and Existing Controversy.

The right sought to be protected by a declaratory judgment may invoke either remedial or preventive relief; it may relate to a right that has either been breached or is only yet in dispute or a status undisturbed but threatened or endangered; but, in either or any event, it must involve actual and existing facts. *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984).

Adequate Remedy.

The rule that the existence of other adequate remedies shall not preclude a declaratory judgment action presupposes an initial determination that a declaratory judgment action is itself an appropriate remedy. The proper method of contesting an agency or judicial decision is by appeal, an order or judgment may not later be collaterally attacked by means of a declaratory judgment action. *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 652 P.2d 649 (1982).

Avoiding Multiplicity of Suits.

Where a full hearing of the "loaned employee" issue would occur in pending tort action between injured employee plaintiff and defendant employer of employees who injured

plaintiff, the interests of defendant were fully protected from any further suits by the plaintiff's employer or its surety through the subrogation provisions of § 72-223; accordingly, it was proper for the district court to dismiss the declaratory judgment action in order to avoid a multiplicity of suits. *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 627 P.2d 326 (1981).

Dismissal Proper.

Where there was a pending tort action which involved the identical issues raised in a declaratory judgment suit, it was proper for the district court to dismiss the petition for declaratory relief on the basis of judicial economy even though the petition for declaratory relief was filed prior to the filing of the tort action. *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 627 P.2d 326 (1981).

The district court did not err when it dismissed the declaratory judgment action brought by criminal defendants, who were attacking their automatic commitment to mental institutions following their acquittal of criminal charges by reason of mental disease or defect, since the proper method of contesting the judicial decisions was by appeal. *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 652 P.2d 649 (1982).

Cited in: *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *Milburn v. State*, 135 Idaho 701, 23 P.3d 775 (Ct. App. 2000); *State v. Lepage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003); *Baker v. State*, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Collection of Liquor Tax.
Construction.
Construction Contracts by Counties.

Criteria for Granting.
Jurisdiction.
Local Beer Licensing Law.
Negligence.

Partnership.
Pleadings.
Proper Remedy.
Purpose.
Quiet Title or Contract to Convey Land.

Collection of Liquor Tax.

Declaratory judgment action lies to determine the right of a state officer to collect tax from a distillery of another state where such distillery stores liquor in this state for sale to the state of Idaho. *Century Distilling Co. v. Defenbach*, 61 Idaho 192, 99 P.2d 56 (1940).

Construction.

Declaratory Judgment Act contemplates some specific adversary question or contention based on an existing state of facts, out of which the alleged "rights, status, and other legal relations" arise, upon which the court may predicate a judgment "either affirmative or negative in form and effect." *State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 52 P.2d 141 (1935); *Whitney v. Randall*, 58 Idaho 49, 70 P.2d 384 (1937); *State ex rel. Diefendorf v. Idaho Egg Producers*, 59 Idaho 38, 80 P.2d 28 (1938); *Thomas v. Riggs*, 67 Idaho 223, 175 P.2d 404 (1946); *Ayers v. General Hosp.*, 67 Idaho 430, 182 P.2d 958 (1947); *Milburn v. State*, 135 Idaho 701, 23 P.3d 775 (Ct. App. 2000).

Supreme Court did not have power to supplement legislative action by injecting into Declaratory Judgment Act a provision providing that "public importance" of a question as to constitutionality of a statute was sufficient to confer legal capacity. *Thomas v. Riggs*, 67 Idaho 223, 175 P.2d 404 (1946).

Construction Contracts by Counties.

Where a grave question arose as to whether Canyon County, by entering into contracts for the construction of a new jail, created an indebtedness in excess of revenues available for the year in which the contracts were made, it was proper to sue under the Declaratory Judgment Act in order to determine this and other questions. *Iverson v. Canyon County*, 69 Idaho 132, 204 P.2d 259 (1949).

Criteria for Granting.

Generally in determining whether to grant a declaratory judgment, the criteria is whether it will clarify and settle the legal relations in issue, and whether such a declaration will afford relief from uncertainty and controversy giving rise to the proceeding. *Sweeney v. American Nat'l Bank*, 62 Idaho 544, 115 P.2d 109 (1941).

Jurisdiction.

District court has jurisdiction to entertain suit to construe unemployment compensation

law, notwithstanding power conferred on Industrial Accident Board to determine its jurisdiction and questions relative to enforce it. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

Local Beer Licensing Law.

An applicant for a beer license was not precluded by the existence of appellate procedure in the licensing laws from seeking a declaratory judgment to determine the validity of the village ordinance under which his application was denied. *Winther v. Village of Weippe*, 91 Idaho 798, 430 P.2d 689 (1967).

Negligence.

Issue of whether warehouse was guilty of negligence in failing to move crate from danger of flood cannot be determined by declaratory judgment suit. *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951).

Partnership.

In an action by surviving members of a partnership against the administratrix of deceased member for a declaratory judgment and accounting, surviving partners were entitled to a declaratory judgment, where the complaint stated the situation confronting the surviving partners and involving the partnership affairs, and the doubt, uncertainty, and controversy existing between them and the administratrix. *Varkas v. Varkas*, 64 Idaho 297, 130 P.2d 867 (1942).

Pleadings.

Plaintiff must prove allegations of his complaint and has right to open and close case, as action is not one to require defendant to bring suit upon his pretended claim or obligation, but is purely a statutory action in which adverse claim may be adjudicated and determined. *Harrison v. Russell & Co.*, 17 Idaho 196, 105 P. 48 (1909).

In a cause of action for declaratory judgment, a mere averment of the disagreement without pleading the facts disclosing the grounds for and at least the basis of plaintiff's claim in connection with the disagreement is insufficient. *Ayers v. General Hosp.*, 67 Idaho 430, 182 P.2d 958 (1947).

Proper Remedy.

No judicial declaration is necessary or can be granted where there is no difference or threat, present or prospective, existing between the parties to the action or proceedings. *State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 52 P.2d 141 (1935); *Whitney v. Randall*, 58 Idaho 49, 70 P.2d 384 (1937).

There must be adverse parties and an actual controversy over the construction or validity of a statute or an instrument or other

subject-matter coming properly within the purview of the Declaratory Judgment Act upon which the suit is based. *Whitney v. Randall*, 58 Idaho 49, 70 P.2d 384 (1937).

Declaratory judgment is not a proper remedy where main issue is determination of issue of fact. *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951).

Purpose.

The evident purpose of the provisions of the former identical rule was to secure speedy

disposition of declaratory actions so that prejudice would not result to those whose rights are involved. *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 365 P.2d 824 (1961).

Quiet Title or Contract to Convey Land.

Where parties appear and suit may be construed as one to quiet title, or for declaratory relief to construe a contract to convey land, the district court has jurisdiction of both the parties and subject-matter. *Whitney v. Randall*, 58 Idaho 49, 70 P.2d 384 (1937).

RESEARCH REFERENCES

A.L.R. Validity, construction, and application of criminal statutes or ordinances as proper subject for declaratory judgment. 10 A.L.R.3d 727.

Availability and scope of declaratory judg-

ment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements. 12 A.L.R.3d 854.

Rule 58(a). Entry of judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court shall sign the judgment and the judgment shall be entered by the judge or clerk; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall approve the form and sign the judgment, and the judgment shall be entered by the judge or the clerk. Every judgment and amended judgment shall be set forth on a separate document as required in Rule 54(a). The filing of a judgment by the court as provided in Rule 5(e) or the placing of the clerk's filing stamp on the judgment constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. The entry of judgment shall not be made in a divorce or annulment action unless and until the prevailing party furnishes to the clerk a completed certificate of divorce or annulment on a form furnished by the department of vital statistics. In addition, entry of judgment shall not be made as to any decree that contains the obligation for one party to pay child support unless and until it is accompanied by the completed transmittal form to the Department of Health and Welfare. (Adopted March 26, 1992, effective July 1, 1992; amended March 31, 1998, effective July 1, 1998; amended March 1, 2000; effective July 1, 2000; amended March 29, 2010, effective July 1, 2010.)

STATUTORY NOTES

Cross References. General verdict accompanied by jurors' answer to interrogatories, Rule 49(b).

Motion for new trial not later than fourteen days after entry of, Rule 59(b).

Multiple claims, judgment upon, Rule 54(b).

Notice of entry of, Rule 77(d).

JUDICIAL DECISIONS

ANALYSIS

Amended Verdict.
 Continuing Jurisdiction.
 Filing Notice of Appeal.
 Final Judgment Rule.
 Notice.
 Oversight.
 Running of Time for Appeal.
 Timeliness.

Amended Verdict.

Where the trial court had received the verdict and discharged the jury, but the parties agreed to allow the jury to resume their deliberations, and following those deliberations, the jury returned an amended verdict, which the trial court, again without objection, accepted, the trial court properly entered the order of judgment on that verdict pursuant to this rule, and as there was no recognizable error in the district court's original order of judgment, the district court erred in granting defendant's motion to alter or amend that judgment. *Vega v. Neibaur*, 127 Idaho 606, 903 P.2d 1303 (1995).

Continuing Jurisdiction.

When a court properly acquires jurisdiction over the parties, and over the subject matter of a controversy, that jurisdiction continues until extinguished by some event; the court's power to enter judgment, and even to correct a judgment or the record so that it accurately reflects action taken by the court, is not lost by the lapse of time. *Ward v. Lupinacci*, 111 Idaho 40, 720 P.2d 223 (Ct. App. 1986).

Filing Notice of Appeal.

I.R.C.P. 81(l), governing small claims appeals, requires a notice of appeal to be filed within "the time provided by law"; this rule is broad enough to encompass the definition of "entry of judgment" found in this rule, which states that the placing of the clerk's filing stamp on the judgment constitutes entry, since this rule is the only provision of the law which defines entry of judgment. The entry of judgment, in turn, commences the "time provided by law" for filing an appeal within the meaning of I.R.C.P. 81(l). *Smethers v. Wilson*, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984) (decision prior to 1984 amendment of I.R.C.P. 81(l)).

District court signed an order granting summary judgment and an order awarding court costs, but it did not sign a separate document that would constitute a judgment until one month after the builder had filed its notice of appeal, making the builder's notice

of appeal premature. However, since the district court's grant of the landowner's motion for summary judgment resolved all of the substantive issues in the case, the builder's premature notice of appeal became valid upon entry of the final judgment. *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 226 P.3d 1263 (2010).

Oil company's notice of appeal was untimely, Idaho App. R. 14(a), Idaho R. Civ. P. 58(a), because the company filed the notice of appeal more than 42 days after the district court's order, which was a separate document and was a judgment under Idaho R. Civ. P. 54(a). *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 148 Idaho 588, 226 P.3d 530 (2010).

Final Judgment Rule.

Where district court signed an order granting summary judgment, and then entered an order awarding costs, but no final judgment was entered that stated the relief granted and represented a final determination, the Supreme Court had no jurisdiction to hear an appeal. *T.J.T., Inc. v. Mori*, 148 Idaho 825, 230 P.3d 435 (2010).

Notice.

In a malpractice action brought by client against former attorney the evidence was undisputed that the trial court's law clerk sent a copy of the summary judgment order to client the day before the district court clerk placed the clerk's filing stamp on the order, and that the trial court records did not show that the clerk of the district court ever sent client a copy of the order bearing the filing stamp. Since the placement of the filing stamp on the summary judgment order determined when the entry of judgment occurred, the trial court's finding that client did not have actual notice of the entry of judgment dismissing client's claims against his former attorney was not clearly erroneous. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992).

Oversight.

The trial court abused its discretion in denying nunc pro tunc relief where failure to enter the judgment until 23 months after it was due was simply an oversight, and the defendants would not be prejudiced. *Ward v. Lupinacci*, 111 Idaho 40, 720 P.2d 223 (Ct. App. 1986).

Running of Time for Appeal.

The trial court directed that all relief be denied to the city and that the plaintiffs be

awarded their costs and attorney fees; this constituted a specific direction as to the judgment to be entered pursuant to this rule, and the placing of the clerk's filing stamp on the judgment constituted the entry of the judgment which began the running of time for an appeal. *City of Preston v. Baxter*, 120 Idaho 418, 816 P.2d 975 (1991).

Timeliness.

Although a judge may seek assistance from a prevailing party in preparing the judgment, it remains emphatically the province and the responsibility of the judge to ascertain that the judgment is timely entered. *Ward v. Lu-*

pinacci, 111 Idaho 40, 720 P.2d 223 (Ct. App. 1986).

Cited in: *Swayne v. Otto*, 99 Idaho 271, 580 P.2d 1296 (1978); *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979); *Operating Eng'rs Local Union 370 v. Goodwin Constr. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct. App. 1982); *State ex rel. Moore v. Lawson*, 105 Idaho 164, 667 P.2d 267 (Ct. App. 1983); *Harms Mem. Hosp. v. Morton*, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986); *Hunting v. Clark County Sch. Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997); *Noreen v. Price Dev. Co.*, 135 Idaho 816, 25 P.3d 129 (Ct. App. 2001).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal.

Certification.

Clerk's Authority to Enter.

Contents of Judgment.

Judgment Contrary to Verdict.

Mandamus.

Notice.

Order and Judgment Distinguished.

Signing.

What Constitutes Entry.

What Constitutes Judgment.

Appeal.

The district court trying de novo objections to a guardian's sale of real estate on appeal could enter findings of fact, conclusions of law, and judgment notwithstanding the death of the ward after the trial and before such entry. *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967).

Certification.

Certificate of clerk is incompetent to impeach regularity of his official act in filing judgment. *West States Mtg. Loan Co. v. Hurst*, 41 Idaho 80, 237 P. 1107 (1925).

Clerk's Authority to Enter.

Clerk has no authority to enter judgment on a special verdict in an action involving equitable issues, where no judgment has been rendered by the court. *Stewart Whsle. Co. v. District Judge*, 41 Idaho 572, 240 P. 597 (1925).

Contents of Judgment.

Court has a discretion to omit from the judgment an order for the return of the property, where the substantial rights of both parties may be subserved thereby. *Johnson v. Fraser*, 2 Idaho 404, 18 P. 48 (1888).

Any papers, records, or copies thereof which

do not belong in the judgment roll may be stricken therefrom on motion. *Williams v. Boise Basin Mining & Dev. Co.*, 11 Idaho 233, 81 P. 646 (1904).

A notice of motion to strike out a part of a pleading and the order granting the motion form no part of the judgment roll. *Graham v. Lineham*, 1 Idaho 780 (1880); *Swanson v. Groat*, 12 Idaho 148, 85 P. 384 (1906).

Instructions given or refused at trial are not part of the judgment roll. Unless alleged errors in giving and refusing instructions are presented by the reporter's transcript, they can be reviewed only when saved by a bill of exceptions. *Crowley v. Croesus Gold & Copper Mining Co.*, 12 Idaho 530, 86 P. 536 (1906), overruled in part on other grounds, *Hall v. Jensen*, 14 Idaho 165, 93 P. 962 (1908); *Minneapolis Threshing Mach. Co. v. Peterson*, 31 Idaho 745, 176 P. 99 (1918).

Minutes of the court, as such, are not properly a part of the judgment roll, except in so far as they may contain any order or judgment, a copy of which is by statute made a part of the judgment roll. *Perkins v. Loux*, 14 Idaho 607, 614, 95 P. 694 (1908).

An order entered on the minutes denying relief prayed for is no part of the judgment roll. *Bissing v. Bissing*, 19 Idaho 777, 115 P. 827 (1911).

Affidavit of attachment, undertaking on attachment, writ of attachment and return to writ of attachment, and notice of levy on real estate under attachment are no part of the judgment roll or the transcript. *King v. Seebeck*, 20 Idaho 223, 118 P. 292 (1911).

Findings of fact and conclusions of law are not part of judgment roll in default case unless they might be incorporated in judgment physically; there is no necessity of their being on separate paper, but if they are, they are not part of judgment roll. *Blandy v. Mod-*

ern Box Mfg. Co., 40 Idaho 356, 232 P. 1095 (1925).

The mere omission of a blank intended for the clerk to insert the amount of costs will not vitiate the judgment. *St. John v. O'Reilly*, 80 Idaho 429, 333 P.2d 467 (1958).

Judgment Contrary to Verdict.

In action to recover possession of horses and their increase or value thereof, where jury found that plaintiff was entitled to recover horses which defendant bought from the plaintiff's wife by reason of a judgment which was reversed on appeal, but did not find that the plaintiff was entitled to recover a certain horse or its value or that such horse was not one of the horses attempted to be sold or a descendant thereof, the judgment awarding that horse to the plaintiff contrary to verdict was erroneous. *Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426 (1942).

Mandamus.

Mandamus will lie to compel court to enter judgment. *Santi v. Hartman*, 29 Idaho 490, 161 P. 249 (1916).

Notice.

Clerk's record of the judgment is not only actual notice to the parties to the action who are named in the judgment, but it is constructive notice to both these and to persons in privity with them, if it is made to appear that the latter have succeeded to same right or

title adjudicated by the judgment. *Smith v. Kessler*, 22 Idaho 589, 127 P. 172 (1912).

Order and Judgment Distinguished.

Whether document expressing the action of the court is a mere "order" or possesses the dignity of a "judgment" is to be determined by its contents. *State v. McNichols*, 62 Idaho 616, 115 P.2d 104 (1941).

Signing.

There is difference between signing judgment and entering it, as judgment is properly signed by judge instead of clerk. *Faris v. Burroughs Adding Mach. Co.*, 48 Idaho 310, 282 P. 72 (1929).

What Constitutes Entry.

Supplemental decree bearing notation of entry and filing is deemed "entered." *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734 (1933).

When judgment is filed it is deemed in law to be entered. *Berding v. Varian*, 34 Idaho 587, 202 P. 567 (1921); *West States Mtg. Loan Co. v. Hurst*, 41 Idaho 80, 237 P. 1107 (1925).

Judgment is "entered" when deposited with the clerk. *Miller v. Gooding Hwy. Dist.*, 54 Idaho 154, 30 P.2d 1074 (1934).

What Constitutes Judgment.

An entry of findings of fact and conclusions of law does not constitute a judgment and, therefore, is not appealable. *Hamblen v. Goff*, 90 Idaho 180, 409 P.2d 429 (1965).

RESEARCH REFERENCES

A.L.R. What constitutes "entry of judgment" within meaning of Rule 58 of Federal

Rules of Civil Procedure, as amended in 1963. 10 A.L.R. Fed. 709.

Rule 58(b). Satisfaction of judgment.

Upon full payment of a judgment, the party in whose favor the judgment was rendered shall have the duty to record a satisfaction of judgment in every county where the judgment or abstract of the judgment is recorded and to file it in the court of entry. A satisfaction of judgment may be signed by the attorney of a party in whose favor the judgment was entered.

JUDICIAL DECISIONS

ANALYSIS

Damages.

Purchase of Property Equal to Amount Due.

Damages.

Where the defendant failed to record the satisfaction of judgment, the plaintiff's com-

pensatory damage claim was controlled by the question of causation. If the trial court correctly found that no damages were proximately caused by the defendant's acts or omissions, recovery was unavailable under the slander of title theory, but if, on the other hand, some damages were proximately

caused, recovery was available under the negligence theory. *Crosby v. Rowand Mach. Co.*, 111 Idaho 939, 729 P.2d 414 (Ct. App. 1986).

Purchase of Property Equal to Amount Due.

Judgment creditors' purchase of debtor's

property, for the whole amount due on judgment, entitled debtors to require creditors to record a satisfaction of the judgment. *Boller v. Sun Valley Shamrock Resources, Inc.*, 119 Idaho 1060, 812 P.2d 1221 (Ct. App. 1991).

RESEARCH REFERENCES

A.L.R. Validity, construction, and application of uniform enforcement of foreign judgments act. 31 A.L.R.4th 706.

Rule 59(a). New trial — Amendment of judgment — Grounds.

A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
2. Misconduct of the jury.
3. Accident or surprise, which ordinary prudence could not have guarded against.
4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.
5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.
6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.
7. Error in law, occurring at the trial. Any motion for a new trial based upon any of the grounds set forth in subdivisions 1, 2, 3 or 4 must be accompanied by an affidavit stating in detail the facts relied upon in support of such motion for a new trial. Any motion based on subdivisions 6 or 7 must set forth the factual grounds therefor with particularity. On a motion for new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. (Amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Cross References. Affidavits, time for serving, Rule 59(c).

Amended judgment, motion for joined with motion for new trial, Rule 52(b).

Disability of judge cause for granting, Rule 63.

Enforcement of judgment, stay of proceedings on motion for new trial, Rule 62(b).

Enlargement of time, when, Rule 6(b).

Harmless error no ground for, Rule 61.

Juror's answers to interrogatories inconsistent with verdict, new trial ordered, Rule 49(b).

Motion for, joined with motion to set aside verdict and judgment on motion for directed verdict, Rule 50(b).

Motion to alter or amend judgment, Rule 59(e).

New trial on initiative of court, Rule 59(d).

Time for motion, Rule 59(b).

JUDICIAL DECISIONS

ANALYSIS

Accident or Surprise.
 Additional Evidence.
 Affidavit.
 Alternative Motion.
 Appellate Review.
 Application.
 Basis for Motion.
 Burden of Proof.
 Character Evidence As to Truthfulness.
 Constitutionality.
 Damages.
 —Amount.
 —Error by the Court.
 —Evidence.
 —Excessive or Inadequate.
 —Punitive.
 Denial.
 Discretion of Court.
 Distinguished from Directed Verdict.
 Duty of Court.
 Erroneous Grant of New Trial.
 Error by Jury.
 Error in Instructions.
 Evidence.
 —Exclusion.
 —Insufficient.
 —Newly Discovered.
 —Review.
 —Sufficient.
 Inadequate Time Requested for Continuance.
 Invasion of Province of Jury.
 Irregularity in the Proceedings of the Court.
 Jury Instructions.
 Jury Misconduct.
 —Standard to Determine.
 Motion.
 —Denial.
 —Facts in Support.
 —Granted.
 —Improperly Granted.
 —Properly Refused.
 —Review.
 —Time for Filing.
 —Untimely.
 Motion Properly Denied.
 New Trial Improperly Granted.
 Particularity of Grounds Alleged.
 Passion or Prejudice.
 Reopening a Case.
 Required Issues and Findings.
 Review.
 —Scope.
 Special Verdict.
 Statement of Reasons.
 Test.
 Unfair Tactics.
 Verdict Based on Averaging.

Waiver of Right.
 Worker's Compensation Cases.
 Worthlessness.

Accident or Surprise.

A motion for a new trial pursuant to subsection (3) is similar to a motion pursuant to subsection (2) in the sense that both must show prejudice. However, a motion pursuant to subsection (3) also requires a showing that the alleged accident or surprise was one that ordinary prudence could not have guarded against. *Hughes v. State*, Dep't of Law Enforcement, 129 Idaho 558, 929 P.2d 120 (1996).

Additional Evidence.

Additional evidence should be received only if the party seeking to reopen the case shows some reasonable excuse such as oversight, inability to produce evidence, ignorance of evidence or excusable neglect, and in an appropriate situation, a mistake of law may be treated as excusable neglect. *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 991, 812 P.2d 298 (Ct. App. 1990).

Affidavit.

Subdivision 7 of this rule provides that a motion for new trial based on grounds set forth in subdivision 1 "Shall be supported by affidavit," however, where the ground for the new trial is the misconduct of counsel in producing documents which would form the basis for the affidavit, the court may act without the affidavit; therefore, the court acted properly in granting the new trial. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

Even if affidavits from every juror are not presented with the motion for a new trial, the affidavits filed with the court must establish by a clear showing that all jurors agreeing to the "quotient verdict" were impermissibly bound. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Alternative Motion.

If an alternative motion for a new trial is made with the motion for judgment n.o.v., the trial court must rule on both motions separately. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Where an alternative motion for new trial is made with a motion for judgment n.o.v., the trial court must rule on both motions separately. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

Appellate Review.

In order to determine that the trial court

abused its discretion in granting a new trial on the issue of damages only, the Supreme Court must conclude that (1) the damages awarded by the jury were inadequate, (2) the issue of liability was close, and (3) other circumstances indicated that the verdict was probably the result of prejudice, sympathy, or compromise, or that, for some other reason, the liability issue was not actually determined by the jury. *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988).

On appeal, the Supreme Court will not reverse a trial court's order granting or denying a motion for new trial unless the court has manifestly abused the wide discretion vested in it. While the Supreme Court must review the evidence, it is not a position to "weigh" it as the trial court. *Jones v. Panhandle Distribs., Inc.*, 117 Idaho 750, 792 P.2d 315 (1990).

Role on appeal is not to "re-weigh" the evidence, but is limited to determining whether there was a manifest abuse of discretion by the trial court. *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992).

Appellate court reviews the evidence but does not "weigh" it in the same manner as the trial court does. The appellate court will not reverse a trial court's order granting a motion for a new trial unless the court has manifestly abused its broad discretion. *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 835 P.2d 1282 (1992).

Trial court did not make sufficient findings to support granting of a new trial under this rule; the trial court declared that the motion was being granted under this rule, then stated that the reasons for granting a new trial were "that the jury awarded inadequate damages and their verdict appears to have been given under the influence of passion or prejudice." Such a conclusory statement, unsupported by the identification of any factual basis, was not adequate to illuminate for the appellate court the rationale for the trial court's findings. Furthermore, the reasons for granting a new trial were not obvious to the appellate court from the record. *Pratton v. Gage*, 122 Idaho 848, 840 P.2d 392 (1992).

District court erred in denying an inmate's motion for reconsideration of the decision denying his petition for writ of habeas corpus. The inmate stated a valid claim that the parole commission denied him parole in retaliation for his litigative activities. The case was remanded to the district court for further proceedings. *Drennon v. Craven*, 141 Idaho 34, 105 P.3d 694 (Ct. App. 2004).

Application.

The rule that a verdict will not be set aside when supported by substantial but conflicting

evidence has no application to a trial court ruling upon a motion for a new trial. *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979).

Wise appellate review should only require the ordering of a new trial where there is a probability that a different result would occur upon the completion of the new trial. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

The rule that a verdict will not be set aside when it is supported by substantial but conflicting evidence has no application to a trial court ruling upon a motion for a new trial; this substantial evidence standard is applicable to a trial court's determination on a motion for judgment n.o.v. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Where the district judge specifically articulated the reasons for granting a new trial, clearly gave due consideration to the facts and circumstances of the case, and correctly applied the law thereto, his decision to grant a new trial was based on an exercise of reason. *Sheridan v. Saint Luke's Reg'l Med. Ctr.*, 135 Idaho 775, 25 P.3d 88 (2001).

Basis for Motion.

The trial court should require the same particularity as is required with regard to a judge granting a motion for a new trial, of a party seeking relief pursuant to a motion for new trial, judgment n.o.v., or alternative additur or remittitur. Trial judges should not be required to attempt to guess at the applicable rule governing each charge of error claimed by the moving party. It is incumbent upon counsel to set out the legal basis for each motion, set forth the basis in the record upon which the motion rests, and specify the applicable Rule of Civil Procedure. *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082 (1991).

Case involving improper firing of housing authority employee was remanded for further findings regarding the motion for a new trial as to damages, where the trial court's conclusion did not reflect that it had performed the required analysis under this rule. *Lubcke v. Boise City/ADA City Hous. Auth.*, 124 Idaho 450, 860 P.2d 653 (1993).

Where district court recognized the decision of whether to grant motion for a new trial as a discretionary one and applied the relevant standards applicable to a motion for a new trial and utilized the reason for denying on basis of the weight of the evidence, court's denial of the motion was not an abuse of discretion. *Beco Constr. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

Where the defendants argument that as a matter of constitutional due process "the jury's entire punitive damages verdict must be

stricken” was not supported by propositions of law, authority or argument, the appellate court would not consider that issue. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

District court’s order granting a new trial on the ground of insufficiency of the evidence to support a verdict was reversed where plaintiffs’ motion for a new trial was not based upon that ground. District court could not sua sponte grant a new trial on that ground. *Harger v. Teton Springs Golf & Casting, LLC*, 145 Idaho 716, 184 P.3d 841 (2008).

Burden of Proof.

Where a motion under this rule is based upon misconduct, the moving party has only the burden to establish that the misconduct occurred, the party opposing the motion then being required to establish that the conduct could not have affected the outcome of the trial. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999).

Character Evidence As to Truthfulness.

Admission of character evidence as to truthfulness of a defendant was improper and warranted a new trial where a direct attack on the truthfulness of defendant could not be inferred from the tone of cross-examination questions posed to the defendant nor from the fact that defendant was asked to explain some apparent inconsistencies between his testimony and previous statements. *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989).

Constitutionality.

Where the trial court discloses its reasons for granting or denying motions for a new trial and/or remittitur or additur, unless those reasons are obvious from the record itself, the standard for granting a new trial under this rule permits an adequate review of the decision of the trial court in order to insure the right to trial by jury guaranteed by Const., art. 1, § 7. *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988).

Damages.

Trial court did not abuse its discretion in granting plaintiff’s motion for new trial under subdivision 5 of this Rule. Under that subdivision, the court is not required to find that the verdict was not supported by the evidence as a condition precedent to granting a new trial. Defendant’s argument that the jury’s verdict was supported by the evidence would be applicable had the trial court granted the motion under subdivision 6, but it has no application when the new trial is based on subdivision 6. *Pratton v. Gage*, 122 Idaho 848, 840 P.2d 392 (1992).

Since a verdict can be sustained only to the extent that the amount does not exceed the restitutionary interest of the prevailing party, the trial judge correctly exercised his equitable powers in directing a remittitur reducing the amount of damages awarded to the vendors of farm property to the amount which they would have been entitled to under the set-aside program had they retained the property. *Toews v. Funk*, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994).

In plaintiff’s action to recover damages for personal injuries following a car accident, where the district court rendered a net judgment of \$284,334.78 for the plaintiff, defendant was not entitled to a new trial. The judgment was properly reduced for comparative negligence and charges required by Medicare regulations; defendant was not entitled to have the judgment reduced for payments plaintiff received from her insurance company. *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003).

—Amount.

Where the contention is that the award is so great as to appear to have been given by jurors activated by passion or prejudice, a more narrow question is presented within the confines of a Rule 59(a)5. motion, and the question to be answered is not one of law, since the Idaho cases make plain that the trial judge is not restricted as a matter of law in considering excessive verdicts; thus the question is answered only by a weighing of the evidence, and considerations of doing substantial justice. *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979).

The sole question on a motion for new trial is the amount of the jury’s damage award, as compared to the amount of damages the trial court on his view of the evidence would have awarded, and where the disparity is so great as to suggest, but not necessarily establish, that the award is what might be expected of a jury acting under the influence of passion or prejudice, the court will, in the interests of justice, grant a new trial or, alternatively, as a condition to denying the motion, order a remittitur, and if permissible by statutory or case law, an additur. *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979).

The power of the Supreme Court over excessive or inadequate damages exists only when the facts are such that the excess or inadequacy appears as a matter of law. *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979).

Where nothing in the record showed that the injured plaintiff was anything less than a credible witness, where his testimony was not inherently improbable, to the contrary, it was

almost completely confirmed by other witnesses including the expert medical witness for the defense, and where he was not impeached and the surrounding circumstances supported him, for the jury, and later the trial judge, to disregard his testimony on any point, including lost wages, was error, and the resulting verdict, allowing only \$540 over the uncontradicted medical expenses and lost property with apparently no lost wages at all, was so small as to “shock” the reviewing court’s collective “conscience.” *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979).

Where the difference between the jury’s damage award and the amount the trial court would have awarded is so great as to suggest, but not establish, passion or prejudice, the granting of a new trial is appropriate. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983).

Since a remittitur of damages arises only out of a new trial motion based on the excessiveness of damages under subdivision 5. of this rule, a remittitur cannot be based on any of the other grounds for a new trial enumerated under this rule. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In granting a remittitur, the trial judge must first have determined that the jury’s damage award was so excessive that it could only have been a product of passion or prejudice on the part of the jury; hence, the amount by which the trial judge offers to reduce the damage award is a discretionary decision that is inexorably linked to the exercise of discretion in ruling on a new trial motion under subdivision 5. of this rule. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Where the Supreme Court could not ascertain whether the trial court was either shocked by the jury’s award, or whether it found that award unconscionable, and it merely substituted its award amount, reached by way of a different method of calculation, for that of the jury, the order granting remittitur or new trial was set aside, and the Supreme Court remanded to the trial court so that it may enter findings of fact as to whether the trial court was, in fact, shocked by the jury award, or found such award unconscionable so as to have the appearance that it was given under the influence of passion or prejudice. *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986). See also *Sanchez v. Galey*, 115 Idaho 1064, 772 P.2d 702 (1989).

Where the trial court expressly found that the jury’s award was not the result of passion or prejudice, the predicate for awarding an additur, as an alternative to offering a new trial, then, was not present. *Howes v. Fultz*, 115 Idaho 681, 769 P.2d 558 (1989).

A trial judge can grant an additur or remittitur only by offering a new trial as an alternative, and then only if he determines that the disparity between his evaluation of damages and the jury’s award is sufficient to suggest that the jury’s evaluation of damages was the result of passion or prejudice. *Howes v. Fultz*, 115 Idaho 681, 769 P.2d 558 (1989).

Decisions of trial judges ruling on motions for new trials will not be measured by statistical analysis based on verdicts in other cases nor by reference to the opinion of appellate judges as to the adequacy of the verdict. *Sawyer v. Claar*, 117 Idaho 157, 786 P.2d 548 (1990).

The testimony of plaintiffs’ expert readily supported the jury’s award of \$700,000 to the widow of a man killed while operating a log skidder because widow’s loss of decedent husband’s economic support alone, and without consideration of other intangible forms of damages, was in excess of the \$700,000 which the jury awarded, and therefore was not the result of passion or prejudice under subdivision 5. of this rule. *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 821 P.2d 973 (1991).

Based on the evidence jury’s award to the appellants did not shock the conscience and was not necessarily the result of “passion and prejudice” and the district court properly denied the appellants’ motion for a new trial. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

—Error by the Court.

Remand for further proceedings was required where the trial court’s decision overlooked and failed to address plaintiffs’ motion for new trial as it related to the compensatory phase of the trial. *Schaefer v. Ready*, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000).

—Evidence.

The record contained substantial evidence supporting jury verdict where the plaintiffs presented evidence which, if satisfactory in the minds of the jurors, sufficiently established that the brush guard of log skidder was in a defective condition when log skidder left defendant’s control, particularly that its protective strength was below the standards of the industry; in addition, the jury’s damage award was also supported by evidence presented at trial regarding the reasonable economic expectations of plaintiffs’ decedent husband, had he not been struck down by the penetrating jillpoke; therefore, there was sufficient evidence under subdivision 6. of this Rule. *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 821 P.2d 973 (1991).

District court abused its discretion in denying a new trial to the estate of a dairy em-

ployee who died when caught in a rapid-exit gate where there was no conflicting evidence with respect to the fact that the dairy did not comply with OSHA safety regulations and the clear weight of the evidence supported the contention that dairy failure to instruct employees on a lockout procedure was a substantial factor in bringing about the accident; in contrast the dairy's theory of how the accident occurred was supported by circumstantial evidence of much less weight. *Juarez v. Aardema*, 128 Idaho 687, 918 P.2d 271 (1996).

—Excessive or Inadequate.

Under subdivision 5. of this rule, if the trial judge discovers that his or her determination of damages is so substantially different from that of the jury that the difference can only be explained as resulting from some unfair behavior, or what the law calls "passion or prejudice," on the part of the jury against one or some of the parties, then the trial judge should grant a new trial; how substantial this difference must be will necessarily vary with the factual context of each action and the trial judge's sense of fairness and justice. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

If, technically, the verdict is supported by substantial, competent evidence and the court still finds the verdict excessive, then it must rule whether in its opinion the jury appears to have acted under the influence of passion or prejudice; in ascertaining whether the jury appears to have acted under the influence of passion or prejudice, the judge looks to the disparity between the awards and to whether such disparity shocks the conscience. *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986). See also *Sanchez v. Galey*, 115 Idaho 1064, 772 P.2d 702 (1989).

In determining whether the trial court abused its discretion in granting a new trial on the issue of damages only, the trial court's finding that the verdict was not a compromise was not clearly erroneous, despite the fact that only 9 of the 12 jurors signed the special verdict, and the jury awarded the plaintiffs less than the amount of special damages that was supported by the un rebutted evidence at trial. *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988).

Subdivision 5. of this rule applies to motions for remittitur, additur, or a new trial on the issue of damages based upon excessive or inadequate damages. *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082 (1991).

In finding that the verdict appeared to have been given under the influence of passion or prejudice, the trial court properly identified the language required by this rule. It was not sufficient, however, to merely recite the language of the rule. While the trial court is not

required to state the dollar amount it would have awarded, the ruling must show that the trial court has weighed the evidence, determined the amount it would have awarded, compared that amount with the jury's award, and found a disparity so great that it shocks the conscience of the court. *Pratton v. Gage*, 122 Idaho 848, 840 P.2d 392 (1992).

If the trial court believes an injustice has occurred because the verdict is excessive or inadequate and likely arrived at by passion or prejudice, assessing the disparity between the jury's award and the judge's own opinion of damages, the court may grant a new trial. *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993).

Whether to order a new trial on the issue of damages under subdivision 5. of this rule is a subjective question that should be resolved based on the trial court's belief concerning the inadequacy or excessiveness of the award after weighing the evidence. *Curtis v. Firth*, 125 Idaho 229, 869 P.2d 229 (1994).

In a negligence action where the jury apportioned damages and the accident victim moved for a new trial on the issue of damages, and the district court did not make its own assessment of damages and compare it to the jury's award as required, but rather found there to be sufficient evidence to support the jury verdict, the trial court applied the wrong legal standard requiring a remand and reconsideration. *Leavitt v. Swain*, 131 Idaho 765, 963 P.2d 1202 (Ct. App. 1998).

District court did not abuse its discretion in denying the realtors' motion for a new trial under subsection (5), where the district court weighed the jury's damage awards and concluded that, while it may not have awarded the amounts the jury did, the amounts were not so high as to shock the conscience of the court. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

—Punitive.

The defendants' love of the environment did not absolve them from the unreasonable and willful conduct in which they engaged, and there was no error in submitting the issue of punitive damages to the jury where the plaintiff claimed intentional interference with its forest road building business. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

Denial.

New trial was not warranted on the landowner's claims against one of the neighbors because there was no showing that the district court abused its discretion in submitting the equitable claims to the jury nor had it been shown that the district court failed to

issue proper findings on the equitable claims. *Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146 (2010).

Discretion of Court.

A determination of the issues to be retried after the granting of a new trial is committed to the discretion of the trial court. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

Where the trial court failed to specify the issues to be tried on retrial but it was nonetheless clear which issues should be retried, the court's failure to specify was not an abuse of discretion. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

The holding of the supreme court that a trial judge invaded the province of the jury by overruling the jury verdict on the clear and narrow factual issue of causation did not abolish the judicial oversight function where a jury returns a general verdict, nor did it limit the verdict discretion of a trial court in ruling on a motion for new trial based on any of the other grounds for a new trial specified by this rule. *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977).

While the trial court has broad discretion in determining whether a new trial is proper, such a decision is by no means absolute; and in the event that a motion for new trial fails to allege the grounds with sufficient particularity, the trial court should ordinarily deny the motion. *Luther v. Howland*, 101 Idaho 373, 613 P.2d 666 (1980).

In action for wrongful death of child, where the trial judge found the verdict awarding \$212,500 to be in keeping with the circumstances of the case and the evidence presented and further observed that had he tried the case without the benefit of a jury, he would not have determined damages to be in a lesser amount than that rendered by the jury, trial judge acted within his sound discretion by denying the school district's motion for a new trial upon the grounds of an excessive verdict. *Packard v. Joint Sch. Dist. No. 171*, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983).

The constitutional right to trial by jury in civil cases, under the state constitution, is subject to the trial court's discretionary power to grant a new trial; the limits of this power are defined by the "abuse of discretion" standard of review. Because the discretionary power to grant a new trial does not contravene the state constitution, the abuse of discretion appellate standard is also free from constitutional infirmity. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983).

In personal injury action involving injury suffered as result of chemical spill, where,

while the fact of chemical spill was not hidden or concealed, the risk of harm was not obvious to plaintiff and the warning given was not sufficient to discharge distributor's duty of care, but where jury allocated majority of negligence to plaintiff, the trial court did not abuse its discretion in granting new trial considering the jury's allocation of negligence, the seriousness of the risk and the disparity of knowledge of the potential harmful effects and recommended precautions. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983).

The trial court's determination not to grant a new trial will not be overturned absent manifest abuse of discretion. *Stout v. Westover*, 106 Idaho 533, 681 P.2d 1008 (1984); *Wise v. Fiberglass Sys.*, 110 Idaho 740, 718 P.2d 1178 (1986).

When cognizable grounds for a new trial have been established, the district court has two options; the court may grant a new trial as requested, or it may condition the grant upon the nonmoving party's rejection of a suggested reduction in, or addition to, the damages awarded, in conformity with the court's view of the evidence. As is the case with an unconditional grant or denial of a new trial, the nonbinding offer to modify a verdict by additur or remittitur will not be disturbed on appeal unless an abuse of discretion is shown. *Young v. Scott*, 108 Idaho 506, 700 P.2d 128 (Ct. App. 1985).

In an action for breach of warranty in a sale of sheep, where the jury found for the seller, the trial judge did not abuse his discretion in granting the buyer's motion for a new trial on the ground that the verdict was inconsistent with the evidence, where the evidence showed the seller delivered fewer sheep than the contract amount, nine of the sheep were castrated males, some of the sheep were older than represented, some were infected with a disease causing abortions, and others did not bear lambs in the numbers anticipated. *Murphy v. Etchegaray*, 108 Idaho 814, 702 P.2d 852 (Ct. App. 1985).

The Supreme Court will uphold the trial court's grant or denial of a motion for a new trial unless the court has manifestly abused the wide discretion vested in it. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

A judge's ruling on a motion for new trial will not be overturned, absent an abuse of discretion. *Preuss v. Thomson*, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986).

The trial court has the discretion and prerogative to redress, by way of ordering a new trial and/or remittitur, what it perceives as a miscarriage of justice. *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986). See also

Sanchez v. Galey, 115 Idaho 1064, 772 P.2d 702 (1989).

On a motion for new trial on the ground of insufficient evidence under subdivision 6 of this rule, a trial judge is not required to view the evidence in a light most favorable to the verdict winner, but instead is free to weigh conflicting evidence. If the judge, having considered the entire evidence, and having given full respect to the jury's findings, is left with the conviction that an injustice has been done, he or she may grant a new trial. Nations v. Bonner Bldg. Supply, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987).

The determination to grant or to deny a motion for a new trial is within the discretion of the trial court and will not be overturned on appeal unless that discretion has been abused. Ortiz v. State, Dep't of Health & Welfare, 113 Idaho 682, 747 P.2d 91 (Ct. App. 1987).

A trial court has broad discretion in deciding whether to grant or to deny a motion for a new trial; the trial judge may weigh all the evidence, pass on the credibility of witnesses and make independent findings of fact and compare them to the jury's findings. Smith v. Praegitzer, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988).

The decision whether to grant a new trial because of jury misconduct or irregularities in the proceedings rests in the sound discretion of the trial court. Myers v. A.O. Smith Harvestore Prods., Inc., 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

In a sex and age discrimination case, trial court did not err in granting plaintiff's motion for a new trial; where trial court stated that there were disturbing facts that defendants had not explained, trial court adequately set forth the basis of his ruling, and the record provided no basis for a conclusion that the trial court manifestly abused his discretion. Hinman v. Morrison-Knudsen Co., 115 Idaho 869, 771 P.2d 533 (1989).

The trial court is accorded wide discretion in making its ruling pursuant to this rule. Stoddard v. Hubbard, 119 Idaho 225, 804 P.2d 1356 (Ct. App. 1991).

A trial court, sitting without a jury, should not be forced to enter a judgment until it is satisfied that it has heard all necessary evidence. The court should have reasonable discretion to determine the scope of the evidence upon which its judgment is based. The exercise of such discretion is in the interest of justice, and it encroaches on no jury function when the trial has been to the court alone. Thus, when a judge is sitting without a jury, he or she may reopen a case to hear additional evidence, prior to final judgment, regardless

of the enumerated restrictions in this rule. Davison's Air Serv., Inc. v. Montierth, 119 Idaho 991, 812 P.2d 298 (Ct. App. 1990).

While the Idaho Supreme Court did not hold that all cases of jury misconduct necessarily require that a new trial be conducted as to all parties, in the instant case it was not an abuse of discretion for the district court to so order a new trial for all parties; this was a lengthy and complicated trial dealing with many interrelated issues and therefore, the trial court did not abuse its discretion in ordering a new trial as to all parties including manufactured and retail farm implement dealer in the event that upon remand the court determined that the alleged jury misconduct necessitated a new trial. Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992).

On a motion for a new trial, unlike a motion for a directed verdict or judgment n.o.v., the trial court has broad discretion to weigh the evidence and the credibility of witnesses, and it may set aside the verdict based upon its independent evaluation of the evidence, even though there is substantial evidence to support the verdict. Litchfield v. Nelson, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992).

In determining whether to order a new trial, the trial court has broad discretion to redress what it perceives to be a miscarriage of justice. The trial court is better positioned than an appellate court to evaluate the demeanor, credibility, and testimony of the witnesses in weighing the evidence before it. Bott v. Idaho State Bldg. Auth., 122 Idaho 471, 835 P.2d 1282 (1992).

Where the trial court weighed the evidence, setting out the pertinent facts in some detail, determined the amount it would have awarded, compared the amount with the jury's award, and found a disparity, but not a disparity so great that the court was of the belief that the verdict must have come from passion or prejudice, the trial court did not abuse its discretion in denying appellant's motion for a new trial on the issue of loss of consortium. Barnett v. Eagle Helicopters, Inc., 123 Idaho 361, 848 P.2d 419 (1993).

Where the plaintiffs established that the defendant provided transcripts to witnesses subject to an exclusion order, where the defendant failed to clearly establish the violation had no effect, and where it was apparent from the court's order granting a new trial that the judge understood that he had discretion in determining whether to grant the motion, the judge acted within the boundaries of his discretion. Slaathaug v. Allstate Ins. Co., 132 Idaho 705, 979 P.2d 107 (1999).

The district court abused its discretion by

failing to recognize the general rule that a jury instruction is presumed to have cured any error in the admission of evidence; however, on remand, the court ordered the district court to reconsider the motion for a new trial, and determine whether the witness's testimony was so highly prejudicial that the jury instruction was insufficient to cure any resulting prejudice. *Cook v. Skyline Corp.*, 135 Idaho 26, 13 P.3d 857 (2000).

Where the district judge recognized its discretionary authority, followed the legal standards governing disposition of the motion for a new trial, and reached its decision based upon an exercise of reason, the district judge did not abuse its discretion in granting a new trial under I.R.C.P. 59(a)(6). *Sheridan v. Jambura*, 135 Idaho 787, 25 P.3d 100 (2001).

Because trial judges stand in the unique position of having heard all of the testimony and examined all of the evidence, their weighing of the evidence in a motion for new trial is given considerable discretion, and the district judge's determination to discount the testimony of the defendant's expert witnesses was a proper exercise of his discretion in weighing the demeanor, credibility and persuasiveness of the evidence. *Sheridan v. Saint Luke's Reg'l Med. Ctr.*, 135 Idaho 775, 25 P.3d 88 (2001).

Trial court acted within the boundaries of its discretion and consistently with applicable legal standards in denying the father's motion for a new trial, and properly weighed the evidence and found it was not against the verdict and that justice would not have been served by vacating the verdict in his medical malpractice lawsuit. *Palmer v. Spain*, 138 Idaho 798, 69 P.3d 1059 (2003).

Injured parties, who struck a cow carcass, moved for a new trial after a verdict was returned in favor of the cow owner, the pasture owner, and the state where they attempted to argue that the trial court erred in not analyzing the motion under a clear weight of the evidence standard; however, the trial court did not err, as a trial court need not separately restate and reanalyze the same facts or evidence in deciding an I.R.C.P. 59(a)(6) motion for a new trial that were previously applied in deciding a motion for judgment n.o.v. since a proper disposition of each motion necessarily rests upon the same facts or evidence. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004).

In subrogation action against Idaho transportation department by company whose employee drove through a stop sign, striking another vehicle and killing its occupants, the department's motion for a new trial was properly denied where the district court clearly perceived the issue before it as one of discre-

tion and its decision at least implicitly concluded that it weighed the evidence and was unable to find that the verdict went against the clear weight of the evidence. *Schwan's Sales Enterprises v. Idaho Transp. Dep't*, 142 Idaho 826, 136 P.3d 297 (2006).

Distinguished from Directed Verdict.

Unlike the rule which applies to motions for directed verdict or judgment n.o.v., a trial court may set aside the jury's verdict and grant a new trial pursuant to this section even though there is substantial evidence to support the verdict. A trial court is not required to view the evidence in a light most favorable to the nonmoving party. *Jones v. Panhandle Distribs., Inc.*, 117 Idaho 750, 792 P.2d 315 (1990).

Duty of Court.

The trial court has a duty to grant a new trial where prejudicial errors of law have occurred, even though the verdict is supported by substantial and competent evidence. *Schaefer v. Ready*, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000).

Erroneous Grant of New Trial.

Where a plaintiff has chosen to submit his case upon certain issues or theories, they are bound by those choices, and it is error for the trial court to afterward grant one party a new trial on the basis that the plaintiff might have prevailed had it raised a different issue. *Heitz v. Carroll*, 117 Idaho 373, 788 P.2d 188 (1990).

Error by Jury.

A motion for new trial should be granted if the court believes that the jury verdict is not in accord with law or justice. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983).

Where the great weight of the evidence indicated that the defendant primarily caused the accident by driving over the fog line on the west edge of the traveled southbound lane of traffic and striking the plaintiff's automobile, and the impact injured two plaintiffs, the jury's assessment of negligence equally between the defendant and the injured plaintiff was against the great weight of the evidence, and the jury's finding of no damage was contrary to the evidence. Accordingly, the district court abused its discretion in denying the plaintiff's motion for a new trial. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

The proper standard, in determining whether to grant a new trial on the basis of whether extraneous prejudicial information was improperly brought to jury's attention, is whether prejudice reasonably could have occurred, rather than whether prejudice actu-

ally has occurred. *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989).

Where court remanded case to the trial court to reconsider motion denying new trial, judge was to distinguish between those parts of the jurors' affidavits which would be admissible in evidence under I.R.E. 606(b), and those parts which would not; the judge was also to consider those parts which would identify the extraneous information and the circumstances under which it reached some or all of the jurors; however, the judge was not to consider the affiants' statements as to whether the extraneous information affected their votes on the verdict. *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989).

Error in Instructions.

Where there was no showing of the elements of an estoppel waiver, the payor of a promissory note could not discharge the note by a simple oral statement and the submission of an instruction on the law of waiver was an error warranting a new trial. *Everton v. Blair*, 99 Idaho 14, 576 P.2d 585 (1978).

The trial judge did not abuse its discretion in granting a new trial, where it concluded that the cumulative effect of the instructions likely caused the jury to accumulate contributory negligence on the part of the plaintiff, 80% contributory negligence was not justified, and a fair and impartial trial was not had. *Griffith v. Schmidt*, 110 Idaho 235, 715 P.2d 905 (1985).

When a jury verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial. *Walton v. Portlatch Corp.*, 116 Idaho 892, 781 P.2d 229 (1989).

It is well established that an instruction which incorrectly states the law provides grounds for ordering a new trial. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991).

Jury instruction was a substantially accurate statement of the law and when it was read and considered in conjunction with all the instructions as a whole, the jury would have understood it and applied it in the proper manner thus, there was no reversible error. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991).

Only instructions which are pertinent to the pleadings and the evidence should be given, but where it appears that the giving of the instruction did not result in any substantial injury, though not founded on the issues, the cause will not be reversed. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991).

Evidence.

In negligence action by farmer against pes-

ticide contractor, district court did not abuse its discretion when it granted contractor's motion for a new trial on damages based upon newly discovered evidence. Canner's decision to stop purchasing asparagus from domestic suppliers occurred before the conclusion of trial, and had direct bearing on potential damages. *Obendorf v. Terra Hug Spray Co.*, 145 Idaho 892, 188 P.3d 834 (2008).

—Exclusion.

The trial court did not abuse its discretion in denying admission of an environmental impact statement and the testimony of biologists where that evidence would have been very confusing, not only in its subject matter, but as to the ultimate issues in the case. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

—Insufficient.

In order to grant a new trial on the ground of insufficiency of the evidence to justify the verdict or other decision, or that it is against the law, the trial court must determine both (1) the jury verdict is against the clear weight of the evidence, and (2) a new trial would produce a different result. *Heitz v. Carroll*, 117 Idaho 373, 788 P.2d 188 (1990).

In considering a motion for new trial on the grounds of insufficient evidence under subdivision 6 of this rule, the trial court is required to undertake a two-part analysis. First, the court is to consider whether the verdict was against the weight of the evidence and if the ends of justice would be served by vacating the verdict. The court then must consider whether a different result would follow in a retrial. *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992).

—Newly Discovered.

Enlargements of photographs originally entered as exhibits at trial did not constitute newly discovered evidence under subdivision 4. of this rule since the enlargements revealed nothing relative to the item pictured which was not already discernible on the original exhibits, and since the plaintiff's counsel, during his cross-examination of the defense witnesses, could have used the original exhibits to counter allegedly false testimony which theoretically would have been refuted by the enlargements. *Rowett v. Kelly Canyon Ski Hill, Inc.*, 102 Idaho 708, 639 P.2d 6 (1981).

Enlargements of two photographs which were admitted into evidence at trial did not qualify as newly discovered evidence which would warrant a grant of a new trial pursuant to this rule. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

There was no ground for a new trial where

the newly discovered evidence was an affidavit which purported to question the validity of the zoning ordinance, and raised a legal issue that could have been discovered with reasonable diligence prior to the end of trial. *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991).

—Review.

On a motion for a new trial under this rule, unlike a motion for a directed verdict or judgment n.o.v., the trial judge may set aside the verdict even though there is substantial evidence to support it. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In considering a motion for a new trial, the trial judge is not required to view the evidence in a light most favorable to the prevailing party. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

—Sufficient.

Although the mere fact that the evidence is in conflict is not enough to set aside the verdict and grant a new trial, when a motion for a new trial is based on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the conflicting evidence for himself. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Under subdivision 6. of this rule, the trial court may grant a new trial when it is satisfied the verdict is not supported by, or is contrary to, the evidence, or is convinced the verdict is not in accord with the clear weight of the evidence and that the ends of justice would be subserved by vacating it, or when the verdict is not in accord with either law or justice. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Trial court did not err by refusing to grant a judgment n.o.v. or a new trial on liability for firing of housing authority employee, where there was sufficient evidence to show that the housing authority breached employment contract while acting under color of state law. *Lubcke v. Boise City/ADA City Hous. Auth.*, 124 Idaho 450, 860 P.2d 653 (1993).

Inadequate Time Requested for Continuance.

Under subdivision 3 of this rule, where defendant's counsel requested a two day continuance in order to prepare to rebut the plaintiffs' expert's changed testimony, and this request was granted, the fact that defendant's counsel may not have requested

enough time to prepare was not grounds for reversal. *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 821 P.2d 973 (1991).

Where no information was presented suggesting that extraneous prejudicial information was improperly brought to the jury's attention, that outside influence was improperly brought to bear on any juror, or that the jury resorted to chance, the evidence of a juror's statement contained in affidavit, to the effect that several jurors refused to participate in deliberations, was inadmissible; therefore, the jury's verdict and the court's order denying the new trial motion were affirmed. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

Invasion of Province of Jury.

Where a trial judge overruled the verdict of the jury on the clear and narrow factual issue of causation of an accident resulting in personal injury, substituted his own judgment on the quantum of causation and ordered a new trial unless the plaintiff agreed to accept a reduction of the verdict, the judge improperly invaded the province of the jury. *Ryals v. Broadbent Dev. Co.*, 98 Idaho 392, 565 P.2d 982 (1977).

Irregularity in the Proceedings of the Court.

Where, on at least two occasions during jury deliberations, bailiff, without any authority from trial court, denied jury requests for certain materials, and where those requests concerned certain deposition transcripts, which had been referred to during the trial, and an enlargement of an administrative bulletin, which formed the basis of plaintiff's contract claim, trial court was correct in granting a new trial since there existed reasonable doubt as to whether the actions of the bailiff could have had an effect on the jury. *Hinman v. Morrison-Knudsen Co.*, 115 Idaho 869, 771 P.2d 533 (1989).

Jury Instructions.

So far as the liability of those other than the ski area operator, the assumption of risk to which § 6-1106 refers must be assumption of risk in the secondary sense, or nothing more than a form of comparative negligence, and the court correctly concluded that it erroneously instructed the jury concerning the assumption of risk, and the court did not abuse its discretion in granting a new trial pursuant to subdivision (a)(7) of this rule. *Davis v. Sun Valley Ski Educ. Found., Inc.*, 130 Idaho 400, 941 P.2d 1301 (1997).

The trial court did not err in refusing affirmative defense instructions where it deter-

mined that no evidence presented by the defendants asserted that their conduct was proper, since the justification defense instruction requested was therefore unnecessary and would have only served to confuse the issues in the case. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

Jury Misconduct.

The case was remanded for the district court's determination of whether the verdict was based on adequate deliberations and for consideration of the first set of jury affidavits involving an alleged quotient verdict, in light of the well established standard that in order to find jury misconduct it must be clearly shown that each juror joining in the verdict severally agreed in advance to be bound by the averaged figures; accordingly, the order of the district court granting a new trial was vacated on the ground of jury misconduct and remanded for further consideration. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Remand was required where extraneous prejudicial information regarding the source of a plaintiff's injuries in a negligence case may have been improperly brought to the jury's attention, as the scope of the trial court's investigation in interviewing only the jury foreperson was insufficient as although the foreperson claimed to have no knowledge of the improper information the juror could have talked with other jurors without the foreperson's knowledge, and the juror which allegedly obtained the improper information would not discuss her conduct with the plaintiff's attorney nor was asked to explain it by the court. *Leavitt v. Swain*, 131 Idaho 765, 963 P.2d 1202 (Ct. App. 1998).

When a doctor sued a hospital under the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C.S. § 701 et seq., for terminating his hospital privileges due to his bipolar illness diagnosis, *Idaho R. Evid.* 606(b) did not bar the introduction of a juror's affidavit stating that another juror made a prejudicial comment during voir dire to show the second juror's dishonesty, but the doctor's motion for a new trial under *Idaho R. Civ. P.* 59(a)(2), which alleged juror misconduct, did not point to a material question the juror failed to answer honestly on voir dire, or show that a correct answer to the question would have provided a basis for a challenge for cause, so, because his allegation that a juror lied during voir dire was not raised before the trial court, the trial court correctly denied his motion for new trial. *Levinger v. Mercy Med. Ctr.*, 139 Idaho 192, 75 P.3d 1202 (2003).

—Standard to Determine.

Because the district court did not apply the "unique and compelling" standard in determining whether the evidence of juror misconduct justified considering plaintiff's Rule 60(b) motion, it failed to apply the correct legal standard in evaluating the motion which amounted to a clear abuse of discretion; remand was required for district court to determine whether unique and compelling circumstances existed in granting relief from judgment. *Miller v. Haller*, 129 Idaho 345, 924 P.2d 607 (1996).

Motion.

—Denial.

Where, in an action on an installment land sale contract, the purchasers' attorney did not request a delay nor indicate to the court why one of the purchasers did not appear at trial or what the substance of his testimony would have been, the court did not err in denying a motion for new trial which alleged that such testimony would have showed that the vendors waived the purchasers' default. *Ellis v. Butterfield*, 98 Idaho 644, 570 P.2d 1334 (1977).

Rule 11(a)(2), both before and after its 1987 amendment, clearly disallows a motion to reconsider an order granting or denying a motion for new trial under Rule 59; plaintiff's motion for reconsideration brought pursuant to Rule 59(e) was properly denied by the trial court because it is a motion specifically excluded from reconsideration by *I.R.C.P.* 11(a)(2)(B). *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Where the court did not use the words lease, sublease, or option in any of its instructions but instead, the court simply instructed the jury that if it concluded an assignment occurred without the property owner's consent, the defendants had breached the contract, read as a whole, the instructions adequately explained to the jury the issue in the case in light of applicable Idaho law; therefore, the court did not err in denying the motion for a new trial. *Haag v. Pollack*, 122 Idaho 605, 836 P.2d 551 (Ct. App. 1992).

—Facts in Support.

Under subdivision 7 of this rule, the requirement that motion for new trial "must set forth the factual grounds therefor with particularity" is mandatory and the factual grounds must set out where the evidence was insufficient or where the court erred; therefore where the motion sufficiently excluded irrelevant facts, properly cited the error of the jury and gave defendant adequate notice of the finding that was questioned so that it

could present its own evidence on the matter, the motion was proper. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

—Granted.

Wife was entitled to a new trial in her wrongful death action concerning her husband's suicide because inconsistencies in the verdict form and the jury's findings were irreconcilable. It could be inferred that the jury found a physician and a nurse negligent and that they proximately caused the injury by failing to properly inform and treat the husband after determining that he was HIV positive, but the jury also found that the medical center's negligence did not proximately cause the injury after being instructed that any negligence on the part of the physician and the nurse would be imputed to the medical center. *Cramer v. Slater*, 146 Idaho 868, 204 P.3d 508 (2009).

—Improperly Granted.

Where the defendants squarely raised an issue of comparative negligence, but the trial judge, noting that the jury never reached this issue, left the question undecided, the Court of Appeals remanded for a further finding on this issue, and the order granting a new trial was vacated. *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987).

—Properly Refused.

Where the record indicated the plaintiffs presented evidence of special damages totaling \$7,300, and of this amount, approximately \$4,000 was uncontroverted, and where the jury found that the plaintiffs sustained a total of \$5,000 in damages, it cannot be concluded based on these facts that the trial court abused its discretion in refusing to grant the plaintiffs' motion for a new trial on damages. *Stoddard v. Hubbard*, 119 Idaho 225, 804 P.2d 1356 (Ct. App. 1991).

The jury instructions allowed the jury to apportion to the city and telephone company not only their own negligence, but also the negligence of contractors in failing to place and maintain barricades and cones to warn the public of the excavation which led to plaintiff/motorcyclist's injury; this was not an error in law; where a city has a nondelegable duty, the city may be liable not only for its own negligence in failing to carry out the duty, but also for the failure of others whom the city has authorized to carry out it's duty; the trial court correctly denied the motions for a new trial pursuant to this rule. *Beitzel v. City of Coeur d'Alene*, 121 Idaho 709, 827 P.2d 1160 (1992).

—Review.

The "substantial evidence" standard is not

appropriate for review of the trial court's grant of new trial motions; to adopt such a standard would, in effect, eliminate new trial motions, and leave a trial court with a choice between granting a judgment n.o.v. or acquiescing in what the court believes to be a flawed verdict. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983).

—Time for Filing.

When the judge denied the plaintiff's motion under I.R.C.P. 60(b) for relief from the dismissal, the plaintiff had ten days to file a motion for amendment or alteration under this rule or I.R.C.P. 59(e), and he had 42 days to appeal; where he did neither within these time periods, later motion was filed too late. *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986).

—Untimely.

Where judgment was entered against the defendant on June 26, the defendant's motion for a new trial was denied on September 27, and his motion for reconsideration was denied on October 23, the defendant's notice of appeal, which was filed on December 5, was untimely, as the denial of the motion for a new trial reinstated the 42-day period within which an appeal should have been filed, and the motion for reconsideration was not filed within ten days of the motion for a new trial and was filed approximately 90 days after the entry of judgment. *Hamilton v. Rybar*, 111 Idaho 396, 724 P.2d 132 (1986).

Motion Properly Denied.

The trial court's denial of the defendants' motion for a new trial was affirmed where the fact that certain defendants were found to have committed more acts than others did not create the type of conflict requiring additional peremptory challenges, and where the overall approach of the defense was uniform in that they believed they were justified in their environmental protest actions against a forest road building company. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

Where two drivers collided at an uncontrolled intersection, plaintiff driver was not entitled to recover personal injury damages from defendant driver because each driver was 50 percent negligent for failing to keep a proper lookout, and it was for the jury to determine the relative fault of the parties; further, plaintiff was not entitled to a new trial. *Vaughn v. Porter*, 140 Idaho 470, 95 P.3d 88 (Ct. App. 2004).

Motion for a new trial or additur by high school girl who had consensual affair with her coach/teacher was properly denied. Because a

reasonable jury could have concluded that plaintiffs failed to prove their damages, the jury did not err by failing to award monetary compensation after it found the school district liable for negligent supervision and a proximate cause of the damages, especially since the student offered no evidence of her past medical, counseling, or therapy costs, or of economic loss. *Hei v. Holzer*, 145 Idaho 563, 181 P.3d 489 (2008).

A new trial may not be granted so the jury can consider issues the party did not raise until after the conclusion of the trial; therefore, there was no harm in the district court's failure to address whether the electric company was entitled to a new trial so that the jury could consider the issue of ratification. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 188 P.3d 854 (2008).

Order denying plaintiffs' motion for a new trial in their medical malpractice action against defendants was proper. The trial court did not abuse its discretion in precluding plaintiffs' medical expert from testifying regarding a delegation of services agreement on the ground that the expert's opinion had not been disclosed to defendants. *Schmechel v. Dille, M.D.*, 148 Idaho 176, 219 P.3d 1192 (2009).

New Trial Improperly Granted.

The district court's order for a new trial on the issue of informed consent in a medical malpractice action was reversed where despite the trial court's reservation's as to the attending doctor's credibility, there was substantial evidence that an alternate procedure that the doctor did not explain to the patient was not a viable alternative under the circumstances, there was no specific finding that the doctor failed to disclose the risks and complications of a second surgery, and the trial court made no specific finding that a new trial would have led to a different result. *Shabinaw v. Brown*, 131 Idaho 747, 963 P.2d 1184 (1998).

Grant of a judgment n.o.v. or in the alternative, a new trial, to the contractor was improper where uncontradicted testimony showed the contractor failed to verify field conditions prior to commencing work. There was sufficient evidence that the State did not have a duty to indemnify the contractor because the contractor had breached its own duty. *Gillingham Constr., Inc. v. Newby-Wiggins Constr., Inc.*, 142 Idaho 15, 121 P.3d 946 (2005).

Particularity of Grounds Alleged.

A violation of the rule that a motion for new trial based on subdivision 6 or 7 must state grounds with sufficient particularity is not to be excused simply because defendants are

appearing pro se and may not be aware of the rule. *Scafco Boise, Inc. v. Rigby*, 98 Idaho 432, 566 P.2d 381 (1977).

Where the defendants moved for a new trial supported by a brief and affidavits rearguing their case, an exhibit which they had forgotten to introduce during trial, and a report of a hearsay conversation with the jury foreman, such motion violated this section in that it failed to allege grounds with sufficient particularity as required for a motion under subdivision 6. *Scafco Boise, Inc. v. Rigby*, 98 Idaho 432, 566 P.2d 381 (1977).

In ruling on a motion for new trial, it is not required that the movant must be able to point to the record of proceedings and demonstrate some occurrence which created jury passion or prejudice; this is true whether the motion for a new trial is by a defendant complaining of an excessive award or by a plaintiff complaining of an inadequate award. *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979).

The plaintiff who filed a timely motion was allowed to satisfy the particularity requirement after the ten-day period had elapsed, where the plaintiff's motion alerted the defendant that the judgment would not go unchallenged, the defendant was put on prompt notice that the judgment did not possess all the attributes of finality, and although the motion did not initially satisfy the particularity requirement, the briefing schedule established by the trial court allowed the plaintiff to supplement the motion with the precise grounds for the motion and the facts on which it rested. *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987).

In denying the motion for new trial, the trial court did not adequately state the grounds for the denial of the motion because the trial court did not refer to this rule or the standard applicable to the consideration of a motion under this rule, and did not weigh the evidence to determine what amount the trial court would have awarded the injured party and compare that amount with the jury's award. *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991).

There was not a sufficient showing of conduct amounting to "an extreme deviation from reasonable conduct" to allow the issue of punitive damages to go to the jury where bank breached its contract with debtors when they stopped sending the monthly statements and bank was negligent when it took them over one year to correct the credit information. *Hoglan v. First Sec. Bank*, 120 Idaho 682, 819 P.2d 100 (1991).

Where the plaintiffs described a witness' testimony with particularity in its memoran-

dum supporting the motion for a new trial, and where the defendant did not object to this characterization of the testimony in its opposing memorandum, a trial transcript was not necessary to effectuate the two purposes of the rule demanding particularity. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 983 P.2d 834 (1999).

Passion or Prejudice.

Subdivision (5) did not apply to the facts of the instant case since the action was tried without a jury. *Enright v. Jonassen*, 129 Idaho 694, 931 P.2d 1212 (1997).

When ruling on a motion premised upon inadequate or excessive damages, the trial court compares the jury's award to what the court would have given, based upon its weighing of the evidence. Unless the disparity is so great that it appears to the trial court that the award was given under the influence of passion or prejudice, the award must stand. *Phillips v. Erhart*, — Idaho —, 254 P.3d 1 (2011).

Reopening a Case.

The Supreme Court has recognized the power of a court to reopen a case prior to final judgment. This discretionary power was not granted pursuant to this rule, but arose separately, through case law. Reopening a case to admit additional evidence is not analogous to granting a new trial. *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 967, 812 P.2d 274 (1991).

Where the trial court issued a Memorandum Decision, but a Motion to Reopen was filed and ruled on before any judgment was entered, the trial judge properly exercised his discretion in reopening the matter. *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 967, 812 P.2d 274 (1991).

Required Issues and Findings.

In a suit for wrongful death, where the jury found that the driver was not negligent, but the district court granted the widow's motion for a new trial, the district court erred in failing to address the issue of whether a different result would have occurred in a retrial under Idaho R. Civ. P. 59(a)(6) and it failed to make findings showing the reasons for a new trial; thus, the matter was reversed and remanded for reconsideration. *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003).

Review.

—Scope.

An appellate court will not overturn a trial court's ruling on motions to set aside or reconsider, and to grant a new trial, absent an abuse of discretion. *Northwest Roofers & Em-*

ployers Health & Sec. Trust Fund v. Bullis, 114 Idaho 56, 753 P.2d 267 (Ct. App. 1988).

The appellate court reviews a trial court's decision to grant or deny a new trial for an abuse of discretion and that decision will not be disturbed absent a manifest abuse of discretion. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

Special Verdict.

Where the special verdict shows that the jury found the defendant liable under all three causes of action presented to it, the fact that the court reversed on the issue of liability on one cause of action is no basis to impugn the verdict of the jury where the jury's specific findings on the other two causes of action supported the award of compensatory damages. *Hoglan v. First Sec. Bank*, 120 Idaho 682, 819 P.2d 100 (1991).

The requirement of this rule, that the trial court must state its particular reasons for granting a motion for new trial, is met when there is an adequate explanation to allow the reviewing court to understand the basis upon which the action was taken. The trial court must state both the factual basis for its decision and the particular rule of the Idaho Rules of Civil Procedure under which it is acting. *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082 (1991).

Statement of Reasons.

A trial court is not required to specify its reasons for granting a new trial. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

To facilitate a meaningful review of the court's exercise of discretion on a new trial motion, the court should state on the record the reasons which it believes support a new trial, as well as the grounds, provided by rule or statute, on which the court bases its order for a new trial. However, where the trial court grants a new trial, failure to state why the court felt the evidence was insufficient to support the verdict does not constitute reversible error. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 664 P.2d 787 (Ct. App. 1983).

The trial judge must disclose his or her reasoning for granting or denying motions for a new trial and/or remittitur or additur unless those reasons are obvious from the record itself. When the trial court grants one of these motions, it should state its reasons with particularity unless it is obvious from the record itself, whereas, if the trial court simply denies the motion, it need only state, or point to where in the record it reveals, that the moving party has failed to meet its burden to justify granting the motion. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Where it was not obvious from the record why the defendants' motions for a new trial and remittitur were summarily denied, the action was remanded to the district judge who heard the case to state his reasons for his denial of each of defendants' separate motions. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

In deciding whether to grant a new trial pursuant to this rule, it is preferable for a trial court to state the exact amount it would have awarded for damages as compared to the jury's award; however, where the trial court did not state an exact amount, the Supreme Court did not overturn the trial court's decision where the trial court indicated that it determined the amount it would have awarded and compared this amount to the jury's award. *Beitzel v. City of Coeur d'Alene*, 121 Idaho 709, 827 P.2d 1160 (1992).

When a trial court grants a motion for new trial, it should state its reasons with particularity unless it is obvious from the record itself; however, if the trial court simply denies the motion, it need only state, or point to where in the record it reveals, that the moving party has failed to meet its burden to justify granting the motion. *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992).

Test.

To grant a new trial, the court must apply a two-prong test: (1) the court must find that the verdict is against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict; and (2) the court must conclude that a retrial would produce a different result. *Carlson v. Stanger*, 146 Idaho 642, 200 P.3d 1191 (2008).

Unfair Tactics.

An attorney's intentional, inflammatory, and unfair tactic to violate the statute and confuse and unfairly prejudice the jury should not be tolerated. Such tactics require the firm application of I.C. § 10-111, which requires a mistrial and leaves no discretion to the trial court judge. *Robertson v. Richards*, 115 Idaho 628, 769 P.2d 505 (1989).

Verdict Based on Averaging.

The determination of whether the conduct of the jury in returning a verdict based on averaging has deprived a party of a fair trial, and whether to grant or deny a new trial, is left to the sound discretion of the trial court. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Waiver of Right.

The fact that a party suspects at the time the jury returns its verdict that the verdict may have been a quotient verdict is not sufficient to constitute waiver; defendant's failure to object to the form of the verdict at the time the jury returned its verdict did not constitute a waiver of the right to subsequently bring a timely motion for new trial based on alleged jury misconduct. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Where motorist stated in her affidavit that at some point "following voir dire but before the jury returned its verdict," she recalled that juror had formerly lived in the same neighborhood as motorist's and had been turned down for employment at motorist's day care business, her failure to inform the court, prior to the verdict, of her previous contact with juror constituted a waiver of the issue of alleged juror misconduct. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

Worker's Compensation Cases.

The authority of the Industrial Commission to reconsider its decisions is not analogous to the limitations imposed upon the trial courts by this rule and I.R.C.P. 60, as both §§ 72-718 and 72-719 authorize the commission to reconsider its decisions on its own motion upon the showing set out in those statutes. *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

Worthlessness.

The appellate court refused to overturn the lower court's denial of a new trial in the instant case because it could not find that the testimony of the witnesses was entirely worthless. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Additional Evidence.
Amendment to Findings and Judgment.
Change in Judge.
Decision Against Law.
Denial of Motion.

Discretion of Court.
Erroneous Instructions.
Errors in Law.
Excessive Damages.
Federal Standards.
Finality of Orders.
Form of Motion.

Insufficiency of Evidence.
 Irregularity in Proceedings.
 Issues of Fact.
 Misconduct of Jury.
 Newly-Discovered Evidence.
 Notice of Hearing.
 Order Granting New Trial.
 Quotient Verdict.
 Reduction of Damages on Appeal.
 Reference to Evidence.
 Relief Granted to Party Only.
 Renewal of Motion Prohibited.
 Ruling on Motion.
 Scope of New Trial.
 Statement of Reasons.
 Substituting New Findings and Decree.
 Sufficiency of Reasons.
 Sufficiency of Specifications.
 Surprise.
 Time for Motion.

Additional Evidence.

In an action to enjoin defendant from obstructing an alleged county road which crossed his land, it was not error for the court to reopen the trial to receive evidence of a proper description of the roadway as it crossed defendant's land. *County of Bonner v. Dyer*, 92 Idaho 699, 448 P.2d 986 (1968).

Amendment to Findings and Judgment.

The court properly acted in making an amendment to the findings of fact and judgment after more than 10 days had elapsed after entry of the judgment, for appellant. His motion, to amend the judgment and to grant a new trial, all filed the same day, afforded the trial court an opportunity to proceed under the provisions of this rule, the verdict of the jury not being set aside but was properly used as an offset against the amount the trial court found due and owing by the respondents to the plaintiff. *Dawson v. Eldredge*, 84 Idaho 331, 372 P.2d 414 (1962).

Change in Judge.

Where a motion for a new trial is heard before the successor of the judge who tried the case, the Supreme Court will pass upon the evidence in same way that a nisi prius court would do. *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907).

Decision Against Law.

Subdivision of former statute authorizing a new trial on the ground that "verdict is against the law," was not intended to include all or any of the other grounds enumerated. *Young v. Tiner*, 4 Idaho 269, 38 P. 697 (1894).

An assignment that the verdict is against law does not include an assignment of the insufficiency of the evidence to sustain the

verdict. *Young v. Tiner*, 4 Idaho 269, 38 P. 697 (1894).

Where a judgment is entered upon findings which do not determine all the material issues raised by the pleadings with respect to which evidence was introduced, the decision is against law and a new trial may be granted on that ground. *Brown v. Macey*, 13 Idaho 451, 90 P. 339 (1907).

Where a verdict read "We, the jury, ... find in favor of the plaintiff and against the defendant ... and assess his damages at \$ None," it was in fact and in law a finding for defendant, and plaintiff, as ground for a new trial, stated that the verdict of the jury was against the law, such assignment of error fell within subdivision 6. *Baldwin v. Ewing*, 69 Idaho 176, 204 P.2d 430 (1949).

Denial of Motion.

In the absence of a showing that a different result would follow on a new trial, a motion therefor is properly denied. *Consumers Credit Co. v. Manifold*, 65 Idaho 238, 142 P.2d 150 (1943).

Where a motion for new trial on statutory grounds was in substantially the language in which those grounds are set out, without elaboration or specific application to the action in which filed, there was no error in denying the motion. *Paullus v. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968).

Discretion of Court.

An appellate court will not interfere with orders granting a new trial for newly-discovered evidence in absence of abuse of discretion (*Heilner v. Brown*, 2 Idaho (Hasb.) 263, 2 Idaho 263, 12 P. 903 (1887)); but such an application should be looked upon with suspicion and disfavor. *Black v. Lewiston*, 2 Idaho 276, 13 P. 80 (1887).

An order granting a new trial will not be disturbed in absence of abuse of discretion. *Jacksha v. Gilbert*, 4 Idaho 738, 44 P. 555 (1896); *Brossard v. Morgan*, 6 Idaho 479, 56 P. 163 (1899); *Wolfe v. Ridley*, 17 Idaho 173, 104 P. 1014 (1909); *Say v. Hodgins*, 20 Idaho 64, 116 P. 410 (1911); *Caravelis v. Cacavas*, 38 Idaho 123, 220 P. 110 (1923); *Turner v. First Nat'l Bank*, 42 Idaho 597, 248 P. 14 (1926).

Where a trial court, in granting or refusing a new trial, exercises a legal and not an arbitrary discretion, in conformity with the spirit of the law and in such manner as will subserve rather than impede or defeat the ends of justice, avoiding technicalities, same will not be disturbed on appeal. *Baillie v. Wallace*, 22 Idaho 702, 127 P. 908 (1912).

The court would not be precluded from granting a new trial because it was moved for on a ground for which court could have granted new trial on its own motion. *Turner v.*

First Nat'l Bank, 42 Idaho 597, 248 P. 14 (1926).

Trial courts possess a discretion to be exercised wisely in granting or refusing new trials, which discretion will not be disturbed on appeal unless it clearly appears to have been exercised unwisely and to have been manifestly abused. *Baldwin v. Ewing*, 69 Idaho 176, 204 P.2d 430 (1949).

The Supreme Court is firmly committed to the proposition that when the trial court is of the opinion that a verdict based on conflicting evidence, or even when there is no conflict, is not in accord with law or justice, he may grant a new trial, and such order will not be reversed on appeal except for manifest abuse of discretion in making the order. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

The granting of a new trial is largely in the discretion of the court. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

If trial court determines that instruction resulted in a denial of substantial justice it was not error to grant new trial. *Cassia Creek Reservoir Co. v. Harper*, 91 Idaho 488, 426 P.2d 209 (1967).

Though motions for new trial are usually made at the same time as a motion for directed verdict, the substantial evidence rule is not applied to motions for a new trial because granting the motion for a new trial is within sound discretion of trial court and will not be reversed without a showing of abuse of discretion. *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

Trial court did not abuse its discretion in refusing to grant a new trial based on plaintiff's inability to testify due to illness, since the supporting affidavit indicated that the plaintiff was ill for a considerable period prior to the trial, while the record did not contain any request for a delay of trial. *Isaguirre v. Echevarria*, 96 Idaho 641, 534 P.2d 471 (1975).

Erroneous Instructions.

It was not error for the trial court to grant a new trial on the ground that the jury erroneously had been instructed upon the effect of their answers to a special verdict upon the ultimate rights of the parties, where the court, in its discretion, could determine, under the circumstances of the case, that the instruction resulted in a denial of substantial justice. *Cassia Creek Reservoir Co. v. Harper*, 91 Idaho 488, 426 P.2d 209 (1967).

Where instruction to jury inaccurately stated the law and was prejudicial to plaintiff's case, trial judge was correct in granting a new trial. *Corey v. Wilson*, 93 Idaho 54, 454 P.2d 951 (1969).

Errors in Law.

An error of the trial court in granting or refusing a new trial is an order made after trial, and is addressed to the discretion of the court, and is not an error occurring at the trial. *Baillie v. Wallace*, 22 Idaho 702, 127 P. 908 (1912).

That court may have erred in applying law to facts as found is no ground for reexamining facts, but remedy is by appeal from judgment. *Walton v. Clark*, 40 Idaho 86, 231 P. 713 (1924).

If trial court is in error in ruling favorably on motion of non-suit, the error can be corrected and should be corrected on motion for new trial based on error in law in granting motion for non-suit; *Tucker v. Hypotheek Mining & Milling Co.*, 31 Idaho 466, 173 P. 749 (1918), and *Carscallen v. Lakeside Hwy. Dist.*, 44 Idaho 724, 260 P. 162 (1927), holding that court has no power to grant a new trial after entering judgment of dismissal, are expressly overruled. *Julien v. Barker*, 75 Idaho 413, 272 P.2d 718 (1954).

Excessive Damages.

On appeal from an order granting a new trial, the record showing that there was only a difference of some twenty or thirty dollars between the amount of damages shown by defendant's proofs and that allowed by the jury, and that expenses of a new trial would greatly exceed the difference, a new trial should not be granted. *Wood Livestock Co. v. Woodmansee*, 7 Idaho 250, 61 P. 1029 (1900).

Federal Standards.

Where jury rendered verdict for defendants in state court in a case governed by federal maritime law, federal standards were applicable to jury findings, and it was error to grant new trial where jury answers to interrogatories were based on sufficient evidence and could be interpreted in a consistent manner. *Stobie v. Potlatch Forests, Inc.*, 95 Idaho 666, 518 P.2d 1 (1973).

Finality of Orders.

Order granting or denying motion for new trial is final, and only remedy is by appeal. *Spivey v. District Court*, 37 Idaho 774, 219 P. 203 (1923).

Form of Motion.

The statute does not require a formal motion to be made for a new trial; yet when such motion is put in writing and filed as a part of the records in the case, same will not be stricken. *Storer v. Heitfeld*, 17 Idaho 113, 105 P. 55 (1909).

The motion for a new trial may be oral or in writing, and is not required to be in any particular form or to state grounds upon

which same is made. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912).

Insufficiency of Evidence.

Specifications of insufficiency of evidence which designate some particular fact and aver that it is not justified by, or not sustained by, or is contrary to the evidence are sufficient. *Bernier v. Anderson*, 8 Idaho 675, 70 P. 1027 (1902); *Palmer v. Northern Pac. Ry.*, 11 Idaho 583, 83 P. 947 (1905).

A specification that the evidence is insufficient and that the plaintiff is not entitled to one hundred eighty-five inches of water, but is entitled to fifteen inches of water, is not a sufficient specification of the insufficiency of the evidence. *Robson v. Colson*, 9 Idaho 215, 72 P. 951 (1903).

On an issue as to whether a road was a private road or a public highway, a specification of insufficiency of evidence stating that "the evidence is undisputed that the road in question was a private road" is sufficient. *Palmer v. Northern Pac. Ry.*, 11 Idaho 583, 83 P. 947 (1905).

The trial court may and should grant a new trial regardless of the existence of a conflict in the evidence, if he concludes that the verdict of the jury is improper. *Jones v. Campbell*, 11 Idaho 752, 84 P. 510 (1906).

A motion for a new trial should be directed at the verdict of the jury or the "decision" of the court, and not at the judgment; otherwise the sufficiency of the evidence to support an order overruling such motion cannot be reviewed on appeal. *Caldwell v. Wells*, 16 Idaho 459, 101 P. 812 (1909), modified on other grounds, *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967).

The question of the insufficiency of the evidence is a ground for a new trial, and on appeal from an order on motion for a new trial, such ground or the sufficiency of the evidence to justify the verdict or other decision may be reviewed. *Buster v. Fletcher*, 22 Idaho 172, 125 P. 226 (1912).

Where evidence is conflicting and trial court is satisfied that the verdict is contrary to the evidence, granting of a new trial on ground of insufficiency of evidence will not be disturbed on appeal, unless it affirmatively appears that there was an abuse of discretion. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

Where it was clear from the motion that the evidence did not support jury's finding of the amount of damages suffered by respondents, no more exact specification than this was required, and respondent's motion for new trial was not faulty on the ground of alleged insufficiency of evidence. *Fignani v. Lewiston*, 94 Idaho 196, 484 P.2d 1036 (1971).

Irregularity in Proceedings.

Movant is not entitled to a new trial on ground of irregularity in proceedings of the adverse party unless timely and proper objections are made. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

In motion for new trial based on alleged irregularity in proceeding by adverse party which prevented a fair trial in that it was charged that expert witnesses of plaintiff in malpractice proceeding were prevented from appearing at trial, where affidavit was based on hearsay it was not shown that affidavits could not have been obtained from expert witnesses. *Julien v. Barker*, 75 Idaho 413, 272 P.2d 718 (1954).

Under the first subparagraph it is necessary that the moving party show he was prevented from having a fair trial and in the instant action appellant himself verified the statements made by the witnesses whose testimony he is now challenging. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

Issues of Fact.

No new trial can be had unless there is to be a reexamination of an issue of fact. *People ex rel. Lincoln County v. George*, 3 Idaho 108, 27 P. 680 (1891); *Tucker v. Hypotheek Mining & Milling Co.*, 31 Idaho 466, 173 P. 749 (1918).

Misconduct of Jury.

The action of the father of plaintiff in liberally patronizing, during the trial, a saloon conducted by one of the jurors in the presence of the other jurors in the case is such misconduct of the adverse party as to require a new trial. *Palmer v. Utah & N.R.R.*, 2 Idaho 315, 13 P. 425 (1887).

Juror will not be allowed to impeach his verdict except for reason that it was arrived at by chance. *Griffiths v. Montandon*, 4 Idaho 377, 39 P. 548 (1895); *Bernier v. Anderson*, 8 Idaho 675, 70 P. 1027 (1902); *State v. Abbott*, 38 Idaho 61, 213 P. 1024 (1923); *State v. Boykin*, 40 Idaho 536, 234 P. 157 (1925), overruled on other grounds, *State v. McMahen*, 57 Idaho 240, 65 P.2d 156 (1937).

Affidavit of attorney that jurors had told him verdict was result of chance, met by counter affidavits of two jurors that such was untrue, insufficient to show misconduct authorizing a new trial. *Graham v. Coeur d'Alene & St. Joe Transp. Co.*, 27 Idaho 454, 149 P. 509 (1915).

Affidavits of dissenting jurors to impeach the verdict will not be considered, unless it is attacked on ground that it was arrived at by chance. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

Motion for new trial based on alleged misconduct of juror was properly denied where

juror by affidavit denied misconduct. *Bates v. Siebrand Bros. Circus & Carnival*, 71 Idaho 318, 231 P.2d 747 (1951).

The rule has long been established in this state that a verdict may not be impeached by the affidavits of jurors except for the statutory ground that it was determined by chance. *Dawson v. Eldredge*, 84 Idaho 331, 372 P.2d 414 (1962).

The misconduct of the jury deprived appellants of a fair trial and vitiated the entire verdict, not just the one cause of action as to which verdict was rendered by chance and new trial should be granted in all three causes. *Clark v. Foster*, 87 Idaho 134, 391 P.2d 853 (1964).

It was not error to deny plaintiff's motion for a new trial of a malicious prosecution suit supported by the affidavit of a juror that, during the deliberations of the jury, one juror remarked that he had known the defendant a long time and "he wouldn't do anything like this" and another stated that he couldn't see why the defendant should have to send out 15 notices to collect a bill, where the voir dire examination of such jurors did not disclose any false or misleading answers or any bias or prejudice. *Robinson v. White*, 90 Idaho 548, 414 P.2d 666 (1966).

Newly-Discovered Evidence.

It is not error to refuse a new trial on the ground of discovery of alleged evidence entirely irrelevant to the issue. *Gaffney v. Hoyt*, 2 Idaho 199, 10 P. 34 (1886); *St. Regis Lumber Co. v. Turner Lumber & Mfg. Co.*, 30 Idaho 555, 166 P. 254 (1917).

Objection to affidavit read on motion for a new trial on ground of newly discovered evidence, predicated on the want of a proper jurat, must be made in the trial court in order to be available on appeal. *Heilner v. Brown*, 2 Idaho 263, 12 P. 903 (1887).

Alleged newly-discovered evidence which is mainly cumulative and which was not beyond the reach of the parties at the time of the trial is not ground for a new trial. *A.J. Knollin & Co. v. Jones*, 7 Idaho 466, 63 P. 638 (1900); *Heckman v. Espey*, 12 Idaho 755, 88 P. 80 (1906); *Hall v. Jensen*, 14 Idaho 165, 93 P. 962 (1908).

The newly-discovered evidence must be set forth and it must also appear from the affidavit that the party with reasonable diligence, could not have discovered same and produced it at the trial. *Hall v. Jensen*, 14 Idaho 165, 93 P. 962 (1908); *Stolz v. Scott*, 28 Idaho 417, 154 P. 982 (1916); *Amonson v. Stone*, 30 Idaho 656, 167 P. 1029 (1917).

New trial cannot be granted because of existence of evidence not adduced at former trial, unless such evidence is newly-discov-

ered. *Dayton v. Drumheller*, 32 Idaho 283, 182 P. 102 (1919), overruled on other grounds, *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953).

A new trial should not be granted on the ground of newly-discovered evidence unless it reasonably appears that a different result would be reached on the retrial. *Caravelis v. Cacavas*, 38 Idaho 123, 220 P. 110 (1923).

Where one of two jointly interested parties knew, before the trial, of evidence not adduced at the trial, a new trial cannot be granted on the ground of newly-discovered evidence. *Caravelis v. Cacavas*, 38 Idaho 123, 220 P. 110 (1923).

There is no error in denying new trial where the newly-discovered evidence might have been produced by due diligence before or at the time of the trial or where no sufficient reason is disclosed why the evidence could not have been produced at the trial. *Livestock Credit Corp. v. Corbett*, 53 Idaho 190, 22 P.2d 874 (1933).

To entitle one to a new trial on the ground of newly-discovered evidence it must be shown that the newly-discovered evidence could not, with reasonable diligence, have been discovered and produced at the trial. *Boise-Payette Lumber Co. v. Idaho Gold Dredging Corp.*, 56 Idaho 660, 58 P.2d 786 (1936).

In suit by plaintiff to recover amount of alleged deposit from bank where counsel for plaintiff was advised prior to trial that deposit slip was questioned and that a handwriting expert was advisable, but no attempt was made to secure testimony of expert until after termination of trial, the plaintiff was not entitled to a new trial on the ground of newly discovered evidence as to handwriting of teller who allegedly signed deposit slip. *Papineau v. Idaho First Nat'l Bank*, 74 Idaho 145, 258 P.2d 755 (1953).

Assuming the facts stated in the affidavit were true, that one of appellant's witnesses had stated to or in the presence of affiant facts that were not true and in variance with what he had initially told appellant and that witness had been paid to change his testimony, such testimony, even assuming it came as a surprise to appellant, which ordinary prudence could not have guarded against, was not shown to have materially affected appellant's rights and the testimony of such witness being merely cumulative, was not sufficient to warrant the grant of a new trial. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

The denial of a motion for new trial made on the basis of newly discovered evidence will not be overturned on appeal absent a showing of an abuse of discretion by the trial court and

such abuse did not occur where newly discovered evidence could have been discovered and produced at the trial with reasonable diligence. *Craig H. Hisaw, Inc. v. Bishop*, 95 Idaho 145, 504 P.2d 818 (1972).

Trial court properly refused to grant a new trial on the basis of newly discovered evidence, where the new evidence would not have changed the result of the first trial. *Grasser v. First Sec. Bank*, 96 Idaho 754, 536 P.2d 749 (1975).

Notice of Hearing.

Where the attorneys for the parties sign a stipulation waiving notice of time and place of hearing and passing upon a motion for a new trial, trial judge may hear and pass on motion without notice to adverse party. *Buckle v. McConaghy*, 11 Idaho 533, 83 P. 525 (1905).

Adverse party is entitled to notice of hearing on the motion for new trial, and has right to be heard and to be present when moving party is presenting his side of the case. *Peter v. Kalez*, 11 Idaho 553, 83 P. 526 (1905).

Either party may call up for a hearing an application for a new trial. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912).

Order Granting New Trial.

It would be in the interest of good practice and the dispatch of business if trial courts, when making orders granting new trials, would specify the particular grounds on which such orders are made. *Wolfe v. Ridley*, 17 Idaho 173, 104 P. 1014 (1909).

Where a motion for a new trial has been made on several grounds and the trial court grants same, it will not be reversed on appeal, if it can be justified on any of the grounds on which the motion was made. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

Quotient Verdict.

A quotient verdict is invalid. *Clark v. Foster*, 87 Idaho 134, 391 P.2d 853 (1964).

If the jury's verdict was a quotient verdict, it was an abuse of discretion for the trial court to deny a new trial but where there was no agreement made in advance by the jury to be bound by the average figure, the verdict was not reached by chance and plaintiffs were not entitled to a new trial because of the manner in which the verdict was reached. *Lombard v. Cory*, 95 Idaho 868, 522 P.2d 581 (1974).

Reduction of Damages on Appeal.

In an action for injuries under the Federal Employees Liability Act, the Supreme Court has power to modify the judgment conditionally by reducing the damages, and, if refused, a new trial will be granted. *Roy v. Oregon S.L.R.R.*, 55 Idaho 404, 42 P.2d 476 (1934),

cert. denied, 296 U.S. 579, 56 S. Ct. 89, 80 L. Ed. 409 (1935).

Reference to Evidence.

In a hearing upon motion for a new trial, when made upon the minutes of the court, sufficiency of evidence and questions arising during trial and matters in reporter's notes may all be referred to, and the court may determine such questions from his recollection of what took place and from his own minutes kept of the proceedings, and by reference to stenographer's notes, without waiting for a transcript of proceedings and evidence as transcribed by stenographer. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912).

When motion for new trial is made on minutes of the court, the trial judge may have the official reporter read any parts of his notes or record to refresh his memory of the testimony and thus save litigants the necessity of paying for the reporter's transcript unless, after entry of the order allowing or denying motion, the aggrieved party desires to appeal, then it will be necessary for him to procure the transcript and have it served and settled. *Poitevin v. Randall*, 57 Idaho 649, 66 P.2d 1113 (1936).

Relief Granted to Party Only.

A new trial may be granted as to one party and denied as to others who have joined in the application. *Gaffney v. Hoyt*, 2 Idaho 199, 10 P. 34 (1886).

Renewal of Motion Prohibited.

District judge has no power to allow motion for new trial to be renewed and thus reverse his original order. *Spivey v. District Court*, 37 Idaho 774, 219 P. 203 (1923).

Ruling on Motion.

Rule prohibiting an appellate court from reversing a judgment supported by substantial, competent evidence, is not applicable to a trial court ruling on a motion for a new trial. *Rosenberg v. Toetly*, 93 Idaho 135, 456 P.2d 779 (1969).

Scope of New Trial.

Trial judge who grants a new trial on ground of excessiveness of verdict should, in the exercise of his discretion, determine whether or not the issues should be limited to the amount of damages sustained by the plaintiff. *Mendenhall v. MacGregor Triangle Co.*, 83 Idaho 145, 358 P.2d 860 (1961).

Statement of Reasons.

Where a motion for a new trial has been made on several grounds and the trial court grants the same without designating the ground upon which the order is made, the

order will not be disturbed on appeal if it could have been granted properly on any ground mentioned in the motion. *Gray v. Pierson*, 7 Idaho 540, 64 P. 233 (1901); *Penninger Lateral Co. v. Clark*, 20 Idaho 166, 117 P. 764 (1911).

The grounds upon which a new trial is granted should be stated in the order. *Cox v. Cox*, 22 Idaho 692, 127 P. 679 (1912) but if not so stated, Supreme Court, in reviewing the order, will examine record and sustain order if there is sufficient error to warrant granting of a new trial. *Bernier v. Anderson*, 8 Idaho 675, 70 P. 1027 (1902).

Trial court was not required to express its reasons for granting a motion for a new trial, however it was required to express its grounds for granting same, having reference to the eight grounds set forth in former statute. *Deshazer v. Tompkins*, 93 Idaho 267, 460 P.2d 402 (1969), overruled on other grounds, *Mann v. Safeway Stores*, 95 Idaho 732, 518 P.2d 1194 (1974).

Substituting New Findings and Decree.

Where findings of fact, conclusions of law and decree have been made and entered by trial court, and recorded, in favor of one of the parties, it is reversible error for court, upon motion for new trial, and of its own motion, to set aside previous judgment entered and substitute new findings of fact, conclusions of law and decree in favor of the other party, without granting a new trial. *Lawrence v. Corbeille*, 28 Idaho 329, 154 P. 495 (1916).

Sufficiency of Reasons.

Newly discovered evidence, which is merely cumulative or designed to contradict witnesses, is not sufficient to warrant the granting of a new trial. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

The motion for a new trial was in substantial compliance with the procedural requirements for such a motion where part of the motion specified the particulars in which the evidence was alleged to be insufficient, and clearly inferred that the motion was made on the basis of the record of the evidence adduced

at the trial. *Fignani v. Lewiston*, 94 Idaho 196, 484 P.2d 1036 (1971).

Sufficiency of Specifications.

Specifications that the evidence does not support the "judgment" and that the "judgment" is contrary to law cannot be considered on a motion for a new trial. *Curtis v. Walling*, 2 Idaho 416, 18 P. 54 (1888).

A motion for a new trial which did not specify in what particulars the evidence was insufficient and what errors of law were made was properly overruled. *Paullus v. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968).

Surprise.

In order to obtain a new trial on the ground of surprise, the surprise should be shown by the best and most satisfactory evidence within reach of applicant. *Lillienthal v. Anderson*, 1 Idaho 673 (1866).

Facts constituting accident or surprise must be set forth in the affidavit. *Hall v. Jensen*, 14 Idaho 165, 93 P. 962 (1908).

Accident or surprise must be such as ordinary prudence could not have guarded against. *Cupples v. Zupan*, 35 Idaho 458, 207 P. 328 (1922).

Time for Motion.

A motion for a new trial shall be heard at the earliest practicable time, and in bringing said motion to be heard, counsel are required to prosecute with diligence the steps necessary to prepare for a hearing; where sixteen months have elapsed between the date of the judgment and the hearing of a motion for a new trial, where no excuse is shown for the delay, appeal for the order on such motion will be dismissed. *Smith v. American Falls Canal & Power Co.*, 15 Idaho 89, 95 P. 1059 (1908).

Successful party on trial may bring notice of motion for new trial to attention of trial court without waiting for convenience of moving party. *Thibadeau v. Clarinda Copper Mining Co.*, 47 Idaho 119, 272 P. 254 (1928).

Motion for new trial does not extend time to appeal. Appeal does not stay new trial proceedings. *Idaho Gold Dredging Corp. v. Boise-Payette Lumber Co.*, 54 Idaho 270, 30 P.2d 1076 (1934).

RESEARCH REFERENCES

A.L.R. Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term of time prescribed by statute or rules of court. 3 A.L.R.3d 1191.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case. 7 A.L.R.3d 1000.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as

ground for mistrial, new trial, or reversal. 19 A.L.R.3d 694; 93 A.L.R.3d 556.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 A.L.R.3d 812.

New trial on ground of newly discovered evidence going to amount of recovery. 55 A.L.R.3d 696.

Juror's voir dire denial or nondisclosure of

acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 A.L.R.3d 126.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 A.L.R.4th 229.

Propriety of juror's tests or experiments in jury room. 31 A.L.R.4th 566.

Juror's reading of newspaper account of trial in state criminal case during its progress

as ground for mistrial, new trial, or reversal. 46 A.L.R.4th 11.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone, new trial granted on ground of inadequacy of damages — modern cases. 5 A.L.R.5th 875.

Prejudicial Effect of Juror Misconduct Arising from Internet Usage. 48 A.L.R.6th 135.

Rule 59(b). Time for motion for new trial.

A motion for a new trial shall be served not later than fourteen (14) days after the entry of the judgment. (Amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Action by Court on Own.

Motion Timely.

Particularity of Grounds Alleged.

Untimely Motion.

Waiver of Right.

Action by Court on Own.

The time limitation affecting the power of the trial court to grant motions for a new trial, for judgment notwithstanding the verdict, or to alter or amend a judgment includes action by the court on its own initiative. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

Having once ruled on the post-trial motions for a judgment notwithstanding the verdict or for a new trial and an appeal being taken following its ruling, the district court did not have authority to reconsider this earlier ruling on its own initiative more than ten days after the entry of the judgment. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

Motion Timely.

Where the plaintiffs discovered within the 14 day window to file a motion for a new trial that the defendant's counsel had provided trial transcripts to witnesses subject to an exclusion order, the court properly granted the plaintiffs' motion. *Slaathaugh v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999).

Particularity of Grounds Alleged.

The plaintiff who filed a timely motion was allowed to satisfy the particularity requirement after the ten-day period had elapsed, where the plaintiff's motion alerted the defendant that the judgment would not go unchal-

lenged, the defendant was put on prompt notice that the judgment did not possess all the attributes of finality, and although the motion did not initially satisfy the particularity requirement, the briefing schedule established by the trial court allowed the plaintiff to supplement the motion with the precise grounds for the motion and the facts on which it rested. *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987).

Untimely Motion.

The trial court has no power to grant the relief requested by a motion for a new trial, for judgment notwithstanding the verdict, or to alter or amend a judgment if the motion is not timely filed, but instead the court is obligated to deny the motion. *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986).

Where the motion for a new trial was served well outside the 14-day requirement, the district court correctly denied the motion because it was untimely. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

A Rule 59 motion to amend the judgment or a Rule 11(a)(2)(B) motion for reconsideration, if timely made, would toll the time to file a notice of appeal, however, the filing of such motions 17 days after entry of judgment did not enlarge the period of time for the direct appeal from an order on summary judgment. *Ade v. Batten*, 126 Idaho 114, 878 P.2d 813 (Ct. App. 1994).

Waiver of Right.

The fact that a party suspects at the time the jury returns its verdict that the verdict may have been a quotient verdict is not suffi-

cient to constitute waiver; defendant's failure to object to the form of the verdict at the time the jury returned its verdict did not constitute a waiver of the right to subsequently bring a timely motion for new trial based on alleged jury misconduct. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Cited in: *Sines v. Blaser*, 98 Idaho 435, 566

P.2d 758 (1977); *Swayne v. Otto*, 99 Idaho 271, 580 P.2d 1296 (1978); *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979); *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986); *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988); *Foster v. Kootenai Med. Ctr.*, 143 Idaho 425, 146 P.3d 691 (Ct. App. 2006).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.

Excusable Delay.

Jurisdiction.

Motion Not in Time.

Notice Need Not Designate Time.

Premature Motion.

Prosecuting with Diligence.

Specifications of Error.

Time Allowed for Appeal.

Waiver.

Discretion of Court.

The time for hearing the motion for new trial is not jurisdictional, and it is in the discretion of trial court whether or not reasonable diligence has been exercised by movant; and mere lapse of time is insufficient to show an abuse of discretion in refusing to dismiss the motion. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

Excusable Delay.

Denial of objections was held to amount to a finding that defendant was not guilty of inexcusable delay and that the motion was presented at the earliest practicable period. *Thibadeau v. Clarinda Copper Mining Co.*, 47 Idaho 119, 272 P. 254 (1928).

When trial court denies the objections to hearing the motion for new trial, such denial is an implied finding that motion was presented at earliest practicable time. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

Jurisdiction.

Where motion for new trial was not filed within 10 days district court has no jurisdiction. The ten-day period starts running upon the filing of the findings and conclusions. *Wayne v. Marquardt*, 54 Idaho 211, 30 P.2d 369 (1934).

Motion Not in Time.

Court properly denied motion to vacate judgments which were in effect motions for a new trial and were not filed within ten days

after verdict. *Mountain States Implement Co. v. Arave*, 49 Idaho 710, 291 P. 1074 (1930).

Notice Need Not Designate Time.

Notice of motion for new trial need not designate time when motion will be made. The motion is a mere formality and may be made at any time prior to the hearing. *Times Printing & Publishing Co. v. Babcock*, 31 Idaho 770, 176 P. 776 (1918).

Premature Motion.

Motion filed after court's oral announcement of judgment for defendant, but before filing of such findings and conclusions, was premature. *Forsman v. Holbrook*, 47 Idaho 241, 274 P. 111 (1929).

Prosecuting with Diligence.

Statutory provisions contemplate that the party intending to move for a new trial shall prosecute such action with diligence. *Behrensmeyer v. Gwinn*, 25 Idaho 186, 136 P. 623 (1913).

Specifications of Error.

Specifications of error and particulars touching the alleged insufficiency of the evidence must be filed before motion for new trial could be heard. *Hall v. Johnson*, 70 Idaho 190, 214 P.2d 467 (1950).

Time Allowed for Appeal.

There is no statutory requirement that the motion for new trial be submitted and determined before the expiration of the time allowed for appeal from the judgment. *Thibadeau v. Clarinda Copper Mining Co.*, 47 Idaho 119, 272 P. 254 (1928).

Waiver.

As motion for a new trial may be brought to hearing upon motion of either party, if appellant does not ask that the motion be heard until after the stenographer's notes are transcribed and the respondent makes no objection to the hearing of the motion at the time it is made on the ground of unreasonable delay, he waives such objection. *Kelley v. Clark*, 21 Idaho 231, 121 P. 95 (1912).

Rule 59(c). Time for serving affidavits on motion for new trial.

When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen (14) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty one (21) days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits. (Amended June 15, 1987, effective November 1, 1987.)

STATUTORY NOTES

Cross References. Time computation, Rule 6(a).

JUDICIAL DECISIONS**Untimely Filing.**

The trial court correctly ruled that the second set of juror affidavits were not timely filed within the period prescribed by this rule, and could not be considered under Rule 60(b); these affidavits were simply "opposing affidavits" as contemplated by this rule, and should

have been filed within the period of time allowed by the rule; accordingly, the trial court properly refused to consider the second set of affidavits because they were not timely filed. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Change of Judge.
Counter Affidavits.
Discretion of Court.
Grounds for Motion.
Objections to Affidavit.
Review of Ruling.
Time for Filing.
Waiver.

Change of Judge.

Judge of one district called into another district to try a case pending there has all the powers of the judge of that district for purposes of case and may make an order extending time for filing affidavits on motion for a new trial. *Morris v. Lemp*, 13 Idaho 116, 88 P. 761 (1907).

Counter Affidavits.

Upon a motion for a new trial in a criminal case, the court may receive and consider counter affidavits in relation to any pertinent matter, except the issue of fact to which the newly-discovered evidence is addressed. *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910).

Discretion of Court.

Court has discretionary power to allow counter affidavits to be filed at any time, under liberal construction, even after statu-

tory time has expired. *Darling v. Fremstadt*, 22 Idaho 684, 127 P. 674 (1912).

Grounds for Motion.

For a party to obtain a new trial on ground of error in refusing a continuance for an absent witness, it is necessary, upon the motion for a new trial, to produce affidavit of absent witness showing that he could testify to facts sought to be proved by him or to show that such an affidavit could not be procured. *Lillienthal v. Anderson*, 1 Idaho 673 (1866).

Objections to Affidavit.

Objection to affidavit read on motion for a new trial on ground of newly-discovered evidence, predicated on the warrant of a proper jurat, must be made in a trial court and an exception be taken to the ruling, in order to be available on appeal. *Heilner v. Brown*, 2 Idaho 263, 12 P. 903 (1887).

Review of Ruling.

A motion for new trial which did not specify whether it was made upon affidavits or minutes of the court, with the party neither filing affidavits nor presenting a transcript containing a certificate showing what papers were used in ruling on the motion, presents no error on appeal. *Paullus v. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968).

Time for Filing.

A motion for a new trial based on affidavits cannot be heard and considered prior to the expiration of ten days allowed the adverse party in which to file and serve counter affidavits, and an order made pursuant to such a premature hearing will be reversed, although the order itself is not made until some time after counter affidavits are filed. *Peter v. Kalez*, 11 Idaho 553, 83 P. 526 (1905).

Where notice of intention to move for a new trial does not state that the motion will be based upon affidavits, it is improper to file affidavits, and if filed, they will be stricken from the records. Where the notice does so state, such affidavits must be filed within ten days after service of such notice, unless the court or judge allows further time. *Storer v. Heitfeld*, 17 Idaho 113, 105 P. 55 (1909).

Affidavits filed more than ten days after service of notice of motion for new trial, no extension of time for service appearing and no extenuating circumstances being shown, could not be considered, especially where neither notice of motion nor motion for new trial specified that motion would be made on affidavits. *F & M Bank v. Hartford Fire Ins. Co.*, 43 Idaho 222, 253 P. 379 (1926).

Waiver.

Right to ten days after service of affidavits in support of motion is waived by appearing at the place of hearing of the motion for new trial and participating therein without objection and without applying for additional time. *Carey v. Lafferty*, 59 Idaho 578, 86 P.2d 168 (1938).

Rule 59(d). On initiative of court.

Not later than fourteen (14) days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. The court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, such order shall be made only after giving the parties notice and an opportunity to be heard on the matter, and the court shall specify in the order the grounds therefor. (Amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS**ANALYSIS**

Authority to Grant Trial.
Effect of Filing Motion Prematurely.
Grounds.
Statement of Basis for Order.

Authority to Grant Trial.

While the motion for a new trial of the plaintiffs was pending, the court had authority under this rule to consider granting a trial on the issue of liability as well as the issue of damages, despite the fact that the defendant had not filed a motion for a new trial at that time. *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988).

Effect of Filing Motion Prematurely.

In a suit for wrongful death, where the widow filed a motion for new trial after the jury verdict was rendered, but before the district court entered judgment thereon, the language of Idaho R. Civ. P. 59(d) only precluded motions filed later than 14 days after judgment was entered. *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003).

Grounds.

The court was obligated by this rule to specify the grounds for the ruling, and the court's disagreement with the jury's determination of negligence was not a sufficient basis for finding misconduct of the jury. The court acted outside the bounds of its discretion when it granted a new trial for jury misconduct. *Hughes v. State, Dep't of Law Enforcement*, 129 Idaho 558, 929 P.2d 120 (1996).

Statement of Basis for Order.

A trial court need not specify its reasons for granting a new trial, although it is encouraged to do so; it is sufficient for the court to set down the statutory grounds for its order. *Luther v. Howland*, 101 Idaho 373, 613 P.2d 666 (1980).

Cited in: *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979); *Syth v. Parke*, 121 Idaho 156, 823 P.2d 760 (1991).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Applicability.
Discretion of Court.
Divorce.
Error of Jury.
Power to Set Aside Verdicts.
Validity of Grant.

Applicability.

Failure to comply with former provision governing notice of intent to move for new trial did not ipso facto oust the court of jurisdiction to grant a new trial. *Ricard v. Gollen*, 91 Idaho 335, 421 P.2d 130 (1966).

Discretion of Court.

Where a trial court in granting or refusing a new trial exercises a legal and not an arbitrary discretion, in conformity with the spirit of the law and in such manner as will subserve rather than impede or defeat the ends of justice, avoiding technicalities, same will not be disturbed on appeal. *Baillie v. Wallace*, 22 Idaho 702, 127 P. 908 (1912).

The trial court did not abuse its discretion in ordering a new trial upon its own initiative where evidence which the court had excluded under the parol evidence rule might have been relevant and admissible as tending to prove that corporation had no real existence but was merely a continuation of borrower's business under a new name. *Kluntz v. Carothers*, 96 Idaho 782, 537 P.2d 62 (1975).

Divorce.

Once a divorce decree becomes final, it is res judicata with respect to all issues which were or could have been litigated. However, there exist various avenues for directly attacking a divorce decree. For example, a party may move the district court to amend the decree, or for a new trial, within 14 days of the decree's entry. The decree is also subject to appeal within 42 days. Moreover, where a party seeks to avoid the operation of a judgment

on the basis of fraud, mistake, or other justifiable reason, I.R.C.P. 60(b) permits the court to set aside the judgment upon timely motion. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992).

Error of Jury.

There was no error on the part of the trial court in failing to set aside verdict of jury on its own motion where no motion for new trial is made, and it appeared that the instructions left the jury a free agent to find the facts one way or the other. *Poulsen v. New Sweden Irrigation Dist.*, 67 Idaho 177, 174 P.2d 206 (1946).

The court has power to set aside verdict only when the error of the jury is such as to be at once apparent. *Poulsen v. New Sweden Irrigation Dist.*, 67 Idaho 177, 174 P.2d 206 (1946).

Power to Set Aside Verdicts.

Power to set aside verdict of its own motion exists only in court, where error of jury is such as to be at once apparent. *Merchants Protective Ass'n v. Jacobson*, 33 Idaho 387, 195 P. 89 (1921).

Authority granted under former statutory provisions was entirely distinct from granting new trial upon motion of one of parties. *Boam v. Sewell*, 40 Idaho 524, 234 P. 153 (1925).

Trial court is not precluded from granting new trial because moved for on grounds on which court was empowered to grant new trial on its own motion. *Turner v. First Nat'l Bank*, 42 Idaho 597, 248 P. 14 (1926).

Validity of Grant.

When court has granted new trial on its own motion, on ground not authorized by statute, order will not be reversed, if on careful inspection of record it may be seen that order may be supported on valid grounds. *Merchants Protective Ass'n v. Jacobson*, 33 Idaho 387, 195 P. 89 (1921).

Rule 59(e). Motion to alter or amend a judgment.

A motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment. (Amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Appeal.
 Criminal Rules.
 Damages.
 Discretion of Court.
 Evidence.
 —Insufficient.
 Hearing.
 Motion to Reconsider.
 Motion to Set Aside.
 New Evidence.
 Notice of Judgment Entry.
 Petition to Reconsider.
 Post-Conviction Relief.
 Purpose.
 Relief Proper.
 Status of Case.
 Time for Filing.

Appeal.

A motion under this rule destroys the finality of a judgment for purposes of appeal and the full time for appeal commences to run anew from the entry of an order disposing of the motion and restoring finality. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

Since failure to provide notice of entry of judgment under I.R.C.P. 77(d) does not affect the time within which to file a post-judgment motion under this section, even assuming denial of defendant's motion for relief under I.R.C.P. 59(a) and 60(b) was timely appealed, the district court properly denied the motion because more than 10 days elapsed from entry of judgment, especially since I.R.C.P. 6(b) specifically prohibits extension of time for filing for relief under I.R.C.P. 60(b). *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

An order denying a motion made under this rule to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

Criminal Rules.

There is no counterpart to this rule in the Idaho Criminal Rules. *State v. Nelson*, 104 Idaho 430, 659 P.2d 783 (Ct. App. 1983).

Damages.

Fact that employee of Idaho Department of Education, wrongfully terminated for complying with subpoena, had not found commensurate employment as of the date of the hearing on the motion to amend judgment to increase damages did not establish a basis for the district court's award of additional damages.

Hummer v. Evans, 129 Idaho 274, 923 P.2d 981 (1996).

Discretion of Court.

This rule provides a trial court a mechanism to correct legal and factual errors occurring in proceedings before it and thus, as long as the trial court recognizes the matter as discretionary and acts within the outer boundaries of its discretion, reaching its conclusions through an exercise of reason, the decision will not be disturbed on appeal. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999).

District court reasonably denied an Idaho R. Civ. P. 59(e) motion to alter or amend its order, certified as a judgment under Idaho R. Civ. P. 54(b), disallowing water right claims; the district court was not required to excuse pro se litigants' untimely filing of a challenge to the special master's recommendations. *Bedke v. City of Oakley (In re SRBA)*, 149 Idaho 532, 237 P.3d 1 (2010).

Evidence.**—Insufficient.**

Landowner's motion to alter or amend judgment, which ordered landowner to return a relocated lateral ditch to its original position, was properly refused where evidence to support the motion consisted of an affidavit that landowner had run a sub-lateral ditch from the relocated lateral ditch and had cleaned the relocated ditch to lower its elevation, and an affidavit from an expert witness which essentially reiterated and expanded upon the witness's trial testimony regarding the sufficiency of the relocated lateral ditch; the affidavits were not "newly discovered" evidence in the usual sense. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

Hearing.

Under this rule, a motion to amend a judgment, including a default judgment, in a manner which would be prejudicial to another party may not be granted without notice and an opportunity for hearing; to do so contravenes the very basis of due process and finality of judgments. *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

Motion to Reconsider.

A motion to reconsider a dismissal order should be treated as a motion to alter or amend a judgment under I.R.C.P. 59(e) if the motion was timely filed. The rule requires that such a motion, in order to be timely, must be filed within fourteen days after the entry of

the “judgment.” *Ross v. State*, 141 Idaho 670, 115 P.3d 761 (Ct. App. 2005).

Motion to Set Aside.

Where a motion to set aside and reinstate did not specify whether it was based on this rule or Rule 60(b), but was filed seven days after the entry of judgment, it would be treated as a timely motion under this section. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

New Evidence.

Where motion for “reconsideration” raises new issues, or presents new information, not addressed to the court prior to the decision which resulted in the judgment, the proper analogy is to a motion for relief from judgment under I.R.C.P. 60(b), and not a motion under this rule. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

Until a judgment had been entered or a certificate granted by the trial court pursuant to I.R.C.P. 54(b), the order dismissing a counterclaim was not final and appealable. Therefore, trial court should have considered new facts upon motion for reconsideration of order. *Idaho First Nat’l Bank v. David Steed & Assocs., Inc.*, 121 Idaho 356, 825 P.2d 79 (1992).

Because a motion to amend is brought after a judgment, new evidence may not be presented. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

Notice of Judgment Entry.

In a malpractice action brought by client against former attorney the evidence was undisputed that the trial court’s law clerk sent a copy of the summary judgment order to client the day before the district court clerk placed the clerk’s filing stamp on the order, and that the trial court records did not show that the clerk of the district court ever sent client a copy of the order bearing the filing stamp. Since the placement of the filing stamp on the summary judgment order determined when the entry of judgment occurred the trial court’s finding that client did not have actual notice of the entry of judgment dismissing client’s claims against his former attorney was not clearly erroneous. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992).

Petition to Reconsider.

A petition to reconsider a memorandum decision was properly treated as a motion to alter or amend judgment. *Obroy v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977).

Although the Rules of Civil Procedure do not provide for a motion for reconsideration of a grant of summary judgment, such a motion

may be properly treated as a motion to alter or amend the judgment, which must be filed within ten days of the entry of judgment. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Post-Conviction Relief.

The state’s motion to set aside order granting post-conviction relief and to dismiss petition, made within ten days of the order, should have been treated as a motion to alter or amend the judgment under this rule regardless of the title assigned to it by the state. The trial court was thus incorrect in limiting itself to consideration of only the grounds presented in the motion. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

Purpose.

This rule was designed to allow the trial court to correct errors of fact and law which had occurred in its proceedings, thereby providing a mechanism for circumventing appeal, and the purposes of the respective rules indicate that resort should be made to this rule if the time limitation for such relief has not expired when the motion is served. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

This rule affords the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

Relief Proper.

In a case involving a dispute over a duplex sale, a motion filed after the entry of a stipulated dismissal should have been treated as one to alter or amend; moreover, it was an abuse of discretion to deny relief because the motion alerted the district court to the error in its decision relating to the sellers’ failure to waive the right to seek costs and fees in the dismissal document. In addition, the pleading standards were met for costs and fees. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

Status of Case.

Consideration of motions made pursuant to this rule must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based. *First Sec. Bank v. Webster*, 119 Idaho 262, 805 P.2d 468 (1991).

Time for Filing.

A timely motion to alter or amend a judgment tolls the time for appeal from the order until a ruling is made on the motion to alter or amend it. Thus, the filing of a motion to set aside order granting post-conviction relief,

which should have been treated as a motion to alter judgment, was timely when filed within the 42-day appeal time from the entry of the order denying the state's motion. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

The trial court did not err in denying the former husband's motion filed on November 25, 1981, for relief from, modification or clarification of the judgment and order dated August 26, 1981, where his motion for "modification or clarification of the judgment and the court's order dated August 26, 1981," was essentially a motion to alter or amend the judgment under this rule, which had to be served "not later than ten (10) days after entry of the judgment." *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983).

The plaintiff's motion for reconsideration of a grant of summary judgment was timely and proper even though he made the motion prior to the formal entry of judgment. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Even if the defendant's motion to reconsider the court's denial of the motion for a new trial could be considered by the court as a motion to alter or amend the judgment under this rule, the motion was untimely since not filed within the ten days specified by this rule. *Hamilton v. Rybar*, 111 Idaho 396, 724 P.2d 132 (1986).

Where judgment was entered against the defendant on June 26, the defendant's motion for a new trial was denied on September 27, and his motion for reconsideration was denied on October 23, the defendant's notice of appeal, which was filed on December 5, was untimely, as the denial of the motion for a new trial reinstated the 42-day period within which an appeal should have been filed, and the motion for reconsideration was not filed within ten days of the motion for a new trial and was filed approximately 90 days after the entry of judgment. *Hamilton v. Rybar*, 111 Idaho 396, 724 P.2d 132 (1986).

The plaintiff's motion for reconsideration of the judge's denial of his motion under I.R.C.P. 60(b) for relief from dismissal, was untimely, if treated as a I.R.C.P. 59 motion to alter or amend, when it was filed 42 days after the denial of motion for relief. *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986).

When the judge denied the plaintiff's motion under I.R.C.P. 60(b) for relief from the dismissal, the plaintiff had ten days to file a motion for amendment or alteration under I.R.C.P. 59(a) or this rule, and he had 42 days to appeal; where he did neither within these time periods, later motion was filed too late. *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986).

Because buyer withdrew a first motion to amend the findings of fact and conclusions of law, the time of service of the motion was considered to be the date of the filing of the second motion. The second motion was filed on the 32nd day after the entry of the judgment. This was well outside the 14-day requirement. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

Because an appeal was timely, it was timely as to all issues from which an appeal could be taken, not just those mentioned in the motion to alter or amend. The interests of efficient case management would not be served by interpreting rules to require that a party must appeal from each issue as it is decided or risk losing the right to appeal once the case has been concluded. *Idaho Dep't of Health & Welfare v. Southfork Lumber Co.*, 123 Idaho 146, 845 P.2d 564 (1993).

The Department of Health and Welfare served an I.R.C.P., Rule 59(e) motion within 14 days of the August 10, 1989 order. This was timely for purposes of I.R.C.P., Rule 59(e) motion on January 2, 1990, and the department appealed within 42 days thereafter as required by I.A.R. 14. Therefore, the department's appeal was timely and should not have been dismissed. *Idaho Dep't of Health & Welfare v. Southfork Lumber Co.*, 123 Idaho 146, 845 P.2d 564 (1993).

The filing of a timely motion to alter or amend a judgment under this rule tolls the period for filing a memorandum of costs under I.R.C.P. 54(d). The time for filing the city's cost bill did not elapse until 14 days after entry of the order denying consultant's Rule 59(e) motion and because city filed its memorandum of costs well before that deadline district court properly held that city's memorandum was timely. *J.P. Stravens Planning Assocs. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996).

Sex offender registration requirements under § 18-8310 were improperly reinstated against defendant where the State's motion for reconsideration of an order vacating the reinstatement of those requirements was brought more than 14 days after entry of the order, and thus untimely under this rule; the civil rules applied based on the remedial nature of the registration requirement. *State v. Hartwig*, 150 Idaho 326, 246 P.3d 979 (2011).

Cited in: *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979); *Large v. Mayes*, 100 Idaho 450, 600 P.2d 126 (1979); *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *Tanner v. Estate of Cobb*, 101 Idaho 444, 614 P.2d 984

(1980); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982); *Loomis, Inc. v. Cudahy*, 104 Idaho 106, 656 P.2d 1359 (1982); *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983); *Annest v. Conrad-Annest, Inc.*, 107 Idaho 468, 690 P.2d 923 (1984); *Equal Water Rights Ass'n v. Coeur D'Alene*, 110 Idaho 247, 715 P.2d 917 (1985); *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986); *Kleiber v. City of Idaho Falls*, 110 Idaho 501, 716 P.2d 1273 (1986); *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986); *First Bank & Trust v. Parker Bros.*, 112 Idaho 30, 730 P.2d 950 (1986); *Suchan v. Suchan*, 113 Idaho 102, 741 P.2d 1289 (1986); *Marcher*

v. Butler, 113 Idaho 867, 749 P.2d 486 (1988); *Hoopes v. Bagley (In re Estate of Bagley)*, 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990); *Ramco v. H-K Contractors*, 118 Idaho 108, 794 P.2d 1381 (1990); *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990); *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d 493 (1992); *McIntire v. Orr*, 122 Idaho 351, 834 P.2d 868 (1992); *Hopkins v. Troutner*, 134 Idaho 445, 4 P.3d 557 (2000); *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 141 P.3d 1099 (2006); *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010); *Bratton v. Scott*, 150 Idaho 530, 248 P.3d 1265 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

Timeliness.

Where judgment in case was filed on January 26, 1972 and the motion to reconsider filed on February 2, 1972 the requirements of

the former identical rule were met. *Turner v. Mendenhall*, 95 Idaho 426, 510 P.2d 490 (1973).

Rule 59.1. Additurs or remittiturs in lieu of new trial.

(a) **Acceptance or rejection.** If a trial court conditionally grants or denies a new trial subject to either an additur or remittitur, the party to whom it is directed shall have 42 days from entry of the order in which to accept or reject the same. If such party files a notice of appeal, the appeal shall not constitute an acceptance nor rejection of the additur or remittitur and such party shall not be required to accept or reject the additur or remittitur until the determination of the appeal.

(b) **Effect of appeal.** If a party to whom an additur or remittitur is directed is successful on appeal, the case shall thereafter be processed as provided in the opinion determining the appeal. If the order of the trial court granting a conditional new trial is affirmed, the party to whom the additur or remittitur was directed shall have fourteen (14) days from the date of issuance of the appellate remittitur in which to accept or reject the additur or remittitur in a manner consistent with the appellate opinion. (Adopted June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

No grounds for additur.
Proper Grant.
Remittitur.

No grounds for additur.

Motion for a new trial or additur by high school girl who had consensual affair with her coach/teacher was properly denied. Because a reasonable jury could have concluded that plaintiffs failed to prove their damages, the jury did not err by failing to award monetary compensation after it found the school district

liable for negligent supervision and a proximate cause of the damages, especially since the student offered no evidence of her past medical, counseling, or therapy costs, or of economic loss. *Hei v. Holzer*, 145 Idaho 563, 181 P.3d 489 (2008).

Proper Grant.

The district court determined that since the total amount the jury was awarded was less than half of what it could have awarded, and the award shocked the district court, it did not abuse its discretion in granting additur or

in the alternative a new trial. *Collins v. Jones*, 131 Idaho 556, 961 P.2d 647 (1998).

Remittitur.

Since a verdict can be sustained only to the extent that the amount does not exceed the restitutionary interest of the prevailing party, the trial judge correctly exercised his equi-

table powers in directing a remittitur reducing the amount of damages awarded to the vendors of farm property to the amount which they would have been entitled to under the set-aside program had they retained the property. *Toews v. Funk*, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994).

Rule 60(a). Relief from judgment or order — Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court or the district court, as the case may be, and thereafter while the appeal is pending may be so corrected. (Amended March 26, 1992, effective July 1, 1992.)

STATUTORY NOTES

Cross References. Enlargement of time, when, Rule 6(b).

Mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, Rule 60(b).

New trial, motion for within fourteen days after entry of judgment, Rule 59(b).

Stay of proceedings to enforce on motion to alter or amend, Rule 62(b).

JUDICIAL DECISIONS

ANALYSIS

Child Custody and Support Modifications
Dissolution of Marriage.

Errors Correctible.

Error in Amount of Judgment.

Excusable Neglect.

Fraud.

Legal Error.

Post-Judgment Interest.

Standing.

Child Custody and Support Modifications

The clear directive of Idaho R. Civ. P. 60(c) is that custody and support modifications be treated not as post-judgment orders, but as original proceedings. *Rake v. Rake*, 142 Idaho 83, 123 P.3d 716 (Ct. App. 2005).

Dissolution of Marriage.

Where the failure of the judgment in a dissolution of marriage to reduce the \$800 attorney fee award by the amount already paid, and the failure to award the husband the remaining one-half of the balance of the bank accounts clearly arose from omission or oversight, such mistakes were subject to correction by the court pursuant to this rule. *Weekes v. Weekes*, 101 Idaho 213, 611 P.2d 133 (1980).

Errors Correctible.

Where a jury had returned special verdicts of \$5,422.99 for the plaintiff in his claim against the defendants for services rendered and for \$7,994.67 for the defendants upon their counterclaim for conversion of cattle, but where the trial judge entered judgment for the defendants in the amount of \$8,441.35 rather than the difference between the special verdicts, plaintiff's motion to amend the judgment so that it would be in the amount of \$2,571.68 was properly granted. *Merrick v. Pearce*, 97 Idaho 250, 542 P.2d 1169 (1975).

Magistrate had proper jurisdiction pursuant to Idaho R. Civ. P. 60(a) to modify the divorce decree when the original decree failed to include an offset for child dependency tax exemptions; the magistrate could correct the decree because of a clerical error and modify the father's child support obligation. *Silsky v. Kepner*, 140 Idaho 412, 95 P.3d 30 (Ct. App. 2003).

Error in Amount of Judgment.

An appeal is not the proper procedural remedy to correct a clerical error made by the district court in stating the amount of the judgment; the error should have been corrected pursuant to this rule by making a motion to the district court. *W.F. Constr. Co. v.*

Kalik, 103 Idaho 713, 652 P.2d 661 (Ct. App. 1982).

Excusable Neglect.

Trial court's finding that the seller did not contact an attorney until after the deadline for filing an answer had expired was clearly erroneous, and even though the seller had received demand letters from an Idaho attorney, reasonable prudence would not have required that he obtain Idaho counsel before being served with the threatened lawsuit, particularly where it would likely have been filed in Utah, where both parties resided, and in addition to showing excusable neglect, the seller also showed a meritorious defense to the action which went beyond the mere notice requirements and entitled him to relief under Idaho R. Civ. P. 60(b)(1). *Jonsson v. Oxborrow*, 141 Idaho 635, 115 P.3d 726 (2005).

Where the buyer did not contend that she had otherwise defended the sellers' action to have a contract for the sale of property declared forfeited, to recover possession of the real property, and to have title to the property quieted, she was required to file an answer in order to prevent the entry of default against her and her failure to do so did not entitle her to relief from a default judgment on the basis of excusable neglect under Idaho R. Civ. P. 60(b)(1). *Suitts v. Nix*, 141 Idaho 706, 117 P.3d 120 (2005).

Fraud.

None of the statements of the sellers relied upon by the buyer, even if false, constituted such tampering with the administration of justice as to suggest a wrong against the institutions set up to protect and safeguard the public; thus, seller failed to establish fraud sufficient to set aside the default judgments under Idaho R. Civ. P. 60(b)(3). *Suitts v. Nix*, 141 Idaho 706, 117 P.3d 120 (2005).

Developers had engaged in fraud upon the court and the district court did not abuse its discretion in determining that the order confirming the arbitration award should be set aside. The evidence in the record was sufficient to show the arbitration was a sham and that the developers engaged in the arbitration and a subsequent confirmation proceeding for the sole purpose of circumventing the Ada County, Idaho Code subdivision process. *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005).

Appellants may not use a claim of fraud under clause (3) simply to get the appellate court to discredit the testimony of the respondents and to second guess the findings of the jury and the district court. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

Legal Error.

Where the magistrate did not intend to give the father a credit for the tax exemption benefits awarded to the mother in the first place, it was not a clerical error to be corrected under I.R.C.P. 60(a), but rather a legal error that fell outside the remedy of Rule 60(a); as a result, the magistrate court erred in amending the decree under Rule 60(a) to reduce retroactively the child support obligation based upon a calculation of the pro rata share of the tax benefit which should have been awarded at the time the decree was originally entered. *Silbsby v. Kepner*, 140 Idaho 410, 95 P.3d 28 (2004).

Post-Judgment Interest.

The district court did not err in granting the buyers' motion under this rule by correcting the judgment to include post-judgment interest. *Dursteler v. Dursteler*, 112 Idaho 594, 733 P.2d 815 (Ct. App. 1987).

Standing.

Respondents did have standing under Idaho R. Civ. P. 60(b) as non-parties directly affected by the court's confirmation of a sham arbitration award, and they remained in the case for purposes of an award of sanctions; if the developers escaped the process provided for by the Ada County, Idaho Code via a sham arbitration, then respondents, as well as neighboring properties, suffered a loss to their procedural rights. *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005).

Cited in: *Williams v. Christiansen*, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985); *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986); *Hamilton v. Rybar*, 111 Idaho 396, 724 P.2d 132 (1986); *Devine v. Cluff*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986); *Johnson v. Edwards*, 113 Idaho 660, 747 P.2d 69 (1987); *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d 493 (1992); *Thorn Creek Cattle Ass'n v. Bonz*, 122 Idaho 42, 830 P.2d 1180 (1992); *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Abstract Error.
 Damages.
 Description of Land.
 Divorce.
 Probate Proceedings.

Abstract Error.

Mere showing of an abstract error will not suffice to sustain a contention that prejudice has resulted. *Williamson v. Wilson*, 55 Idaho 337, 42 P.2d 290 (1935).

Damages.

Where the court had entered judgment for \$82.00 for plaintiffs upon the jury's finding of \$607 for plaintiffs for repair of defendants' automobile and \$525 for defendants for damages for wrongful attachment of said automobile, the court could amend said judgment by entering judgment for plaintiffs for \$607 upon determination that defendants were not entitled to damages for wrongful attachment. *Hessing v. Drake*, 90 Idaho 67, 408 P.2d 180 (1965).

Description of Land.

Where a mistake, purely clerical, is made in entering a judgment, such mistake being in the description of land, it may be corrected. *Wilcox v. Wells*, 5 Idaho 786, 51 P. 985 (1898).

Divorce.

Omission of the limitation on the duration of child support in a decree for divorce, which limitation was contained in the prayer of the complaint and the findings and conclusions of the court, was subject to correction and such omission did not render the decree void. *Hayes v. Towles*, 95 Idaho 208, 506 P.2d 105 (1973).

Probate Proceedings.

Any error in the decree approving the administrator's final account and distribution of the estate is subject to correction, both by timely motion in the probate court (now district court) and by appeal. *Horn v. Cornwall*, 65 Idaho 115, 139 P.2d 757 (1943).

RESEARCH REFERENCES

A.L.R. Vacating or opening judgment by confession on ground of fraud, illegality, or mistake. 91 A.L.R.5th 485.

Construction of Rule 60(a) of Federal Rules of Civil Procedure authorizing correction of

clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission. 13 A.L.R. Fed. 794.

Rule 60(b). Mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, grounds for relief from judgment or order.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require

leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to: (i) entertain an independent action to relieve a party from a judgment, order or proceeding, or (ii) to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in said action, or (iii) to set aside a judgment for fraud upon the court. (Amended April 4, 2008, effective July 1, 2008.)

STATUTORY NOTES

Cross References. Time for motion for new trial, Rule 59(b).

JUDICIAL DECISIONS

ANALYSIS

Accrual of Rights to Appeal.
 Any Other Reason Justifying Relief.
 Appeal.
 Basis for Relief.
 Change in Circumstances.
 Competence of Party.
 Construction.
 Custody Proceeding.
 Decree of Condemnation.
 Default Judgment.
 Discretion of Appellate Court.
 Discretion of Court.
 Divorce.
 Effect of Foreign Judgment.
 Equitable Relief.
 Excusable Neglect.
 Failure to Allege Inadvertence or Excusable Neglect.
 Failure to Present Meritorious Defense.
 Failure to Raise Objections.
 Failure to Specify Grounds.
 Fraud.
 Improper Motion.
 In General.
 Inadvertence.
 Insufficient Grounds.
 Judgment.
 —Reversal or Overrule.
 Misrepresentation.
 Mistake.
 Modification of Property Settlement.
 Motion to Set Aside and Reinstate.
 Motion Will Not Substitute for Other Relief.
 Newly Discovered Evidence.
 Overrule of Past Precedent.
 Perjury of Witness.
 Post-Conviction Relief.

Prior Judgment Reversed.
 Pro Se Litigants.
 Prospective Judgment.
 Reasonableness.
 Relief Improper.
 Relief Proper.
 Res Judicata.
 Satisfaction of Judgment.
 Scope of Review.
 Service of Process.
 Showing of Reasonable Prudence.
 Standard of Evaluation.
 Surprise.
 Timeliness.
 Vacation.
 Void Judgments.
 Waiver.
 Worker's Compensation Cases.

Accrual of Rights to Appeal.

Noncustodial father's right to appeal from an order of restitution included in conviction and sentencing for interference with child custody, accrued as of the date of the entry of conviction. *State v. Levick*, 131 Idaho 130, 953 P.2d 214 (1998).

Any Other Reason Justifying Relief.

Clause (6) of this rule was not intended to allow a court to reconsider the legal basis for its original decision. *First Bank & Trust v. Parker Bros.*, 112 Idaho 30, 730 P.2d 950 (1986).

Where the defendants were deprived, without a hearing, of the protection afforded by a final decree when the plaintiff's motion to amend default judgment was granted, and upon seeking relief directly from the district court, defendant's counsel was confronted by

an unexpected, novel, and erroneous justification for the judgment amendment, the defendants were granted relief under clause (6) of this rule. *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

The district judge did not abuse his discretion when he concluded that there was overreaching by defendant's attorney during settlement negotiations where the attorney did not merely state a factual matter to plaintiff, but instead, inappropriately offered plaintiff legal advice upon which the attorney should have expected plaintiff to rely since plaintiff was unrepresented at the time. *Hopkins v. Troutner*, 134 Idaho 445, 4 P.3d 557 (2000).

District court erred in failing to rule on the landowner's Idaho R. Civ. P. 60(b)(6) motion and sufficient unique and compelling circumstances likely existed to support his motion to vacate the prior opinion; the relief granted by the district court in the September 11, 2007 quiet title judgment was premised upon a gross mischaracterization of the holding in a prior case. *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 234 P.3d 699 (2010).

Where appellants did not specifically allege a meritorious defense of abandonment in their verified motion to set aside a default judgment in an eviction case, but the court was able to glean that defense from a letter that was attached as an exhibit to the motion, the district court did not abuse its discretion in finding that unique and compelling circumstances existed to justify setting aside the default judgment *Maynard v. Nguyen*, — Idaho —, — P.3d —, 2011 Ida. LEXIS 130 (Sept. 7, 2011).

Appeal.

Although defendant-appellant's appeal of his motion for relief pursuant to clauses (1), (2) and (4) of this rule was timely filed, the appeal must fail on the merits, since: (i) clause (1) was inapplicable where defendant was alerted by April 11 of entry of summary judgment against him on March 21 and filed a motion for relief under this rule rather than appealing as he had over four weeks to do; (ii) clause (4) was inapplicable since all the proper procedures had been followed leading to the judgment; and (iii) clause (2) was inapplicable in the absence of proof of due diligence in attempting to find the witnesses whose affidavits were not filed until May 12 some three weeks after the motion was filed. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

Where discretionary grounds are invoked for relief from a judgment, the standard of review is abuse of discretion; but where non-discretionary grounds are asserted such as

the judgment being void, the question presented is one of law upon which the appellate court exercises free review. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

A district court's order granting a motion under this rule to set aside a default judgment is appealable. Once a final order is entered, the issue addressed in the motion is subject to review on appeal. *Wright v. Wright*, 130 Idaho 918, 950 P.2d 1257 (1998).

In denying defendant's motion to set aside a default judgment in a quiet title action, the district court abused its discretion in ruling that defendant failed to demonstrate mistake or excusable neglect. A standard of liberality rather than strictness was the correct standard, and the district court erred in not applying this standard. *Cuevas v. Barraza*, 146 Idaho 511, 198 P.3d 740 (2008).

In denying defendant's motion to set aside a default judgment in a quiet title action, the district court abused its discretion in ruling that defendant had not pled a meritorious defense; defendant pleaded a meritorious breach of contract claim sufficient to warrant setting aside the default judgment. *Cuevas v. Barraza*, 146 Idaho 511, 198 P.3d 740 (2008).

Basis for Relief.

Relief from a final judgment pursuant to subdivision (b)(1) of this rule is available where the record shows: that the mistake or inadvertence of counsel was not a result of carelessness; or that the allegedly mistaken fact was not previously available; or that its absence could not have been discovered by the exercise of due diligence; or that there were exceptional circumstances which precluded the appellant from discovering its absence prior to the original hearing. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

A logging company's direct contractual relationship with lessees did not provide a reasonable basis to seek a personal judgment against a lessor, and its sole cause of action was for payment of logging-related work secured by a loggers' lien. *Montane Resource Assocs. v. Greene*, 132 Idaho 458, 974 P.2d 510 (1999).

Change in Circumstances.

Where the prior judgment upon which a judgment against a surety was based had been modified, the trial court properly reduced the judgment against the surety to reflect the reduction in the judgment against the principal. *Merrick v. Pearce*, 97 Idaho 250, 542 P.2d 1169 (1975).

The condition for relief pursuant to subdivision (5) of this rule is similar to the require-

ments of § 32-709, i.e., some change in the circumstances of the parties is necessary to make the prospective application of the judgment inequitable. *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990).

Competence of Party.

Denial of a motion to set aside a stipulated judgment due to the alleged incompetence of the plaintiff was proper, where the evidence failed to show that the 88-year-old plaintiff, although frail in body, was mentally incompetent at the time of the settlement, particularly since the plaintiff's children actively participated in settlement negotiations on her behalf. *Uchiyama v. Nakai*, 107 Idaho 423, 690 P.2d 358 (1984).

In cases where a person lacking the capacity to sue or be sued is represented in an action, whether by a natural guardian, guardian ad litem, or next friend, and the representative completely fails to prosecute a meritorious claim that results in the claim being dismissed with prejudice, relief may be granted under clause (6). *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009).

Construction.

I.R.C.P. 60(b)(1) and 60(b)(6) are mutually exclusive provisions, such that a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6). *Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979).

Where motion for "reconsideration" raises new issues, or presents new information, not addressed to the court prior to the decision which resulted in the judgment, the proper analogy is to a motion for relief from judgment under this rule, and not a motion under I.R.C.P. 59(e). *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

Custody Proceeding.

Where the requirement that an infant's natural parents be sent notice of adoption proceedings was fulfilled by waiver of notice contained in a consent to adoption, the magistrate in a proceeding under this rule correctly ruled that the burden of proof rested on the natural parents rather than the adoptive parents, since the adoptive parents would only have the burden of proof if there was no waiver of notice. *Himmelberger v. Robinson (In re Adoption of Male Child)*, 102 Idaho 225, 628 P.2d 1059 (1981).

Decree of Condemnation.

Where city had acquired a fee simple interest in plaintiff's land through condemnation proceedings but failed to use the land to enlarge its airport as anticipated, the judgment creating a fee simple interest in the city

need not be modified despite discontinuance of public use inasmuch as a decree of condemnation is analogous to a judgment for money damages and lacks the prospective application to which clause (5) of this rule refers. *City of Caldwell v. Roark*, 98 Idaho 897, 575 P.2d 495 (1978).

Default Judgment.

In suit involving a transaction that occurred while first title company owned local title business that it sold to second title company that continued to run it with the same employees and name as the first title company had used, where second title company denied all the allegations in the complaint, and alleged that it was not in any way involved in the transaction giving rise to the suit, that until first title company sold the local business to it, there was of record a certificate of assumed business name that showed first title company to be the owner of the local business and when it was sold to the second title company this certificate was withdrawn and a new certificate was filed by second title company showing it to be the owner, and that it had purchased the physical assets of the business only and not its debts or obligations, such alleged facts showed a real justiciable controversy and if such facts pleaded were proven second title company might be able to establish a defense to the action and thus default judgment obtained by plaintiff against second title company should have been set aside. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Judgments by default are not favored, and the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

In determining whether to set aside a default judgment, the Court of Appeals must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

If defendant was incompetent at the time judgment by default was entered against him, in violation of I.R.C.P. 55(b)(2), that violation would, at most, render the resulting judgment voidable, not void since an entry of judgment against an incompetent, even in the absence of a guardian, does not render the judgment void. Thus, clause (4) of this rule, allowing relief from void judgments, would be inapplicable and defendant's only avenue for relief to set aside the default would be under clause (6) of this rule, and failure to file within the

six-month period prescribed therein barred defendant's motion for relief. *Southern Idaho Prod. Credit Ass'n v. Ruiz*, 105 Idaho 140, 666 P.2d 1151 (1983).

Where the bases alleged by the defendant for his failure to take action on the complaint consisted only of mistakes of law and a conclusory allegation that he had been suffering extreme emotional distress, there was no legal basis in those allegations to justify setting aside the default judgment. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

In workmen's compensation case where it was alleged that claimant had suffered numerous injuries to knee, if, as the surety asserted, none of the current damage was causally connected to the accident for which surety was liable, a meritorious defense to liability existed which surety should be entitled to litigate, and, accordingly, default judgment would be vacated. *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

A motion to set aside a default judgment is addressed to the sound legal discretion of the court and will not be reversed unless an abuse of discretion clearly appears. *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

The district court is only vested with discretion to set aside a default judgment if the moving party has complied with the guidelines and the time for taking any such action pursuant to this rule may not be extended by either the parties or the court under I.R.C.P. 6(b). *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

Where by stipulation a court ordered that a defendant in a civil action be ordered withdrawn as a defendant and answer filed by such defendant stricken, no valid default judgment can be entered against that party and jurisdiction must be reestablished before judgment can be granted. *Morton v. Rugg*, 107 Idaho 886, 693 P.2d 1088 (Ct. App. 1984).

The defendant seeking to set aside a default judgment must show that he has a meritorious defense to the plaintiff's case. *Full Circle, Inc. v. Schelling*, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

On review of the trial court's application of law to the facts found on a motion to set aside a default judgment upon the grounds set forth in I.R.C.P. 60(b)(1), the reviewing court will consider whether appropriate criteria were applied and whether the result is one that logically follows; thus, if (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under I.R.C.P. 60(b)(1) (tempered by the policy favoring relief in doubtful cases), and (c) the trial court's deci-

sion follows logically from the application of such criteria to the facts found, then the trial court will be deemed to have acted within its sound discretion, and its decision will not be overturned on appeal. *Shelton v. Diamond Int'l Corp.*, 108 Idaho 935, 703 P.2d 699 (1985).

In addition to meeting the requirements of this rule, a party seeking to set aside a default judgment must show a meritorious defense going beyond the mere notice requirements which would be sufficient if pleaded before default. *Herzinger v. Lockwood Corp.*, 109 Idaho 18, 704 P.2d 350 (Ct. App. 1985).

When a default judgment is predicated upon an erroneously entered default, the judgment is voidable. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

The standard for review of the grant or denial of relief from a default judgment is as follows: Where the findings of the trial court are not clearly erroneous, the court applies to those facts the proper criteria under clause (1) of this rule, and the court's legal conclusions follow logically from the application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion and its decision will not be overturned on appeal. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

In reviewing requests for relief from default judgment pursuant to clause (1) of this rule, the trial court is required to temper its consideration by the stated policy favoring relief in doubtful cases and allowing such cases to be tried on the merits. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

In applying this rule, the court perceives a difference between persons whose indifference leads to entry of judgment by default and those who take affirmative steps to plead their own case but fail because they misperceive the intent of a court document. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

The pro se defendant who gave literal effect to the court's act of fixing trial and pretrial conference dates, erroneously interpreting this act as signifying that the case would go to a pretrial conference and to trial despite notice he had received from the plaintiff's counsel regarding the motion for summary judgment, was entitled under this rule to relief from judgment entered against him. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

The decision whether to grant a motion to set aside a default judgment, pursuant to Rule 55(c) and this rule, is committed to the sound discretion of the trial court. Such a

decision will not be disturbed on appeal absent an abuse of discretion. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

The requirements for setting aside a default judgment are two-fold: first, the moving party must satisfy at least one of the criteria of clause (1) of this rule; second, he must allege facts, which, if established, would constitute a meritorious defense to the action. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

Relief from a default judgment is favored in doubtful cases. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

Where district court granted defense counsel's motion to withdraw pursuant to I.R.C.P. 11(b)(3), which precludes any action in the proceeding that would adversely affect the withdrawing attorney's client for a period of twenty days, and district court mistakenly entered plaintiff's motion for default judgment under I.R.C.P. 55, only 10 days after the order for withdrawal of defendant's attorney, Court of Appeals granted defendant's motion to set aside the default judgment. Defendant demonstrated that his inaction following withdrawal of his attorney was the product of excusable neglect pursuant to this rule and further, pleaded a meritorious defense, and the Court of Appeals noted that the district court had erred in refusing to grant defendant's motion as defendant was misled by the improper entry of judgment which dissuaded him from making a new appearance in the case. *State, Dep't of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

Upon motion by plaintiff lender, the district court entered default against defendant borrowers for failing to timely answer the lender's complaint, the borrowers then filed a motion to have the default set aside and specified they would submit a brief in support of said motion within 14 days; however, the borrowers did not file a brief to support their motion to have the default set aside, nor did they notice their motion for hearing. The default was not set aside and the failure of the borrowers to have had the default set aside barred their appeal to the Supreme Court of Idaho. *E. Idaho Econ. Dev. Council v. Lockwood Packaging Corp.* Idaho, 139 Idaho 492, 80 P.3d 1093 (2003).

Default judgment was void on the ground that the district court lacked personal jurisdiction over defendant driver when she was not given meaningful notice and meaningful opportunity to be heard in violation of her right to procedural due process. *McGlooin v. Gwynn*, 140 Idaho 727, 100 P.3d 621 (2004)

Discretion of Appellate Court.

A motion for setting aside a default judgment because of mistake, inadvertence, surprise or excusable neglect presents questions of fact to be determined by the trial court; however, where the motion was heard on the written record only and without oral testimony, the appellate court may exercise its own discretion in passing on the matter. *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979).

The right to grant or deny relief from a default judgment is a discretionary one; thus, absent a showing of arbitrary disregard for the relevant facts and principles of law by the court below, the Supreme Court will affirm the lower court's decision to deny or grant relief. *Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

Where judge does not make any findings in ruling of motion to vacate default judgment as he is permitted to do by I.R.C.P., Rule 52(a), the appellate court has no meaningful way to review the decision to determine whether the lower court has properly applied correct legal principles to the facts. Consequently, it is at liberty to form its own impression from the record and exercise its own discretion in deciding whether the default judgment should have been set aside. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

When a motion to set aside a default judgment is considered by the trial court on affidavits and written records alone, and no oral testimony is taken, the Court of Appeals is in as good a position to evaluate the showing made as was the lower tribunal and will therefore examine and be governed by the facts disclosed, and exercise its own discretion. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Where neither findings nor specific reasons are given for the court's decision to grant relief, the reviewing court can form its own impressions from the record and exercise its own discretion in deciding whether the default judgment should have been set aside. *Full Circle, Inc. v. Schelling*, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

Where the trial court makes findings of fact which are not clearly erroneous, the court applies the proper criteria under this rule and the court's legal conclusions follow logically from the application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion. But where the trial court has made neither findings nor stated specific reasons for its ruling on the motion to set aside an order or judgment, an appellate court is at liberty to form

its own impressions from the record and to exercise its own discretion in determining whether the dismissal should be set aside. *Bull v. Leake*, 109 Idaho 1044, 712 P.2d 745 (Ct. App. 1986).

If a trial judge, when ruling on a motion under clause (1) of this rule, makes findings of fact that are not clearly erroneous, applies the proper criteria under the rule to those facts, and reaches a decision that follows logically from application of such criteria to the facts found, then the judge will be deemed to have acted within his or her sound discretion; however, where a trial judge makes no findings and states no reasons, the appellate court must form its own impressions from the record and must exercise its own discretion in deciding whether the default judgment should have been set aside. *Clark v. Atwood*, 112 Idaho 115, 730 P.2d 1035 (Ct. App. 1986).

Discretion of Court.

Where plaintiff's only allegation to justify his failure to prosecute his action was that he was involved in a divorce suit, the trial court did not abuse its discretion in refusing to reinstate his action following dismissal. *Hendrickson v. Sun Valley Corp.*, 98 Idaho 133, 559 P.2d 749 (1977).

The right to grant or deny relief under the provisions of this rule is a discretionary one. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

Where the husband contended that prior to the divorce he was in a state of grave emotional distress and he had no desire to continue living, and therefore he fashioned his complaint to give all the property to his wife, but where the district court concluded that the husband's request to give everything to his wife was a result of his desire that the divorce be completed as rapidly and early as possible, and not solely as a thought that he would not go on living, and where the court further concluded that the husband was of sound mind at the divorce hearing, and competent in the legal sense, and freely and voluntarily consented to the divorce decree in the form in which it was entered, there was no reversible error on the part of the district court in denying relief under this rule. *Henney v. Henney*, 100 Idaho 739, 605 P.2d 503 (1979).

As with proceedings under IRCP 59(e), the right to grant, or deny, relief under the provisions of this rule is a discretionary one with the trial court. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

The decision whether to grant a motion to set aside a default judgment is committed to the sound discretion of the trial court, and ordinarily such decision will not be disturbed

on appeal in the absence of an abuse of discretion. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

When the Court of Appeals reviews the trial court's application of law to the facts found, it will consider whether appropriate criteria were applied and whether the result is one that logically follows. Thus, if (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under I.R.C.P., Rule 60(b)(1), and (c) the trial court's decision follows logically from application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion and its decision will not be overturned on appeal. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983).

A grant of relief under this rule is discretionary with the trial court and its decision to set aside a default judgment will not be disturbed on appeal absent an abuse of discretion. *Full Circle, Inc. v. Schelling*, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

The decision to grant or deny relief under this rule rests in the sound discretion of the trial court and an exercise of that discretion will not be overturned on appeal absent abuse. *Marano v. Dial*, 108 Idaho 680, 701 P.2d 300 (Ct. App. 1985); *Hawkes v. Sparks*, 108 Idaho 917, 702 P.2d 1377 (Ct. App. 1985).

Where magistrate made no findings of fact and provided no reasons for its denial of the defendant's motion to set aside default judgment, the district court properly reviewed the record on appeal, made its own findings, and exercised its own discretion in setting aside the default judgment. *Sysco Intermountain Food Serv. v. City of Twin Falls*, 109 Idaho 88, 705 P.2d 548 (Ct. App. 1985).

A motion under this rule to set aside a judgment is addressed to the sound discretion of the court and will not be reversed unless an abuse of discretion is clearly apparent. *Collier Carbon & Chem. Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710 P.2d 618 (Ct. App. 1985).

The decision whether to grant a motion to set aside a dismissal order under this rule is committed to the sound discretion of the trial court, and such decision will not ordinarily be disturbed on appeal in the absence of a manifest abuse of discretion. *Bull v. Leake*, 109 Idaho 1044, 712 P.2d 745 (Ct. App. 1986).

The decision whether to grant a motion to set aside a default judgment under clause (1) of this rule is committed to the discretion of the trial court; such decisions will not be disturbed on appeal absent an abuse of discretion. *Clark v. Atwood*, 112 Idaho 115, 730 P.2d 1035 (Ct. App. 1986).

If the trial judge makes findings of fact that

are not clearly erroneous, applies the proper criteria under this rule to those facts, and reaches a decision that follows logically from application of such criteria to the facts found, then the judge will be deemed to have acted within his or her sound discretion. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

The decision whether to grant relief under this rule is committed to the discretion of the trial court; such decisions will not be disturbed on appeal unless that discretion is abused. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

A court's usual discretionary authority to grant or deny a motion pursuant to this section may be greatly narrowed where certain procedural safeguards were not strictly complied with in obtaining the judgment. *Deutz-Allis Credit Corp. v. Smith*, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990).

The decision to grant or deny relief pursuant to a motion under this rule is within the sound discretion of the trial court, and, absent a manifest abuse of that discretion, such decision ordinarily will not be disturbed on appeal. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

The right to grant or deny relief under the provisions of this rule is discretionary, and absent an abuse of discretion the trial court's decision will be affirmed on appeal; the trial court's denial of plaintiff's motion for reconsideration, after court had granted a new trial to defendant based on juror's affidavits, was not an abuse of discretion and was, therefore, affirmed. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Trial court did not abuse its discretion by holding the father failed to show unique and compelling circumstances by which it could have granted him a new trial under Idaho R. Civ. P. 60(b) following an adverse verdict in his medical malpractice lawsuit. *Palmer v. Spain*, 138 Idaho 798, 69 P.3d 1059 (2003).

Divorce.

Where husband and wife had been married for three years, and separated with the husband moving to Idaho, where the husband sued for divorce with the wife being served at her home in Colorado; where the wife failed to appear and a default decree of divorce was entered dissolving the marriage, dividing the community property, granting wife custody of their child, husband visitation rights and ordering husband to pay \$175.00 per month child support; and where the wife moved to set aside the decree pursuant to I.R.C.P. 55(c) and this rule which was granted, that portion of the decree relying upon in personam jurisdiction was properly set aside, but since a

divorce action is in rem the trial court had jurisdiction to dissolve the marriage, and that portion of the order setting aside dissolution of the marriage was reversed. *Wood v. Wood*, 100 Idaho 387, 597 P.2d 1077 (1979).

Findings on a motion made pursuant to this rule that there was a reasonable basis for husband's estimate of divorced couples' tax liability was supported by substantial, although conflicting, evidence. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

Where a motion pursuant to this rule was made after final decree of divorce was entered, magistrate should have acted consistently with the statutes governing divorce action and determined whether a \$30,000 tax estimate was based on a mistake since the actual liability was \$11,000, and determine if this was a mistake for which relief could be granted under this rule. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

This rule is not an appropriate basis to move for modification of the division of property in a divorce. *Leatherman v. Leatherman*, 122 Idaho 247, 833 P.2d 105 (1992).

Once a divorce decree becomes final, it is res judicata with respect to all issues which were or could have been litigated. However, there exist various avenues for directly attacking a divorce decree. For example, a party may move the district court to amend the decree, or for a new trial, within 14 days of the decree's entry. The decree is also subject to appeal within 42 days. Moreover, where a party seeks to avoid the operation of a judgment on the basis of fraud, mistake, or other justifiable reason, this rule permits the court to set aside the judgment upon timely motion. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992).

Husband's motion was frivolous and without basis where husband raised issues unrelated to a special clause in divorce decree allowed a motion to modify only in relation to items in the stipulation, and husband also raised additional new issues without facts to support a request for relief under this rule. *Lunn v. Lunn*, 125 Idaho 193, 868 P.2d 521 (Ct. App. 1994).

Effect of Foreign Judgment.

Where the Alaska Supreme Court reversed the order of the Superior Court of Alaska and set aside an Alaska judgment creditor's Alaska money judgment, it was improper for an Idaho district county court to deny the Alaska judgment debtor's I.R.C.P. 60(b) motion to set aside a judgment filed by the Alaska judgment creditor pursuant to the Foreign Judgment Act, § 10-1302. *P & R*

Enters., Inc. v. Guard, 102 Idaho 671, 637 P.2d 1167 (1981).

Equitable Relief.

Idaho courts have inherent power to entertain an independent action for equitable relief from a judgment. This authority is not subject to this rule or its time restrictions. Harper v. Harper, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992).

Ex-husband, against whom child support obligations were ordered, was not entitled to equitable relief because the ex-husband should have raised his claim that he was not a child's father in the underlying proceeding, which was held 11 years earlier. Waller v. Dep't of Health & Welfare, 146 Idaho 234, 192 P.3d 1058 (2008).

Excusable Neglect.

Where first title company had purchased from second title company a local title business and continued to run it with the same employees and name that the second title company had used, where summons and complaint of plaintiff issued in suit involving transaction that occurred when local business was owned by second title company were served on local title business but its employee did not inform his superiors about them and when manager was contacted he discovered the documents on the employee's desk and notified plaintiff's attorney that the second title company was the owner of the business at the time of the transaction and was the proper defendant and gave said attorney the phone number of the second title company's president and where president of first title company after contacting president of second title company sent the documents to him but they were returned unclaimed because he had moved without leaving a forwarding address, the failure of the first title company to respond was excusable neglect under this rule. Johnson v. Pioneer Title Co., 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

Whether a party's conduct, in allowing a default to be entered, constitutes excusable neglect is determined by examining what might be expected of a reasonably prudent person under similar circumstances. Johnson v. Pioneer Title Co., 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

In workmen's compensation case, where the agent of the surety had neither a file nor any notification from the employer of the compensable accident, where the accident situs was not within Idaho and the named "insurance carrier" was unusual and hence, the agent for the surety had in its possession a single document which, during the course of a move of the office from one location to

another, could lead even a reasonable and prudent person into an oversight, and where there was no demonstration of any prejudice to the claimant by 18-day delay in receiving the response of the surety to the application for hearing, the surety demonstrated excusable neglect and default judgment entered against it would be vacated. Nelson v. Pumnea, 106 Idaho 48, 675 P.2d 27 (1983).

Under some circumstances the failure to file a proper pleading may be treated both as a mistake and as excusable neglect; this overlap between mistake and excusable neglect necessarily implies the existence of cases where an act or omission might be treated as a mistake of law but also could be treated as excusable neglect. Stirm v. Puckett, 107 Idaho 1046, 695 P.2d 431 (Ct. App. 1985).

Whether a party's conduct constitutes "excusable neglect," so as to allow the default to be set aside, is determined by examining what might be expected of a reasonably prudent person under similar circumstances; because judgments by default are not favored, the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits. Full Circle, Inc. v. Schelling, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

Where the record indicated that the defendant gave the summons and complaint to his wife to mail to his attorney, and his wife placed the papers in her car, where they became lost or forgotten, such facts, when combined with the plaintiff's attorney's failure to send a copy of such papers to the defendant's attorney, constituted excusable neglect sufficient to set aside the default judgment. Full Circle, Inc. v. Schelling, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985).

It is not enough to merely show neglect — a party seeking relief from a default judgment must show that his neglect was excusable; thus, where the only fact alleged by the defendants which might show "excuse" was that one of the defendants delivered the complaint to his Washington attorney, but his affidavit did not disclose what he instructed the Washington attorney to do about the complaint, and there was no indication in the record that he even discussed the matter with his attorney before leaving town, even had the attorney been legally authorized to file an answer in Idaho on behalf of his client, there would be no excuse. Marano v. Dial, 108 Idaho 680, 701 P.2d 300 (Ct. App. 1985).

Whether a party's conduct in allowing a default to be entered constitutes "excusable neglect" raises a factual question which must be answered by examining what might be expected of a reasonably prudent person under similar circumstances. Herzinger v. Lock-

wood Corp., 109 Idaho 18, 704 P.2d 350 (Ct. App. 1985).

Excusable neglect must be conduct of a type expected of a reasonably prudent person under the same circumstances. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

Excusable neglect is determined by examining what a reasonably prudent person would do under similar circumstances. *Bull v. Leake*, 109 Idaho 1044, 712 P.2d 745 (Ct. App. 1986).

Where defendant claimed that he had decided to use a codefendant's attorney, and because the codefendant was unable to act on the suit he had been foreclosed to proceed himself and was unaware of the 20-day answering time in Idaho, he failed to show excusable neglect under clause (1) of this rule, because no reasonably prudent person under those circumstances would have stood idly by as he did. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

Where plaintiff became aware of notice of withdrawal of counsel under I.R.C.P. 11(b) a full month before dismissal of suit, and she did not make a written appearance or appoint new counsel, plaintiff's claim that she was unaware of the time requirement did not constitute excusable neglect under this rule; therefore, the district court did not abuse its discretion in failing to set aside the dismissal of plaintiff's suit. *Bull v. Leake*, 109 Idaho 1044, 712 P.2d 745 (Ct. App. 1986).

Under this rule, excusable neglect is conduct that might be expected of a reasonably prudent person under the same circumstances; the party claiming excusable neglect must have exercised due diligence in the prosecution of his rights and must not have exhibited indifference or unreasonable delay. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Where the only fact alleged by the defendant which might show "excuse" to set aside the default judgment against him was that settlement negotiations were being conducted prior to default, the defendant has failed to show excusable neglect. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

To obtain relief from a default judgment on the ground of excusable neglect, the moving party must demonstrate that his or her conduct was of a type expected from a reasonably prudent person under the circumstances; the requirement of reasonable prudence extends not only to a party's initial response upon being served process, but also to his or her subsequent efforts to get the default judgment set aside. *Clark v. Atwood*, 112 Idaho 115, 730 P.2d 1035 (Ct. App. 1986).

Where defendant against whom default judgment had been entered allowed his motion for relief to languish for more than a year without a hearing, this extraordinary and unexplained delay reflected an indifference that was fatal to a claim of excusable neglect under clause (1) of this rule. *Clark v. Atwood*, 112 Idaho 115, 730 P.2d 1035 (Ct. App. 1986).

In an appropriate situation, a mistake of law might also be treated as excusable neglect. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

The test for excusable neglect is whether the litigant engaged in conduct which, although constituting neglect, was nevertheless excusable because a reasonably prudent person might have done the same thing under the circumstances. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

The trial judge's holding that a pro se litigant's neglect was not excusable if it could have been avoided by hiring an attorney constituted error; it is not imprudent per se to represent oneself in court. *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

Where the defendant was informed, mistakenly, that he should not file an answer because of his corporation's pending bankruptcy, the plaintiff's attorney may have contributed to the defendant's assumption that an answer should not be filed, and the defendant was reasonably diligent in his effort to set aside the default judgment, once he learned of it, the defendant demonstrated with particularity facts, which, if established, would constitute a meritorious defense, and the district judge's reasons for granting the motion to set aside followed logically from application of proper criteria to the facts; accordingly, the judge acted within his discretion in setting aside the default judgment against the defendant on the ground of excusable neglect. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

In determining whether a party's conduct constitutes excusable neglect, the courts must consider each case in light of its unique facts. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

To obtain relief from a default judgment on the ground of excusable neglect, the moving party must demonstrate that his conduct was of a type expected from a reasonably prudent person under the circumstances. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988).

Excusable neglect is conduct that might be expected of a reasonably prudent person under the same circumstances. *Nickels v. Dur-*

bano, 118 Idaho 198, 795 P.2d 903 (Ct. App. 1990).

Where the district judge made no findings of fact regarding any agreement between mortgagors and mortgagees that would have constituted excusable neglect in denying mortgagees' motion for relief of summary judgment based on excusable neglect, Court of Appeals was required to form its own impressions from the record and exercise its own discretion in deciding whether to set aside the summary judgments on the grounds of excusable neglect. *Federal Land Bank v. Wright*, 120 Idaho 23, 120 Idaho 32, 813 P.2d 371 (Ct. App. 1991).

Even though there was a delay of five months from counsel's Rule 60(b) motion to set aside and his notice for a hearing there was no evidence the defendant was prejudiced by the delay in setting the motion for a hearing, and she could have set the motion for a hearing at any time, therefore, the delay did not preclude a finding of excusable neglect. *Leazure v. Morganroth (In re Estate of Ahner)*, 120 Idaho 455, 816 P.2d 1012 (Ct. App. 1991).

It was reasonable for counsel to assume that the trial would be postponed after the magistrate said that he would "call off" the jury one week before the scheduled trial and because his client did not waive her right to a jury trial, counsel could reasonably believe that the trial would not be conducted without a jury; and as counsel reasonably believed that the trial had been called off, there was no need for him to file a formal motion for a continuance with the magistrate, therefore, his failure to appear at trial amounted to excusable neglect. *Leazure v. Morganroth (In re Estate of Ahner)*, 120 Idaho 455, 816 P.2d 1012 (Ct. App. 1991).

Insurer's failure to timely respond after receiving the notice of service from the Director of Insurance, despite misunderstanding of his legal obligations on the part of insurer's senior claims manager, was not "excusable neglect" which would justify relief from a default judgment. *Washington Fed. Sav. & Loan Assoc. v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 865 P.2d 1004 (Ct. App. 1993).

District court properly concluded that plaintiff, who had default judgment entered against him on defendant's counterclaim to his breach of oral contract claim, was not entitled to Rule 60(b)(1) relief for excusable neglect because he had not acted as a reasonably prudent person by failing to advise counsel of his whereabouts or address, or to ascertain the disposition of his case. *Tyler v. Keeney*, 128 Idaho 524, 915 P.2d 1382 (Ct. App. 1996).

The district court properly refused to set aside a default judgment pursuant to this rule where a defendant's failure to respond to a complaint did not fall within the bounds of excusable neglect, but rather constituted avoidance of service, as the plaintiff contacted the defendant's attorney regarding the case and service, the plaintiff attempted service via certified mail to a known address of the defendant, the plaintiff made service by publication, and the notice of entry of default was not returned when mailed to the defendant. *Danz v. Lockhart*, 132 Idaho 113, 967 P.2d 1075 (Ct. App. 1998).

A lessor's failure to respond to a complaint and summons was excusable where he did not oppose foreclosure of a loggers' lien, and where the complaint did not give unequivocal notice that personal liability was sought against him, particularly where he had no agreement with the plaintiff that would subject him to personal liability. *Montane Resource Assocs. v. Greene*, 132 Idaho 458, 974 P.2d 510 (1999).

In denying defendant's motion to set aside a default judgment in a quiet title action, the district court erred to the extent that it ruled a language barrier cannot be considered in evaluating mistake or excusable neglect. *Cuevas v. Barraza*, 146 Idaho 511, 198 P.3d 740 (2008).

Failure to Allege Inadvertence or Excusable Neglect.

Where defendant admitted all elements necessary to establish plaintiff's right to relief and failed to amend answer to set forth affirmative defense of fraud as ordered by court, trial court properly granted summary judgment under I.R.C.P. 56(c) since it was proper for trial court to condition denial of summary judgment upon defendant amending answer within ten days; since record did not contain motion to set aside the judgment for inadvertence or excusable neglect under this rule, it was assumed the failure to amend the answer was not due to inadvertence or excusable neglect. *McKee Bros. v. Mesa Equip., Inc.*, 102 Idaho 202, 628 P.2d 1036 (1981).

Where party failed to show the existence of mistake, excusable neglect, or the existence of a meritorious defense, the trial court did not abuse its discretion in denying the motion to set aside the default judgment. *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141 845 P.2d 559 (1992).

Failure to Present Meritorious Defense.

From the lower court's written order denying the motion to set aside a default judgment, it was unclear whether the court would have applied the more stringent I.R.C.P. Rule

60(b) standards or the more relaxed “good cause” criteria of I.R.C.P., Rule 55(c), but this omission was not fatal to the motion’s denial. The court did not err in concluding that defendant failed to present a meritorious defense. In absence of a showing of a meritorious defense, defendant did not establish “good cause” for setting aside the default. *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993).

It was unnecessary for the court to address the merits of the defendants’ contention that their failure to file any legal brief, affidavit or other evidence in opposition to the summary judgment motion was a result of excusable neglect, where they made no showing of a viable defense which, if timely presented, could have prevented summary judgment. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

The defendants’ bare assertion that the court lacked jurisdiction did not constitute a meritorious defense warranting relief under this rule. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994).

Failure to Raise Objections.

Argument that mother’s objection to order concerning child custody and support was untimely under this rule, and that therefore the district judge should not have ruled that the order was voidable, which was never raised either to the magistrate or the district court, would not be considered on appeal. *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Failure to Specify Grounds.

A court’s failure to specify its grounds for amending a judgment is not fatal to the court’s ability to make the amendment under this rule. *Fix v. Fix*, 125 Idaho 372, 870 P.2d 1331 (Ct. App. 1994).

Fraud.

Where the final accounting and distribution of an estate occurred in November 1975, an action commenced in May 1976 which alleged fraud by the personal representatives was not barred by this rule since the last sentence of the rule eliminates the effect of the 6 month limitation when fraud upon the court is involved. *Cahoon v. Seaton* (In re Estates of Cahoon), 102 Idaho 542, 633 P.2d 607 (1981).

Fraud within the meaning of this rule will only be found in the presence of such tampering with the administration of justice as to suggest a wrong against the institutions set up to protect and safeguard the public. *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

In a divorce action, the trial court was

correct in finding the husband guilty of both fraud and overreaching where he represented to his wife that they were on the verge of bankruptcy, knowing it to be false, and threatened her with custody litigation if she secured legal representation or disputed the property settlement agreement. *Golder v. Golder*, 110 Idaho 57, 714 P.2d 26 (1986).

Perjury or misrepresentation by a party or witness does not constitute the “fraud upon the court” contemplated by this rule. *Ander-ton v. Herrington*, 113 Idaho 73, 741 P.2d 360 (Ct. App. 1987).

Fraud, for the purposes of subdivision (3) of this rule, requires more than interparty misconduct — it will be found only in the presence of such tampering with the administration of justice as to suggest a wrong against the institutions set up to protect and safeguard the public. *Artiach Trucking, Inc. v. Wolters*, 118 Idaho 656, 798 P.2d 938 (Ct. App. 1990).

Motion for Rule 60(b)(3) relief on fraud grounds by plaintiff, who had default judgment entered against him on defendant’s counterclaim to his breach of oral contract claim, merely asserted the defenses to the counterclaim that he would have raised but for the default judgment and were not sufficiently shown. *Tyler v. Keeney*, 128 Idaho 524, 915 P.2d 1382 (Ct. App. 1996).

The language in the plaintiffs’ amended complaint does not allege fraud upon the court, but rather it is clear that they, and not the court, were the subject of fraud and misrepresentation. Therefore, it is clear that their claims should have been analyzed under the standards applicable to an independent equitable action for relief from a fraudulent judgment, not under the standards pertaining to fraud upon the court. *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 922 P.2d 401 (Ct. App. 1996).

Father and attorney’s motion for summary judgment on the mother’s action to set aside orders entered in a custody action was properly granted as there was no factual basis for the mother’s allegations of fraud upon the court. *Rae v. Bunce*, 145 Idaho 798, 186 P.3d 654 (2008).

Improper Motion.

A party may not use a motion pursuant to this rule as a substitute for a timely appeal. *Bubak v. Evans*, 117 Idaho 510, 788 P.2d 1333 (Ct. App. 1989).

In General.

A motion under clause (1) of this rule is an appropriate way to attack an order denying appellants’ post-judgment motions if the requisite “mistake, inadvertence, surprise or ex-

cusable neglect” can be shown. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

The mistake, inadvertence, surprise or excusable neglect referred to by clause (1) of this rule need not be that of the party making the motion. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

The preservation of the powers of the district court to entertain an equitable independent action to relieve a party from judgment, to challenge, within one year, a judgment entered against a party not served, and to set aside a judgment for fraud upon the court, does not amount to an affirmative grant of power; instead, it only guarantees whatever power existed prior to the rule’s promulgation. *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980).

This rule requires a showing of good cause and specifies particular grounds upon which relief may be afforded. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

A Rule 60(b) motion is not a substitute for a timely appeal. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Where the evidence submitted on a motion for relief from a default judgment is entirely documentary, the Court of Appeals will not disturb a trial judge’s findings of fact unless they are clearly erroneous. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

A trial court decision on a motion for relief from a default judgment will not be disturbed on appeal unless it represents an abuse of discretion. Where oral testimony has been received, the Court of Appeals will give due regard to the trial judge’s special opportunity to evaluate the credibility of the witnesses. Where the evidence is entirely in writing, the Court of Appeals may draw its own impressions from the record, but the Court of Appeals will not substitute its impressions for findings of fact by the trial judge unless the Court of Appeals is convinced that those findings are clearly erroneous. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983).

In limited circumstances, relief from a judgment may be obtained in an equitable independent action. In such instances, the policies furthered by granting relief from the judgment outweigh the purposes of *res judicata*. *McDonald v. Barlow*, 109 Idaho 101, 705 P.2d 1056 (Ct. App. 1985).

When a party seeks relief from a judgment under clause (2) or (3) of this rule, he must do more than simply offer new information; he must also show that such information is material to the outcome of the case. *Simonovich v. Simonovich*, 110 Idaho 9, 713 P.2d 445 (Ct. App. 1985).

Inadvertence.

The independent action in equity is available only rarely and under the most exceptional circumstances; it is not its function to relitigate issues determined in another action between the same parties, or to remedy the inadvertence or oversight of one of the parties to the original action. *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980).

Insufficient Grounds.

A workers’ compensation benefits claimant was not entitled to have the adverse decision of the Industrial Commission set aside under either clauses (1) or (2) of this rule, where the claimant failed to present any evidence of mistake, inadvertence or excusable neglect on the part of his prior counsel, and where the evidence sought to be used by claimant to set aside the final order had been discovered a full month before the final order was entered, and therefore, had been discovered in plenty of time to move for a new trial under I.R.C.P. 59(b). *Gaither v. EG & G Idaho, Inc.*, 106 Idaho 675, 682 P.2d 628 (1984).

Discovery of new legal theories does not constitute grounds for bringing a motion under this rule. *First Bank & Trust v. Parker Bros.*, 112 Idaho 30, 730 P.2d 950 (1986).

The motion to reconsider which raised the issue of unjust enrichment did not reach any of the grounds for relief listed in this rule. *First Bank & Trust v. Parker Bros.*, 112 Idaho 30, 730 P.2d 950 (1986).

Defendant’s motion to reconsider was not proper as an I.R.C.P. 60(b) motion where he failed to provide any new information in support of his request for reconsideration justifying relief pursuant to I.R.C.P. 60(b)(6). Instead, he maintained that the district court was wrong in dismissing the amended application for post-conviction relief, and he asked the district court to reverse itself and rule in his favor on the state’s motion to dismiss, which was an inappropriate use of Rule 60(b) as a disguised substitute for an appeal. *Ross v. State*, 141 Idaho 670, 115 P.3d 761 (Ct. App. 2005).

Judgment.

—Reversal or Overrule.

Denial of I.R.C.P. 60(b)(5) motion of defendant convicted of first-degree murder by torture and sentenced to death was affirmed because case cited by defendant neither reversed his original trial holding nor overruled his original trial; even if the cited case had overruled defendant’s case, retroactive application of the case would have been precluded. *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996).

Misrepresentation.

Where a wife's most serious charge was that husband misrepresented the state of the community, the singular fact of an unequal division of the community property did not in itself require a court to modify the agreement to achieve equality; instead, to survive husband's motion for summary judgment the burden rested with wife, as challenging party in this case, to allege such fraud as to support an independent action for relief from judgment. *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980).

In securities fraud litigation, district court erred in granting plaintiffs' motion to set aside satisfaction of judgment after they discovered that defendant had improperly concealed assets that would have been relevant to their settlement negotiations, as this did not involve a misrepresentation to the court. *Flood v. Katz*, 143 Idaho 454, 147 P.3d 86 (2006).

Mistake.

A mistake sufficient to warrant setting aside a default judgment must be of fact and not of law; neglect must be excusable and, to be of that calibre, must be conduct that might be expected of a reasonably prudent person under the same circumstances. *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979).

In an action to quiet title where, through mistake and inadvertence, plaintiffs did not notice that the recorded plat under which the city claimed title did not meet the statutory requirements of Chapter 13 in the Idaho Code, in the absence of a showing that the mistake and inadvertence of counsel was not a result of carelessness, and in the absence of any suggestion that the lack of statutory acceptance on the plat was a fact not available to plaintiffs prior to the summary judgment hearing, that its absence could not have been discovered by the exercise of due diligence, or that there were exceptional circumstances which precluded plaintiffs from discovering its absence prior to the summary judgment hearing, the plaintiffs failed to make a showing sufficient to justify relief from judgment under clause (1) of this rule, and the trial judge did not abuse his discretion in denying the motion. *Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979).

Where a default judgment is set aside on grounds of mistake or inadvertence, the mistake alleged must be one of fact and not of law, and the inadvertence or neglect must be excusable, or in other words, conduct that might be expected of a reasonably prudent person. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

Only a mistake of fact, and not of law, is

sufficient to warrant setting aside a default judgment. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985).

Where a party presented no cognizable evidence in opposition to movant's summary judgment motion because he believed that he was in small claims court and all that was required of him was to send a letter to the court explaining facts in defense of the action and show up on the date set for hearing to argue his claim before the court, any mistake made by the party was a mistake of law, not of fact, and that no relief could be provided based on said mistake. *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990).

Failure to abide by the summary judgment procedural rules may not be excused simply because the party was appearing pro se and may not have been aware of the rules. *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990).

Upon a showing of good cause, subdivision (b)(1) of this rule provides for relief from a judgment on the basis of mistake; for the mistake to be excusable, the parties must establish (1) how the mistake occurred and (2) who made the mistake, it must be one of fact and not of law, and a determination should be made by examining what a reasonably prudent person would do under similar circumstances. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

Where tax liability of couple was estimated at \$30,000 but was actually \$11,000, such estimate was an excusable mistake of fact which could support the grant of relief under this rule. The next step in the exercise of the magistrate's discretion should have been to determine whether to grant the motion, since this rule does not require, but rather allows, relief in the mistake situation. Here, the court in granting relief must be governed in the exercise of its discretion by the statutes which regulate Idaho divorce actions, and specifically § 32-712(1)(a), which mandates a substantially equal division in value, considering debts, between the spouses, unless there are compelling reasons otherwise. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

Mistake or inadvertence referred to in clause (1) applies primarily to errors or omissions committed by an attorney or by the court that are not apparent in the record. Any claim of mistake must be a mistake of fact and not a mistake of law. *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009).

Modification of Property Settlement.

Where husband did not initiate proceedings to modify the property provisions of a divorce decree until after the time allowed for appeal or for relief under this rule had expired, the

district court did not have jurisdiction to entertain husband's motion to modify. *Paul v. Paul*, 97 Idaho 889, 556 P.2d 365 (1976).

Where the husband contended that prior to the divorce he was in a state of grave emotional distress and he had no desire to continue living, and therefore he fashioned his complaint to give all the property to his wife, but where the district court concluded that the husband's request to give everything to his wife was a result of his desire that the divorce be completed as rapidly and early as possible, and not solely as a thought that he would not go on living, and the court further concluded that the husband was of sound mind at the divorce hearing, and competent in the legal sense, and freely and voluntarily consented to the divorce decree in the form in which it was entered, there was no reversible error on the part of the district court in denying relief to the husband. *Henney v. Henney*, 100 Idaho 739, 605 P.2d 503 (1979).

The trial court erred in modifying a property settlement agreement merged into a divorce decree, where the wife failed to demonstrate the existence of fraud sufficient to support an independent action for relief from judgment. *McDonald v. Barlow*, 109 Idaho 101, 705 P.2d 1056 (Ct. App. 1985).

In action by former wife to modify and vacate that part of divorce decree which awarded husband's military retirement benefits to husband since the U.S. Congress had subsequent to the decree enacted legislation that permitted division of such benefits upon divorce, where the record showed that the parties had entered into a voluntary settlement relating to the division of property, the recitation in the agreement of the property to be divided included the retirement benefits, and no value was placed on the benefits nor any of the property items in the agreement, where wife's counsel advised her against such division of property because of the award of the retirement benefits to the husband but she did not accept the advice because she wanted to conclude the proceedings as quickly as possible so she could remarry, there was no inequity in the trial court's refusal to modify the divorce decree under clause (5) of this rule. *McBride v. McBride*, 112 Idaho 959, 739 P.2d 258 (1987).

In action to vacate and modify that part of divorce decree that awarded husband's military retirement pension to husband where subsequent to property agreement and divorce Congress had enacted law that provided that such retirement pensions were subject to division in divorce proceedings, where there was no showing that the trial court lacked jurisdiction in either subject matter or in

personam, or that the decree granted relief which was not within the power of the court and where it was wife herself who had instituted the action and sought the jurisdiction of the court and who tended the settlement agreement and asked the court to ratify and confirm the terms of such agreement which specifically set forth the property benefits in the military retirement benefits and awarded them to the husband and where in her prayer for relief wife requested that the court divide the property in accordance with the agreement and where the record indicated that the respondent husband defaulted and did not appear, the finding of the trial court was equitable and fair and could have only been based on the testimony and assertion of wife and, therefore, there was no error in trial court's refusal to modify the decree under the provisions of clause (4) of this rule. *McBride v. McBride*, 112 Idaho 959, 739 P.2d 258 (1987).

A modification of the division of property in a divorce is not appropriate under this rule in order to provide relief for women affected by *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981) whereby state courts were prevented from dividing military retirement benefits according to state community property laws. *Ross v. Ross*, 117 Idaho 548, 789 P.2d 1139 (1990).

Since this rule does not provide a method of proceeding for modifying a property division in divorce cases where judgment was entered after *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), and before the Uniform Services Former Spouses Protection Act under Const., Art. 5, § 13, the legislature was entitled to enact § 32-713A (now repealed) to provide necessary method for considering the modification of such property divisions. *Ross v. Ross*, 117 Idaho 548, 789 P.2d 1139 (1990).

In limited circumstances, a property division may be modified contrary to the bar of res judicata using this rule. *Fix v. Fix*, 125 Idaho 372, 870 P.2d 1331 (Ct. App. 1994).

Motion to Set Aside and Reinstate.

Where a motion to set aside and reinstate did not specify whether it was based on this rule or Rule 59(e), but was filed within ten days after the entry of judgment, it would be treated as a Rule 59(e) motion. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

Motion Will Not Substitute for Other Relief.

Where plaintiff plainly tried to use subdivision (6) of this rule as a substitute for a timely motion to amend a judgment and a timely appeal, a motion thereunder was not an ap-

propriate vehicle for relief and was properly denied. *Hoopes v. Bagley* (In re Estate of Bagley), 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990).

Newly Discovered Evidence.

Where husband showed that wife had misled divorce court by falsely stating that she had nothing to do with a resale of the parties' mobile home after it was repossessed, but failed to show how the divorce decree would be affected by this new information, as the disposition of the mobile home following repossession was not material to a division of the parties' community property, husband did not prove that the newly discovered evidence was material to the outcome of the case. *Simonovich v. Simonovich*, 110 Idaho 9, 713 P.2d 445 (Ct. App. 1985).

Until a judgment had been entered or a certificate granted by the trial court pursuant to I.R.C.P. 54(b), the order dismissing a counterclaim was not final and appealable. Therefore, trial court should have considered new facts upon motion for reconsideration of order. *Idaho First Nat'l Bank v. David Steed & Assocs., Inc.*, 121 Idaho 356, 825 P.2d 79 (1992).

Landowner's motion to alter or amend judgment, which ordered landowner to return a relocated lateral ditch to its original position, was properly refused where evidence to support the motion consisted of an affidavit that landowner had run a sub-lateral ditch from the relocated lateral ditch and had cleaned the relocated ditch to lower its elevation, and an affidavit from an expert witness which essentially reiterated and expanded upon the witness's trial testimony regarding the sufficiency of the relocated lateral ditch; the affidavits were not "newly discovered" evidence in the usual sense. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

In a malpractice suit, trial court properly denied patient's motion to reconsider grant of summary judgment in favor of hospital. Newly-discovered evidence that showed the hospital had received a copy of the patient's letter informing the Idaho State Board of Medicine of his malpractice claim did not constitute adequate notice to the hospital under the Idaho Tort Claims Act and would not have changed the trial court's summary judgment ruling. *Foster v. Kootenai Med. Ctr.*, 143 Idaho 425, 146 P.3d 691 (Ct. App. 2006).

Mother's motion to reinstate parental rights due to newly discovered evidence was properly denied because (1) three months after the mother's parental rights were terminated, the mother discovered that a foster family's foster license had been temporarily

revoked due to physical abuse on another foster child; (2) the mother had not made a showing that the physical abuse on another child in the foster family was relevant to the issue of her own character and fitness as a parent; (3) a magistrate court reached its decision through an exercise of reason by comparing all the evidence and weighing how it related to the child's best interest; and (4) the magistrate court addressed the issue of physical abuse, and found that at the age of 17, it would not have been in the child's best interest to reinstate the mother's parental rights. *Doe v. State* (In re Doe), 145 Idaho 650, 182 P.3d 707 (2008).

Overrule of Past Precedent.

There is a reversal only when an appellate court overturns a lower court's decision in the same case; when an appellate court overrules past precedent, the jurisprudence of retroactivity comes into play, not I.R.C.P. 60(b)(5). *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996).

Perjury of Witness.

Perjury of a witness is not the type of fraud giving rise to relief under this rule. *Roberts v. Bonneville County*, 125 Idaho 588, 873 P.2d 842 (1994).

Post-Conviction Relief.

An application for post-conviction relief is civil in nature, and the Idaho Rules of Civil Procedure apply; thus, the state's jurisdictional challenge could properly have been considered by the district court under this rule. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996).

Claims under this rule are generally made by motion to the trial court in the original action. However, as this rule expressly provides, a court is not limited by this rule in its power to entertain an independent action to relieve a party from a judgment, order or proceeding. The state's jurisdictional challenge may have been raised in the post-conviction action. The state's failure to directly raise this rule in the post-conviction action does not preclude its challenge pertaining to the order revoking probation in the criminal action. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996).

Where appellant filed a pro se petition for post-conviction relief alleging the ineffective assistance of counsel, but after years of neglect by his appointed attorneys, his petition for post-conviction relief was dismissed for inactivity pursuant to Idaho R. Civ. P. 40(c). The Supreme Court of Idaho held that a dismissal under Idaho R. Civ. P. 40(c) was in effect a final judgment for purposes of relief

under Idaho R. Civ. P. 60(b); appellant was permitted to seek relief from the judgment of dismissal under Idaho R. Civ. P. 60(b), given the complete absence of meaningful representation in the only available proceeding for him to advance constitutional challenges to his conviction. *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010).

Prior Judgment Reversed.

District court erred in reopening divorce decree on the ground that a prior case, upon which the divorce decree was based, was reversed; the first prong of subdivision (5), relied on by spouse, was inapplicable since there was no prior judgment in the sense of *res judicata* or collateral estoppel upon which the final divorce decree was based, and since the prior judgment applicable to the final divorce decree was only used for its precedential value. *Curl v. Curl*, 115 Idaho 997, 772 P.2d 204 (1989).

Pro Se Litigants.

Pro se litigants in Idaho are held to the same standards and rules as those represented by attorneys. The failure to abide by the rules may not be excused simply because appellant appears pro se and may not be aware of the rules. *Ade v. Batten*, 126 Idaho 114, 878 P.2d 813 (Ct. App. 1994).

Pro se litigants are held to the same standards and rules as those represented by attorneys, however, the standard for the applicable inquiry regarding excusable neglect is not what a lawyer would have done but whether the movant's conduct, under the circumstances, was that which might be expected of a reasonably prudent person under the same circumstances. *State, Dep't of Law Enforcement ex rel. Cade v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (Ct. App. 1995).

Prospective Judgment.

Where the original decree in divorce action ordered all of the property owned by the parties to be sold and the proceeds divided, but, by the time the motion for a final division of property was made much of the personal property had either disappeared or become worthless, it was no longer equitable that the prospective decree continue in force. *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983).

A motion under clause (5) of this rule must be made within a reasonable time, and requires a showing that the judgment is prospective and that it is no longer equitable to enforce the judgment as written. *Devine v. Cluff*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986).

Where judgment adjudicated all the rights

as between the parties as of the date of the judgment wherein each party was awarded various portions of the property and there was no showing but that each party had gone into and remained in possession of those elements of property, wherein plaintiff was awarded a money judgment payable at certain times, together with interest thereon, and those moneys were secured by a mortgage in favor of plaintiff covering the real property of respondent and there was no contention that respondent had failed to execute the mortgage, nor failed or refused to pay the moneys, such judgment was not prospective. *McBride v. McBride*, 112 Idaho 959, 739 P.2d 258 (1987).

District court erred in ruling that divorce decree be reopened on the basis that it was no longer equitable that the judgment have prospective application; wife could not show judgment was prospective since the award of the military retirement benefits and the other property, which husband received, was effective immediately. *Curl v. Curl*, 115 Idaho 997, 772 P.2d 204 (1989).

Reasonableness.

The question of reasonableness is ordinarily a question of fact to be resolved by the trier of fact. *Thiel v. Stradley*, 118 Idaho 86, 794 P.2d 1142 (1990).

Relief Improper.

Where, in a personal injury action, the plaintiff submitted to the trial court copies of the applicable section of the Uniform Building Code in her brief in support of her motion to alter or amend the judgment, the facts did not involve mistake, inadvertence, surprise, or excusable neglect, where the ordinances could have been found and brought to the court's attention by due diligence, and such was not done because, at best, there was a mistaken understanding as to the ability to take judicial notice of municipal ordinances, or at worst, the municipal ordinance argument was not contemplated by the plaintiff until after the decision granting summary judgment. *Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988).

This rule may not be applied to relieve a driver from the effects of an order suspending his driving privileges when, allegedly through mistake, inadvertence, or excusable neglect, the driver failed to request a show cause hearing within the seven-day time period. *Ausman v. State*, 124 Idaho 839, 864 P.2d 1126 (1993).

Denial of plaintiff individual's motion to set aside summary judgment was proper because the individual failed to show surprise, newly discovered evidence or fraud under the provi-

sions of Idaho R. Civ. P. 60(b)(1), (2), (3). *Win of Mich., Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002).

Intermediate appellate decision of the district court, reversing an order of the magistrate granting the driver's motion to set aside the magistrate's previous order suspending his driver's license, was proper where, assuming the general applicability of the Idaho Rules of Civil Procedure to license suspension proceedings by virtue of I.M.C.R. 9.2(e), a conflict remained between I.M.C.R. 9.2(b) and I.R.C.P. 60(b)(1); because I.M.C.R. 9.2(b) was the more specific rule, it controlled over the more general I.R.C.P. 60(b)(1) and therefore, I.R.C.P. 60(b)(1) was not available to remedy the driver's untimely request for a show cause hearing. *Hansen v. State* (In re Hansen), 138 Idaho 865, 71 P.3d 464 (Ct. App. 2003).

Where a parent fails to apply for court appointment as his or her minor child's guardian ad litem, the court will not grant relief under clause (6) of this rule based on the technical error. *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009).

Relief Proper.

Where counsel for the appellants was given no notice of entry of judgment and his post-judgment motions were, consequently, untimely made, the appellants' motion for relief under clause (1) of this rule was well-taken and should have been granted. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

Plaintiff did not present any evidence of fraud in action to set aside a quiet title judgment so as to create a genuine issue of material fact so that summary judgment in favor of defendant was correctly granted. *Davis v. Parrish*, 131 Idaho 595, 961 P.2d 1198 (1998).

Res Judicata.

Trial court incorrectly relied on res judicata in dismissing plaintiff's suit brought under this rule. *Davis v. Parrish*, 131 Idaho 595, 961 P.2d 1198 (1998).

Satisfaction of Judgment.

An adjudged debt may be discharged by a valid accord and satisfaction. An accord, like any contract, must be supported by consideration, but when the contract has been fully performed — that is, when the accord has been satisfied — the courts will not retroactively invalidate it upon a question of consideration. *Knoke v. Charlebois*, 107 Idaho 427, 690 P.2d 362 (Ct. App. 1984).

Scope of Review.

An appellate court will not overturn a trial court's ruling on motions to set aside or reconsider, and to grant a new trial, absent an

abuse of discretion. *Northwest Roofers & Employers Health & Sec. Trust Fund v. Bullis*, 114 Idaho 56, 753 P.2d 267 (Ct. App. 1988).

Service of Process.

In a debt collection action the trial court did not abuse its discretion in denying defendant's application to set aside a default judgment where the return of service indicated that defendant was duly served with process, but where defendant contended that she never received service and that she knew nothing of the action. *Credit Bureau, Inc. v. Harrison*, 101 Idaho 554, 617 P.2d 858 (1980).

A default judgment taken in an action where service of process was not made, or was improperly made, is void and may be vacated pursuant to subdivision (4) of this rule. *Thiel v. Stradley*, 118 Idaho 86, 794 P.2d 1142 (1990).

Showing of Reasonable Prudence.

Proof of mistake, inadvertence, surprise or excusable neglect must include a showing that the party seeking relief has acted with reasonable prudence. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Ct. App. 1983).

Where plaintiff's vehicle was involved in a collision with defendant's and plaintiff filed suit and served defendant, who followed its customary procedure in forwarding the summons and complaint to its insurance agent to be forwarded to its insurance carrier, and while normally the documents would have been received by an experienced clerk, it was happenstance that she was in the hospital the day the summons and complaint arrived at agent's and an inexperienced clerk simply filed them without forwarding them to defendant's insurance carrier, because defendant had no control over the actions of its agent, and because when the defendant became aware of the motion for entry of default judgment it acted with reasonable prudence under the circumstances, the default judgment was properly set aside. *Sysco Intermountain Food Serv. v. City of Twin Falls*, 109 Idaho 88, 705 P.2d 548 (Ct. App. 1985).

Standard of Evaluation.

Because the district court did not apply the "unique and compelling" standard in determining whether the evidence of juror misconduct justified considering plaintiff's Rule 60(b) motion, it failed to apply the correct legal standard in evaluating the motion, which amounted to a clear abuse of discretion; remand was required for district court to determine whether unique and compelling circumstances existed in granting relief from judgment. *Miller v. Haller*, 129 Idaho 345, 924 P.2d 607 (1996).

Surprise.

"Surprise" in this context is generally defined to be some condition or situation in which a party to an action is unexpectedly placed as to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against. *Nickels v. Durbano*, 118 Idaho 198, 795 P.2d 903 (Ct. App. 1990).

For purposes of this rule, "surprise" means some condition or situation in which one of the parties is unexpectedly placed to his injury, without any fault or negligence of his own, and which ordinary prudence could not have guarded against. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Entry of a default judgment was a surprise for which relief was authorized by this rule where the plaintiff was never served with a pleading that it was obliged to answer in order to avoid the risk of such a judgment. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Timeliness.

There is no expressed time limit with respect to the independent action to relieve a party from judgment. *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980).

Where plaintiff obtained default judgment against entity of first title company for transaction that took place prior to sale of entity to second title company and on December 4, 1979, court denied motion to vacate judgment of second title company that was not a party to the transaction stating that the second company had not been authorized to intervene and thus had no standing to make motion, whereupon second company filed motion to intervene which was granted on February 12, 1980, and on March 7, 1980, second company renewed its motion to vacate, since first motion to vacate was filed 21 days after entry of judgment and within the time limits of this rule and when it was denied for lack of standing second company promptly sought permission to intervene and by the time hearing was held on this request six months had elapsed and then within 23 days of the order permitting intervention second company renewed its motion, the initial motion satisfied the time requirements of this rule and second company moved in a reasonably prompt manner to obtain relief from the judgment. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

The trial court did not err in denying the former husband's motion filed on November 25, 1981, for relief from, modification or clarification of the judgment and order dated August 26, 1981, where his motion for "modifi-

cation or clarification of the judgment and the court's order dated August 26, 1981," was essentially a motion to alter or amend the judgment under I.R.C.P. 59(e), which had to be served "not later than ten (10) days after entry of the judgment." *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983).

The time for filing a motion under this rule began running from the entry date of the original judgment, where amended judgment set forth only the amended first paragraph, not the entire judgment, it gave no indication that the amendment superseded the original judgment, nor did the amended judgment upset any final determination of rights in the original judgment. *Devine v. Cluff*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986).

The plaintiff's motion for reconsideration of the judge's denial of his motion under this rule for relief from dismissal, was untimely, if treated as a I.R.C.P. 59 motion to alter or amend, when it was filed 42 days after the denial of motion for relief. *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986).

Even if the plaintiff's motion for reconsideration was considered a motion for relief on the ground of newly discovered evidence under clause (2) of this rule, the motion was not timely filed because the motion was really a belated effort to amend his earlier motion under this rule which only sought relief under clause (1) for "mistake, inadvertence, surprise, or excusable neglect," and the order he actually sought to overturn was the original order of dismissal, dated over six months earlier. *Lee v. Morrison-Knudsen Co.*, 111 Idaho 861, 727 P.2d 1289 (Ct. App. 1986).

Where approximately one year after a judgment was entered defendant filed a motion under this rule to reopen or to set aside the judgment, the motion was not timely brought in the absence of an affidavit or other showing presented to the district court to establish the timeliness of defendant's motion. *Harter v. Products Mgt. Corp.*, 117 Idaho 121, 785 P.2d 685 (Ct. App. 1990).

Where defendant did not file his motion to set aside default judgment for divorce until ten months had elapsed since its entry, the magistrate did not err by refusing to grant relief from the default judgment pursuant to subdivisions (1), (3) and (6) of this rule. *Ellis v. Ellis*, 118 Idaho 468, 797 P.2d 868 (Ct. App. 1990).

This rule is mandatory and consequently, any attempt to modify or set aside the judgment and order pursuant to subdivision (1), (2), (3) or (6) will not be allowed where the applicable time limit under this rule has clearly expired. *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990).

Since I.R.C.P. 11(b)(3) allows 20 days for a person to file written notice of how they will represent themselves where their attorney has been permitted to withdraw, and I.R.C.P. 6(e)(1) adds three days to the period because the order allowing the withdrawal was served by mail, since 23 days should have elapsed before order of default in child custody and support action was entered the order which was entered 22 days after mailing of the withdrawal order was voidable under subdivision (b)(4) of this rule. *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Where there was nothing contained in the record, including the copy of the order of October 21, 1982 concerning custody and child support, that indicated mailing of that order by the clerk to wife, and she raised her objection in her motion to dismiss the renewal of judgment complaint on May 18, 1988, two months after the complaint was filed, her objection was timely under this rule since it was made within a reasonable time of her actual notice of the October 21 order. *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Wife acted as a reasonably prudent person would by accepting in divorce property settlement tax liability estimate of \$30,000 when the actual tax liability was \$11,000, since neither of the parties could have known that the actual liability would be so vastly different from the estimated liability, and wife acted with due diligence in filing motion pursuant to this section on May 16, when she learned of the actual tax liability when the return was filed in April. *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Ct. App. 1991).

The trial court correctly ruled that plaintiff had not complied with the time requirements of I.R.C.P. 59(c) in filing the affidavits opposing defendant's motion for new trial and it did not err in refusing to consider plaintiff's second set of affidavits. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

The trial court correctly ruled that the second set of juror affidavits were not timely filed within the period prescribed by I.R.C.P. 59(c), and could not be considered under this rule; these affidavits were simply "opposing affidavits" as contemplated by I.R.C.P. 59(c), and should have been filed within the period of time allowed by the rule; accordingly, the trial court properly refused to consider the second set of affidavits because they were not timely filed. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

"Made" as used in this rule contemplates either filing or service, such that a motion is timely "made" if it either is filed prior to the

6-month time limit or is served within that time period and then filed "within a reasonable time thereafter." *Miller v. Haller*, 129 Idaho 345, 924 P.2d 607 (1996).

Trial court incorrectly focused on plaintiff's actions before the quiet title action commenced, her lack of involvement in the property, and her failure to justify the delay in pursuing action to set aside the quiet title judgment when it should have focused on plaintiff's conduct from the time she had notice of the quiet title decree until the time she filed her action; considering the lapse of time, the suit was brought within a reasonable time. *Davis v. Parrish*, 131 Idaho 595, 961 P.2d 1198 (1998).

Although the plaintiff demonstrated that a default judgment was acquired through impermissible surprise, the district court's finding that it did not act within a reasonable time was not clearly erroneous where the plaintiff offered no explanation for a delay of nearly five months in seeking relief under this Rule. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Regardless of whether a default judgment against defendant was wholly prospective, defendant's motion for relief from the default judgment was untimely. Given that defendant waited over 17 months to challenge the default judgment, it was not an abuse of discretion to deny defendant's motion for relief. *Meyers v. Hansen*, 148 Idaho 283, 221 P.3d 81 (2009).

Vacation.

Where defendant, in his motion to vacate and set aside a default judgment entered in an action on a promissory note, alleged that he was a resident of Michigan with no contacts with the state of Idaho sufficient to establish jurisdiction, the question raised as to whether the court had jurisdiction was a sufficient showing of a meritorious defense and thus the trial court did not abuse its discretion in setting aside the default and judgment. *Marco Distrib., Inc. v. Biehl*, 97 Idaho 853, 555 P.2d 393 (1976).

When moving to set aside a default judgment, the moving party must not only meet the requirements of this rule but must also plead facts which, if established, would constitute a defense to the action, for it would be an idle exercise for the court to set aside a default if there is in fact no real justiciable controversy. *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979).

Although a default judgment may be set aside on the basis of mistake, inadvertence, surprise or excusable neglect, a party seeking to set aside a default judgment must in addition to meeting the requirements of this rule,

show a meritorious defense going beyond the mere notice requirements which would be sufficient if pled before default, since it would be an idle exercise for a court to set aside a default if, in fact, there is no real justiciable controversy. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981).

Where counsel for defendant withdrew and defendant subsequently failed to appear either in person or through new attorney as required by I.R.C.P., Rule 11(b)(3) with the result that a default judgment was entered against defendant, defendant was entitled to have the default judgment set aside pursuant to I.R.C.P., Rule 55(c), and this rule since the order of withdrawal failed to mention that default could be taken "without further notice" to the defendant as required by the last clause of I.R.C.P., Rule 11(b)(3), since the defendant received no notice of the default proceedings, since the requirement in the order requiring defendant to appear in 20 days could have been interpreted as requiring an answer, which had already been filed and since the default was not sought for 27 months during which time plaintiff kept sending defendant various communications related to the case. *Omega Alpha House Corp. v. Molander Assocs.*, 102 Idaho 361, 630 P.2d 153 (1981).

The party moving to set aside a default judgment must not only meet the requirements of this rule, but must also plead facts which, if established, would constitute a defense to the action. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Void Judgments.

A void judgment is a ground for relief under clause (4) of this rule; however, in order for a judgment to be void, there generally must be some jurisdictional defect in the court's authority to enter the judgment, either because the court lacks personal jurisdiction or because it lacks jurisdiction over the subject matter of the suit. Therefore, where the plaintiff's former husband did not allege, and the record did not show, that the district court lacked jurisdiction over the parties or subject matter of the dispute, the plaintiff did not establish that he was entitled to relief from the judgment and order of the court on the ground that the judgment was void. *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983).

The fact that an Idaho Supreme Court decision, holding that military retirement benefits were community property subject to division on divorce, was shown to have been erroneous in light of a subsequent U.S. Supreme Court decision, did not render void a district court's intervening decision awarding such benefits to wife; husband was not en-

titled to seek relief under this rule, nor was he entitled to relief on the ground that it was no longer equitable that the judgment have prospective application. *Nieman v. Nieman*, 105 Idaho 796, 673 P.2d 396 (1983).

To hold that a judgment is void, there generally must be some jurisdictional defect in the court's authority to enter judgment, because the court lacks either personal jurisdiction or subject matter jurisdiction. *Cattledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

Where landowner had not known who owned mining dredge but had made diligent efforts to find out, and claimant had not taken reasonable care to inform the landowner of his interest in the dredge, service by publication was permissible and default judgment quieting title to the dredge was not void under clause (4) of this rule, even though the landowner proved no entitlement to the dredge, because the error was not jurisdictional. A judgment is not void merely because it is erroneous, unless the error is jurisdictional. *Brown's Tie & Lumber Co. v. Kirk*, 109 Idaho 589, 710 P.2d 18 (Ct. App. 1985).

Where trustees had not been named as parties in their individual capacity when suit was instituted, and the trial court never obtained jurisdiction over them in their individual capacity, the judgment against them as individuals was void; the trial court abused its discretion in refusing to set aside the judgment. *Collier Carbon & Chem. Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710 P.2d 618 (Ct. App. 1985).

A legally sufficient notice is a necessary predicate for entering a default judgment under I.R.C.P. 11(b)(3), and, when the predicate does not exist, the judgment is voidable under subdivision (4) of this rule. *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct. App. 1988).

The district court abused its discretion in denying defendant's motion to set aside a default judgment as it was apparent from the record that plaintiff's dealings with defendant during negotiations to settle the claim were at least partially intended to seek a default judgment while limiting defendant's opportunity to challenge its claims, and in this regard, defendant's contention that plaintiff obtained its default judgment through surprise is well-taken. *Deutz-Allis Credit Corp. v. Smith*, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990).

When default is obtained after a party's attorney has been permitted to withdraw before such a default may be entered, Rule 11(b)(3) of Idaho Rules of Civil Procedure requires particularized notice to the party

whose attorney is withdrawing from representation and when the predicate notice does not exist, the subsequent judgment by default is voidable under subdivision 60(b)(4) of this section as a matter of law. *Reinwald v. Eveland*, 119 Idaho 111, 803 P.2d 1017 (Ct. App. 1991).

Where order granting withdrawal failed to state that a failure to comply with the requirement to appear personally or through a new attorney in a timely manner would result in both the entry of a default and the entry of a default judgment, this failure to comply strictly with the requirements of Rule 11(b)(3) rendered the judgment voidable under subdivision (b)(4) of this rule. *Blanc v. Laritz*, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991).

Husband sought to have part of divorce decree mandating specified increases in child support set aside on the ground that the judgment was void, but the court was presented with no facts supporting the existence of a jurisdictional defect and the court had no duty to remand for an alternative disposition of the motion under this rule. *Kukuruza v. Kukuruza*, 120 Idaho 630, 818 P.2d 334 (Ct. App. 1991).

Question of whether motion under subdivision (4) was made within reasonable time was correctly judged from the time respondents learned of the judgment. There was no effort to enforce the judgment for five years. This delay should not be held against the respondents who were unaware of the default and the default judgment. *Wright v. Wright*, 130 Idaho 918, 950 P.2d 1257 (1998).

Waiver.

While it appeared that defendant father was not served pursuant to Idaho R. Civ. P. 4(d)(2) and the judgment could have been rendered void pursuant to Idaho R. Civ. P. 60(b)(4), the court concluded that the father, by pursuing the case without requesting a hearing or final determination from either of the lower courts on the personal service of process question, abandoned the issue of personal service; the father's actions in defending on the merits constituted a voluntary appearance because they were done before any denial of his motion under Idaho R. Civ. P. 12(b)(2), (4), or (5). *Lohman v. Flynn*, 139 Idaho 312, 78 P.3d 379 (2003).

Worker's Compensation Cases.

The authority of the Industrial Commission to reconsider its decisions is not analogous to the limitations imposed upon the trial courts

by I.R.C.P. 59 and this rule, as both §§ 72-718 and 72-719 authorize the commission to reconsider its decisions on its own motion upon the showing set out in those statutes. *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

Cited in: *Cline v. Roemer*, 97 Idaho 666, 551 P.2d 621 (1976); *Baker v. Pendry*, 98 Idaho 745, 572 P.2d 179 (1977); *Swayne v. Otto*, 99 Idaho 271, 580 P.2d 1296 (1978); *In re Andersen*, 99 Idaho 805, 589 P.2d 957 (1978); *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979); *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982); *Annest v. Conrad-Annest, Inc.*, 107 Idaho 468, 690 P.2d 923 (1984); *Williams v. Christiansen*, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985); *Southern Idaho Prod. Credit Ass'n v. Gneiting*, 109 Idaho 493, 708 P.2d 898 (1985); *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct. App. 1986); *Gailey v. Jerome County*, 113 Idaho 430, 745 P.2d 1051 (1987); *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987); *Davis v. Davis*, 114 Idaho 170, 755 P.2d 3 (Ct. App. 1988); *Bates v. Eastern Idaho Regional Medical Ctr.*, 114 Idaho 252, 755 P.2d 1290 (1988); *Siegel Mobile Home Group, Inc. v. Bowen*, 114 Idaho 531, 757 P.2d 1250 (Ct. App. 1988); *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931 (Ct. App. 1988); *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212 (1988); *Cross v. Moulton*, 114 Idaho 884, 761 P.2d 1236 (Ct. App. 1988); *Lopez v. State*, 116 Idaho 705, 779 P.2d 19 (Ct. App. 1989); *Phillips v. Miles*, 116 Idaho 842, 780 P.2d 593 (Ct. App. 1989); *Roselle v. Heirs & devisees of Grover*, 117 Idaho 530, 789 P.2d 526 (Ct. App. 1990); *Desfosses v. Desfosses*, 120 Idaho 354, 815 P.2d 1094 (Ct. App. 1991); *Walborn v. Walborn*, 120 Idaho 494, 817 P.2d 160 (1991); *Syth v. Parke*, 121 Idaho 156, 823 P.2d 760 (1991); *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d 493 (1992); *Rosales v. Balbas*, 125 Idaho 848, 875 P.2d 945 (Ct. App. 1994); *Reynolds v. State*, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994); *Parrott v. Wallace*, 127 Idaho 306, 900 P.2d 214 (Ct. App. 1995); *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996); *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999); *Selkirk Seed Co. v. Forney*, 134 Idaho 898, 996 P.2d 798 (2000); *Blimka v. My Web Wholesaler, LLC.*, 143 Idaho 723, 152 P.3d 594 (2007); *Or. Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 148 Idaho 47, 218 P.3d 391 (2009); *Meyers v. Hansen*, 148 Idaho 283, 221 P.3d 81 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Abuse of Discretion.
 Accepting Benefits of Judgment.
 Collateral Attack.
 Court Without Jurisdiction.
 Custody Decree.
 Death of Party.
 Default.
 Delay.
 Discretion of Court.
 Divorce Decree.
 Due Diligence.
 Effect of Appeal.
 Excusable Neglect.
 Extension of Time to Plead.
 Fraud.
 Hearing on Motion.
 In General.
 Inability to Employ Counsel.
 Inadvertence.
 Irregularity in Proceedings.
 Knowledge of Party.
 Mistake.
 Neglect by Counsel.
 Newly Discovered Evidence.
 Premature Entry of Judgment.
 Proof Necessary to Vacate Decree.
 Proper Remedy.
 Quiet Title Action.
 Right to Relief.
 Surprise.
 Test of Reasonableness.
 Time for Proceedings.
 Voiding Part of Judgment.
 Void Judgment.

Abuse of Discretion.

Since plaintiffs in condemnation proceeding had actual knowledge of appellants' interest in property, it was incumbent on them to join appellants as parties defendant so that the latter might present their case to the trial court; upon their failure to do so, it was abuse of discretion for the trial court to refuse to set aside appellants' default, reopen the case and permit appellants to submit proof, including presentation of evidence as to severance damages. *Rich v. Wylie*, 84 Idaho 58, 367 P.2d 763 (1962).

Accepting Benefits of Judgment.

Where plaintiff has accepted all the benefits of divorce decree and property settlement agreement, and made no offer or tender to restore any of the funds, except upon a court ordered rescission of the agreement, the court under these circumstances looks with disfavor upon a motion for relief (under the

former similar rule). *Willis v. Willis*, 93 Idaho 261, 460 P.2d 396 (1969).

Collateral Attack.

If probate court (now district court) erred in any respect in the course of its proceedings or in the final decree of distribution, such error was open to correction either on appeal or by motion to set aside the judgment under this section, and the judgment could not be vacated in a collateral action. *Moyes v. Moyes*, 60 Idaho 601, 94 P.2d 782 (1939).

Court Without Jurisdiction.

The court is without power to vacate a judgment after the expiration of the prescribed six months unless the court acted without jurisdiction, and such fact appears from the judgment roll. *Vane v. Jones*, 13 Idaho 21, 88 P. 1058 (1907); *Nixon v. Tongren*, 33 Idaho 287, 193 P. 731 (1920); *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921); *Rice v. Rice*, 46 Idaho 418, 267 P. 1076 (1928); *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928).

Custody Decree.

Wife living in Denver, Colorado was not given sufficient time to appear at hearing on motion for modification of custody decree where she did not receive notice from her attorney until three days prior to hearing and she required several days time to borrow the money in order to make the trip. *Kalousek v. Kalousek*, 77 Idaho 433, 293 P.2d 953 (1956).

Where original judgment of trial court found the child the issue of the marriage and granted custody to defendant, the plaintiff was precluded from raising the issue of paternity in an action to modify the custody provision of the divorce decree unless there was a material, permanent and substantial change in circumstances of the parties that required modification of the custody decree for the best interest of the child's welfare. *Miller v. Miller*, 96 Idaho 10, 523 P.2d 827 (1974).

Death of Party.

Where a judgment has been obtained by plaintiff in an action which does not survive and the plaintiff thereafter dies before a motion for a new trial is heard or before the case is heard upon appeal, a clear showing ought to be required from the moving party before the court should set aside or reverse the judgment. *Green v. Kandle*, 20 Idaho 190, 118 P. 90 (1911).

A void judgment in divorce action may be set aside even after death of one of parties when property interests of survivor are in-

volved. *Vincent v. Black*, 30 Idaho 636, 166 P. 923 (1917).

Default.

Relief from default should be granted in doubtful cases. *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951).

Whether an applicant is or is not entitled to have a default judgment taken against him vacated and set aside depends on the showing made in support of such application. *Johnson v. Noland*, 78 Idaho 642, 308 P.2d 588 (1957).

Delay.

A defendant wife in a divorce action could not have the court modify a divorce decree as to property distribution two and a half years after her execution of a waiver of notice and summons in the action on the ground that she was under a mental strain, could not think clearly, and did not know what she was doing at the time she signed such waiver, in the absence of a showing that she continued under such mental strain during the time she might have sought relief. *Lowe v. Lowe*, 92 Idaho 208, 440 P.2d 141 (1968).

Discretion of Court.

It is an abuse of discretion for the court to refuse to permit a party to state to the court his reasons for invoking the court's assistance. *Dunbar v. Griffiths*, 14 Idaho 120, 93 P. 654 (1908).

It is within the sound judicial discretion of the trial court, for good cause shown and in furtherance of justice, to relieve parties from stipulations which they have entered into in the course of judicial proceedings, and it is its duty to do so when enforcement thereof would be inequitable and when all parties to the action will, by vacating the stipulation, be placed in exactly the same condition they were in before it was made. *Koepl v. Ruppert*, 29 Idaho 223, 158 P. 319 (1916).

While right to vacate judgment is generally matter within discretion of court, it is judicial, reviewable discretion to be exercised without violation of constitutional rights. *Ticknor v. McGinnis*, 33 Idaho 308, 193 P. 850 (1920).

Where a motion is made to vacate a judgment, which motion is denied by the trial court, and thereafter, a new motion for the same relief is made upon substantially the same set of facts presented in the previous motion, it is discretionary with the court to refuse to entertain the same motion, and in the absence of a clear abuse of such discretion, such action by the trial court will not be disturbed on appeal. *Dellwo v. Petersen*, 34 Idaho 697, 203 P. 472 (1921).

Motion to vacate a judgment of dismissal is governed by exercise of sound legal discretion

of the trial court. *Arnett v. Throop*, 75 Idaho 331, 272 P.2d 308 (1954).

The purpose of former similar provision was to provide a means of relieving a litigant from the harsh and often unjust consequences of a strict application of a time requirement. To that end the court's discretion should be freely and liberally exercised. *Johnson v. Noland*, 78 Idaho 642, 308 P.2d 588 (1957).

In a quiet title action the trial court did not abuse its discretion in denying plaintiffs' motion to reopen the case on the ground that conduct of defendants' counsel in walking the proposed boundary with the court-appointed surveyor resulted in fraud being perpetrated upon the court, where plaintiffs did not establish fraud by clear and convincing evidence or show that prejudice resulted from any improper influence. *Lisher v. Krasselt*, 96 Idaho 854, 538 P.2d 783 (1975).

Divorce Decree.

Where plaintiff obtained an uncontested decree of divorce, and more than nine months after close of term, defendant sought a motion to vacate on grounds of intrinsic fraud, the court could, by way of analogy, look to former similar provision as to what constituted laches. *Robinson v. Robinson*, 70 Idaho 122, 212 P.2d 1031 (1949).

Trial court erred in concluding that defendant wife, a non-resident, had failed to make an appearance for the trial and was directed to set aside decree and default where in letter sent by husband's counsel to wife's counsel no notice of the particular date upon which the trial of the issues of the divorce action would be had was set forth, but husband's counsel thereafter caused clerk to enter default. *Lovell v. Lovell*, 80 Idaho 251, 328 P.2d 71 (1958).

Due Diligence.

A litigant moving for relief under this section on the grounds of mistake, inadvertence, surprise or excusable neglect must show that he has exercised due diligence in the prosecution of his rights, such as an ordinary prudent man would exercise under similar conditions. *Council Imp. Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909).

Defendant was entitled to prevail on motion to set aside default judgment where he acted promptly upon hearing of default judgment. *Stoner v. Turner*, 73 Idaho 117, 247 P.2d 469 (1952).

A reasonably prudent person having been notified of the situation, the neglect of an attorney to represent him, who fails or neglects, with no sufficient legal excuse, to make any effort to protect his rights and allows several months to elapse without taking any

action, cannot be said to have acted as a reasonably prudent person. *Crumley v. Minden*, 80 Idaho 391, 331 P.2d 275 (1958).

Effect of Appeal.

An appeal from the judgment did not divest the jurisdiction of the trial court to grant relief under former similar section. *Miller v. Prout*, 32 Idaho 728, 187 P. 948 (1920).

Excusable Neglect.

The design and purpose of the former § 5-905 was to further the administration of justice so that the very right upon the merits might be determined, and to that end to grant relief from excusable neglect in cases where diligence was shown in applying promptly for the relief sought, provided the opposite party be not deprived of any advantage to which he might properly be entitled. *Dellwo v. Petersen*, 34 Idaho 697, 203 P. 472 (1921).

What constitutes excusable neglect under the statutory provisions is determined by the facts and surrounding circumstances of the particular case involved. *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951).

In suit to quiet title where plaintiffs alleged that they were sole owners of the land involved and that the defendants had neither right, title nor interest in same, the defendants who stated in affidavit to set aside default judgment obtained in same that they thought plaintiffs were clearing title so that a transaction between the parties could be completed did not show excusable neglect in failing to appear and file an answer to the proceeding. *Thomas v. Stevens*, 78 Idaho 266, 300 P.2d 811 (1956).

Where a party sought relief under the provisions of former section from a default or a default judgment on the ground of excusable neglect, the application was to be judged by the showing made in support of same. Each application must be examined and determined in the light of the facts presented and the circumstances in connection with same. *Straub v. Straub*, 80 Idaho 221, 327 P.2d 358 (1958).

Trial court did not err in setting aside original judgment on plaintiff's motion, and entering a subsequent identical judgment, when plaintiff's failure to move earlier to set aside was occasioned by the fault or neglect of his counsel, even though such determination by the trial court extended the time for appeal; otherwise, plaintiff, not otherwise at fault, would have been precluded from maintaining an appeal. *Andrus v. Irick*, 87 Idaho 471, 394 P.2d 304 (1964).

Extension of Time to Plead.

Where extension of time for complying with

order for new trial on condition of defendants consenting within thirty days to certain diminution of judgment was made without any showing of or application for relief in furtherance of justice through mistake, inadvertence, surprise or excusable neglect, relief cannot be granted. *Idaho Farm Dev. Co. v. Brackett*, 44 Idaho 272, 257 P. 35 (1927).

Fraud.

Where fraud has been perpetrated in obtaining a judgment, defendant is not confined to his statutory remedy to set aside judgment against him by reason of his mistake, inadvertence or excusable neglect. *Keane v. Allen*, 69 Idaho 53, 202 P.2d 411 (1949); *Gregory v. Hancock*, 81 Idaho 221, 340 P.2d 108 (1959).

Where fraud has been perpetrated in obtaining a judgment the motion to vacate the judgment must be made within a reasonable time after discovery of the fraud. *Keane v. Allen*, 69 Idaho 53, 202 P.2d 411 (1949).

Judgment of dismissal of suit for breach of contract was not obtained by fraud if third parties not parties to suit or contract refused to carry out contract between plaintiff and defendants. *Arnett v. Throop*, 75 Idaho 331, 272 P.2d 308 (1954).

During the pendency of appeal from award to condemnee where condemnor learned that fraud had been committed by the condemnee and there was a clear and convincing proof of that fraud, condemnor was entitled to vacation of judgment and new trial. *State ex rel. Symms v. V-I Oil Co.*, 94 Idaho 456, 490 P.2d 323 (1971).

Hearing on Motion.

Motion to vacate a judgment is a direct and not a collateral attack on the judgment and any fact going to show the invalidity of the judgment can be presented at the hearing of the motion. *Baldwin v. Anderson*, 51 Idaho 614, 8 P.2d 461 (1932).

In General.

In considering a motion to vacate and set aside a judgment, it must be remembered that a judgment is property of which the owner should not be deprived without due process of law. *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Inability to Employ Counsel.

Even if contention of respondents that they were financially unable to employ an attorney was sustained by the evidence, which it was not, it would not in itself furnish sufficient reason for setting aside default judgment. *Crumley v. Minden*, 80 Idaho 391, 331 P.2d 275 (1958).

Inadvertence.

Affidavit reciting that plaintiff by oversight and inadvertence did not in his complaint seek all the relief to which it was entitled was insufficient to invoke the discretion of the court; the affidavit must state the facts and circumstances which plainly constitute the oversight and inadvertence. *Occidental Life Ins. Co. v. Niendorf*, 55 Idaho 521, 44 P.2d 1099 (1935); *Voellmeck v. Northwestern Mut. Life Ins. Co.*, 60 Idaho 412, 92 P.2d 1076 (1939); *Kingsbury v. Brown*, 60 Idaho 464, 92 P.2d 1053 (1939).

Irregularity in Proceedings.

Proceedings relating to sale of real property of decedent's estate may be set aside where it affirmatively appears that a copy of the order to show cause was not served on, nor dispensed with by, the interested parties. *Kline v. Shoup*, 38 Idaho 202, 226 P. 729 (1923).

Knowledge of Party.

Former similar provision did not contemplate relief to a defendant who had knowingly failed to answer within prescribed time and thereafter changed his mind because of changed conditions. *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087 (1936), cert. denied, 299 U.S. 615, 57 S. Ct. 319, 81 L. Ed. 453 (1937).

It was error to vacate a default divorce decree under grounds (1) and (6) where the defendant knowingly allowed the decree to be entered against him with full knowledge of the pendency of another action for the same cause in another county and accepted the benefit of the decree by remarrying. *Coombes v. Coombes*, 91 Idaho 729, 430 P.2d 95 (1967).

Mistake.

A mistake in the transmission of a telegram sent by the judge setting the date for a hearing, whereby the party is deprived of a hearing without his fault, is a sufficient ground for vacating a judgment. *Thum v. Pyke*, 6 Idaho 359, 55 P. 864 (1898).

Neglect by Counsel.

Where attorney retained by agent of defendant failed to enter appearance though summons was received by him, trial court did not abuse its discretion in setting aside default judgment where defendant had a meritorious defense to plaintiff's action. *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951).

If an attorney fails to appear and answer for the defendant within the time provided, and he has had plenty of time to so do, and defendant is otherwise without fault, the general rule is that it is immaterial whether attorney was hired personally by defendant or

through others. *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951).

The order setting aside a default judgment was supported by the evidence where it was shown that failure to appear within time limited was fault of defendant's attorneys, not defendant's, as immediately on service of summons and complaint defendant had retained counsel to defend the action. *Olson v. Farmers Ins. Exch.*, 78 Idaho 56, 297 P.2d 1045 (1956).

District court was required to set aside default judgment where counsel for defendant with notice of hearing on demurrer failed to appear and did not file an answer in time. *Pierce v. Vialpando*, 78 Idaho 274, 301 P.2d 1099 (1956).

Neglect of an attorney in causing or permitting a default is a mandatory excuse. *Mountain States Implement Co. v. Sharp*, 93 Idaho 231, 459 P.2d 1013 (1969); *Mountain States Implement Co. v. Sharp*, 94 Idaho 225, 486 P.2d 80 (1971).

Where appellants' counsel might have been negligent for failure to know about clerk's practice of not abiding by I.R.C.P. 77(d) requiring notice to counsel of the entry of judgment, counsel's negligence in untimely filing of post-judgment motions could not be imputed to the appellants and a motion for relief under I.R.C.P. 60(b)(1) should be granted. *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977).

Newly Discovered Evidence.

Where plaintiff's counsel limited his investigation before trial to contacting witnesses living within a radius of 300 miles of the place of trial although having names and addresses of witnesses living beyond such limits and plaintiff secured statements and affidavits 30 to 90 days after the trial from witnesses living outside such radius, plaintiff was not entitled to a new trial or to have the judgment set aside for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." *Telfair v. Greyhound Corp.*, 89 Idaho 385, 404 P.2d 875 (1965).

Fact that prior to trial extensive discovery proceedings were held suggests diligence on part of defendant and thus court erred in not granting motion for new trial on ground that new evidence, which could not have been discovered by exercise of due diligence in time to move for new trial under Rule 59(c) had been found. *In re Estate of Freeman*, 95 Idaho 562, 511 P.2d 1338 (1973).

Premature Entry of Judgment.

The premature entry of a judgment or its entry contrary to the terms of a stipulation

between the parties may be corrected in the lower court. *Grete v. Knott*, 2 Idaho 13, 3 P. 25 (1881).

Proof Necessary to Vacate Decree.

Affidavit filed after judgment for plaintiff on the pleadings reciting that defendant and his attorney believed the allegations of the answer sufficient to constitute a defense was held insufficient to support order vacating judgment. *Green v. Craney*, 32 Idaho 338, 182 P. 852 (1919).

Former similar provision was available to one in whose favor a judgment was rendered as well as to one against whom judgment had gone. It necessarily follows that the same duty to make a showing was imposed upon the one as upon the other. *Occidental Life Ins. Co. v. Niendorf*, 55 Idaho 521, 44 P.2d 1099 (1935).

Defendant in order to vacate a default decree must prove: (1) that the judgment was taken against him by reason of his "mistake, inadvertence, surprise or excusable neglect," and (2) he must allege facts which show that he has a defense to the action. *Thomas v. Stevens*, 78 Idaho 266, 300 P.2d 811 (1956).

The facts constituting the mistake, inadvertence, surprise or excusable neglect must be detailed, and conclusions are not sufficient. *Thomas v. Stevens*, 78 Idaho 266, 300 P.2d 811 (1956).

Whether or not a default or a default judgment should be set aside under the provisions of this section depends upon the showing made in support of the application. Each case must be examined in the light of the facts presented and the circumstances surrounding the same. *Johnson v. McIntyre*, 80 Idaho 135, 326 P.2d 989 (1958).

Absent a showing that a judgment-debtor did not or could not comply with the former similar rule and Rule 55(c) of I.R.C.P., a default judgment entered without the three-day requisite notice is not irregularly obtained and not voidable and not subject to collateral attack. *Acker v. Mader*, 94 Idaho 94, 481 P.2d 605 (1971).

Proper Remedy.

If the judgment is erroneous the remedy of the defendant was by appeal or motion for new trial and not by motion to set the judgment aside made after the lapse of more than six months from the rendition of the judgment. *Commonwealth Trust Co. v. Lorain*, 43 Idaho 784, 255 P. 909 (1927).

Former similar statute provided an independent proceeding existing concurrently with the right to appeal from the judgment. *Baldwin v. Anderson*, 51 Idaho 614, 8 P.2d 461 (1932).

Quiet Title Action.

In action to quiet title, setting aside a default judgment was not an abuse of discretion where motion was filed within time and there was no showing that plaintiffs were prejudiced or that they were deprived of any advantage to which they were properly entitled. *Swanson v. State*, 83 Idaho 126, 358 P.2d 387 (1960).

Right to Relief.

Court properly allowed amendment changing endorsement by "clerk" to be by "auditor" to conform to requirements of law. *O'Conner v. Board of County Comm'rs*, 17 Idaho 346, 105 P. 560 (1909).

The preparation and settlement of a statement or bill of exception is a proceeding within the meaning of the term "proceeding," and where application is made to the court to settle a bill of exception after the time has expired for serving the same, on the ground of mistake, inadvertence or excusable neglect, and the court finds that the bill is not served in time by reason of mistake, inadvertence, surprise or excusable neglect, it is the duty of the court to grant relief from such default. *Richardson v. Bohnay*, 18 Idaho 328, 109 P. 727 (1910).

It is not denial of substantial right to refuse amendment that might have effect of producing accounting in action without bringing another action. *Idaho Trust Co. v. Eastman*, 43 Idaho 142, 249 P. 890 (1926).

The general rule favors the granting of relief from default judgment so as to bring about a judgment on the merits. *Mead v. Citizens Auto. Inter-Insurance Exch.*, 78 Idaho 63, 297 P.2d 1042 (1956).

In determining whether or not a motion to set aside a default should be granted, each case must be examined and considered in the light of the facts presented and the circumstances surrounding the case. In doubtful cases the general rule is to incline towards granting release in order to bring about judgment on the merits. *Davis v. Rathbun*, 79 Idaho 482, 321 P.2d 609 (1958).

Surprise.

If a party stands on his pleadings and a motion is presented which goes to the vitals of the issue, he must abide the result, and the court will not set aside the judgment and allow amendments, where such party is not taken by surprise. *Union Trust & Sav. Bank v. Idaho Smelting & Ref. Co.*, 24 Idaho 735, 135 P. 822 (1913).

Test of Reasonableness.

Mistake or neglect must be such as may be expected on part of reasonably prudent per-

son situated as was party against whom judgment was entered. *Ticknor v. McGinnis*, 33 Idaho 308, 193 P. 850 (1920); *Atwood v. Northern Pac. Ry.*, 37 Idaho 554, 217 P. 600 (1923); *Savage v. Stokes*, 54 Idaho 109, 28 P.2d 900 (1934).

Mistake, inadvertence, and excusable neglect are asserted as grounds for setting aside a default judgment, where reasonable prudent person test is applied. *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951).

It has been held that the mistake, inadvertence and excusable neglect contemplated is such as might be expected on the part of a reasonably prudent person. *Johnson v. Nolan*, 78 Idaho 642, 308 P.2d 588 (1957).

One who wilfully, for no sufficient legal reason, disregards processes of court does not act in a reasonably prudent manner or as a reasonably prudent person would or should act under similar circumstances and such facts fail to establish mistake, surprise, inadvertence or excusable neglect as would justify the setting aside of a default judgment. *Crumley v. Minden*, 80 Idaho 391, 331 P.2d 275 (1958).

Time for Proceedings.

The court or the judge thereof does not have

jurisdiction to open up or set aside its decree more than six months after decree is entered. *Connolly v. Probate Court*, 25 Idaho 35, 136 P. 205 (1913).

Voiding Part of Judgment.

If judgment is void in part and such void portion can be separated from balance, relief may be granted to that extent. In such case void portion will be vacated and balance permitted to stand. *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928).

Void Judgment.

When the judgment is void but the invalidity does not appear on the face of the record the motion to vacate must be made within a reasonable time. *Miller v. Prout*, 33 Idaho 709, 197 P. 1023 (1921); *Armitage v. Horseshoe Bend Co.*, 35 Idaho 179, 204 P. 1073 (1922); *Savage v. Stokes*, 54 Idaho 109, 28 P.2d 900 (1934); *Hanson v. Rogers*, 54 Idaho 360, 32 P.2d 126 (1934).

Setting aside of void judgment where its invalidity does not appear on its face must be made within reasonable time and such reasonable time is not in excess of time provided in this section. In *re Barr's Estate*, 43 Idaho 400, 252 P. 676 (1927).

RESEARCH REFERENCES

A.L.R. Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court. 3 A.L.R.3d 1191.

Absence of judge from courtroom during trial of civil case. 25 A.L.R.3d 637.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 A.L.R.3d 812.

Relief from judicial error by motion under FRCP Rule 60(b)(1). 1 A.L.R. Fed. 771.

Propriety of conditions imposed in granting relief from judgment under Rule of Civil Procedure 60(b). 3 A.L.R. Fed. 956.

Who is a "legal representative" within provision of Rule 60(b) of Federal Rules of Civil Procedure permitting court to relieve "party or his legal representative" from final judgment or order for specified reasons. 12 A.L.R. Fed. 925.

Construction and application of Rule 60(b)(5) of Federal Rules of Civil Procedure authorizing relief from final judgment where its prospective application is inequitable. 117 A.L.R. Fed. 419.

Construction and application of Rule 60(b)(6) of Federal Rules of Civil Procedure, authorizing relief from final judgment or order for "any other reason". 15 A.L.R. Fed. 193.

Construction and application of provision of Rule 60(b) of Federal Rules of Civil Procedure that Rule does not limit power of Federal District Court to set aside judgment for "fraud upon the court". 19 A.L.R. Fed. 761.

Who is a "party" within provision of Rule 60(b) of Federal Rules of Civil Procedure permitting court to relieve "party or his legal representative" from final judgment or order for specified reasons. 35 A.L.R. Fed. 973.

Rule 60(c). Proceedings to modify child custody or child support orders.

Except as otherwise provided by these rules, a motion to modify child custody or child support orders shall be served and adjudicated in substantially the same manner as an original proceeding, but the filing of a motion to modify child custody or child support orders shall not be deemed the

commencement of an action under Idaho Code Section 5-404. The motion shall be in a form similar to a complaint, served with a notice directing the opposing party to file a written response within twenty (20) days, or default may be entered, with or without hearing. The judge, in the judge’s discretion, may require a hearing. The method of service and return thereon shall be the same as for a summons. (Adopted March 31, 1998, effective July 1, 1998; amended March 22, 2002, effective July 1, 2002; amended February 9, 2012, effective July 1, 2012.)

JUDICIAL DECISIONS

24 Hours Notice.

Trial court did not abuse its discretion in allowing the father in a child support case to proceed with his statute of limitation defense although the father did not give at least twenty-four hours’ written notice of his intent to raise the defense to the court and opposing party before the show cause hearing, as the

mother did receive actual notice of the defense well in advance of the hearing date through the father’s motion to continue and his answers to interrogatories. *Stonecipher v. Stonecipher*, 131 Idaho 731, 963 P.2d 1168 (1998).

Cited in: *McGlooin v. Gwynn*, 140 Idaho 727, 100 P.3d 621 (2004).

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATUTORY NOTES

Cross References. Evidence, form and admissibility, I.R.E., Rules 104, 105, 402-404, 409-411, 413, 1003, 1004.

Formal exceptions to rulings or orders of court unnecessary, Rule 46.

Jury instructions, Rule 51.

Motion for judgment notwithstanding verdict, Rule 50(b).

Motion to vacate judgment, order or proceedings, reasons, Rule 60(b).

New trials, grounds for, Rule 59(a).

JUDICIAL DECISIONS

ANALYSIS

Admission of Evidence.
Damages Calculation.
—Notice Requirement.
Evidence.
Exclusion of Evidence.
—Habit.
Expert Testimony.
Frivolous Claims.
Improper Use of Evidence.
Instructions.
Jury Selection.

Lay Testimony.
Nonprejudicial Error.
Notice Requirements in General.
Record on Appeal.
Requests for Additional Time.
Review.
Substantial Right.
Summary Judgment.
—Procedural Defects.

Admission of Evidence.

Appellate courts review trial court decisions admitting or excluding evidence, includ-

ing the testimony of expert witnesses, under the abuse of discretion standard. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Where injured parties brought suit against a cow owner, pasture owners, and the state when their vehicle struck a cow carcass on an interstate highway, the trial court did not abuse its discretion in allowing the pasture owners' expert to testify as to why the cows might have broken down a pasture gate and gone out onto the highway. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004).

Damages Calculation.

Although exhibits were improperly admitted as they contained information on sales from outside the time period from which sales were to be considered in calculating damages, the committed error was harmless as they were not relied upon by the lower court in its computation of damages and such admission did not warrant reversal. *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995).

—Notice Requirement.

Requirement of a three-day notice to a party that default judgment will be sought against him, provided in I.R.C.P. 55(b)(2), is triggered only when that party or his representative has appeared in the action; an appearance triggering the requirement of the three-day notice has been broadly defined, and conduct on the part of the defendant which indicates an intent to defend against the action can constitute an appearance within the meaning of the rule. However, where the record showed no such conduct, but rather it only revealed defendant to be an unresponsive party who never answered the complaint, or retained an attorney to handle the matter, or initiated any contact with plaintiffs or their attorney, and never expressed any interest in defending the claim, noncompliance with the rule was at best technical and at worst constitutes harmless error which must be disregarded in accordance with this rule. *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

Where the clerk of the court mailed a notice of default pursuant to I.R.C.P. 77(d) to defendant's address as listed in the plaintiffs' complaint and as listed as a matter of record with the office of the Secretary of State, such mailing was legally sufficient, and the omission of a certification of address by the plaintiffs was harmless error, since the court in fact used the same address as would have been stated in a certification of address. *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

Evidence.

No error in either the admission or the exclusion of evidence is grounds for granting a new trial or for setting aside a verdict unless refusal to take such action appears to the court to be inconsistent with substantial justice. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

Exclusion of Evidence.

In an action to quiet title to land the trial court's exclusion of certain deposition questions on the ground that they called for an ultimate conclusion was harmless error where the party who had given the deposition gave at trial the same testimony as was erroneously excluded. *Collins v. Parkinson*, 98 Idaho 871, 574 P.2d 913 (1978).

In an action by a furniture company to recover damages for loss of business and destruction of property due to flood damage caused by a broken water main, the court properly precluded evidence at trial, on grounds of irrelevancy, showing the source of money needed to keep the business going while it was interrupted; the furniture company was allowed to present information that the company actually had to use specified amounts to keep the business afloat but the source of that money was irrelevant. *L & L Furn. Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991).

The erroneous exclusion of evidence justifies setting aside a jury verdict only if substantial rights of the parties were affected by the error. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Where court excluded a witness on defendant's witness list and defendant had informed plaintiff that it reserved the right to call anyone on the witness list, error occurred; however, it was harmless because excluding the witness' testimony did not affect defendant's substantial rights as defendant presented other direct evidence and the excluded witness' testimony was cumulative and inadmissible in part. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

In a property sale dispute, the grant of a new trial on damages, based on erroneous exclusion of evidence, was proper where the error affected a substantial right of the buyer, within the meaning of I.R.C.P. 61 and I.R.E. 103(a), because he was precluded from presenting evidence of his remodeling costs as an element of his damages. *White v. Mock*, 140 Idaho 882, 104 P.3d 356 (2004).

—Habit.

Where, in a medical malpractice action, defendant doctor was allowed to testify as to his referrals of plaintiff to other doctors, and

where the medical charts of the doctor concerning his treatment of plaintiff that were admitted in evidence indicated that the doctor had suggested consultations with others, including a neurological consultation if the patient would agree, in light of this evidence the exclusion of evidence of defendant's habit of referring patients to other doctors was not inconsistent with substantial justice and did not affect the substantial rights of the doctor; accordingly, such an exclusion did not warrant a new trial. *Hake v. DeLane*, 117 Idaho 1058, 793 P.2d 1230 (1990).

Expert Testimony.

When reviewing an evidentiary ruling on expert testimony, court's inquiry is limited to whether the challenged ruling was an abuse of the trial court's discretion, and error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

Frivolous Claims.

Although district court committed error in failing to act upon defendant's motion for appointed counsel before the court addressed the merits of his application for post-conviction relief, that error was harmless because defendant's alleged claims were time-barred more than a year before his application was filed and therefore frivolous. *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

Improper Use of Evidence.

The jury would not have accepted the debtor's assertion that the creditor breached an accord if the settlement letter had not been used improperly at trial; therefore, the error was harmless. *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986), modified on other grounds, *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987).

Instructions.

Where, although the jury was not instructed under the Idaho Consumer Protection Act (ICPA), it was instructed regarding common law fraud claims and the plaintiffs presented no sound basis for a jury to reach a different result under the ICPA, the court's refusal to present a claim under ICPA to the jury, even if error, constituted harmless error. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

If the jury believed that plaintiff in traffic accident should have had his lights on at the time of the accident, but that he failed to do so, the jury would have had to assign plaintiff some percentage of liability, since he would

have been negligent per se under Idaho law; therefore, it must be assumed by the fact that the jury found plaintiff 0% negligent and defendant 100% negligent, that the jury believed either (1) plaintiff did in fact have his truck properly illuminated at the time of the collision, or (2) the accident occurred when there was still enough natural light that plaintiff was not required to illuminate his vehicle lights and under either of these two findings, failure to give an instruction regarding plaintiff's employee's negligence and his agency with plaintiff could have made no difference in the jury's verdict; therefore, since only prejudicial errors affecting substantial rights of parties can be grounds for granting a new trial or setting aside a jury verdict the court did not disturb the ruling of the district court or the findings of the jury regarding the liability of the parties. *Lambert v. Hasson*, 121 Idaho 133, 823 P.2d 167 (Ct. App. 1991).

Jury Selection.

Where there was no contention nor evidence that the other jurors selected were incompetent or biased, any error in denying plaintiff's challenge of one juror for cause was not prejudicial. *Stoddard v. Nelson*, 99 Idaho 293, 581 P.2d 339 (1978).

Lay Testimony.

Since it was unlikely that the testimony of a lay witness influenced the jury where it was clear that he was an interested witness, any error in allowing the expression of his opinion was harmless. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 983 P.2d 834 (1999).

Nonprejudicial Error.

Even if the trial court did err in refusing to disclose contents of the agreement between the plaintiff and certain defendants to the jury, there was no prejudice resulting from the district court's decision which would warrant reversal. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

Even if the trial court erroneously considered its view of the premises as "evidence," there otherwise remained substantial and competent evidence to support the trial court's findings; therefore, the court's misstatement concerning the view as evidence was harmless error, not affecting the substantial rights of the parties. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

Notice Requirements in General.

Though Rule 6(d) [now Rule 7(b)(3)] does require five days' notice [now 14 days' notice] before a hearing on a motion, the lack of such

notice imposed no additional burden on plaintiff and therefore the error was harmless where hearing on July 14, 1989, was to order plaintiff to answer interrogatories submitted to him by defendant on May 23, 1989, to produce documents, and since date of trial was set for July 24, 1989, this gave plaintiff five days to respond, which would have given defendant four days to review the material before trial; the short notice for the hearing did not affect plaintiff's substantial rights. *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991).

Untimely notice of a hearing requires no relief on appeal unless the aggrieved parties show that the untimeliness of the notice prejudiced them in some way. *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009).

Record on Appeal.

Where, in a personal injury action, only a partial record of the evidence bearing on the issue of fault was presented, the Court of Appeals could not say the trial judge was wrong in concluding that a retrial would produce the same result. *McClure v. Stanley*, 113 Idaho 975, 751 P.2d 671 (Ct. App. 1988).

Requests for Additional Time.

Where the record clearly demonstrated that defendants in a foreclosure action suffered no prejudice by not having additional time to respond to plaintiff's application for a writ of assistance, where at the hearing the court had before it the defendants' "Items for Judicial Notice and Demand for Jury Trial," where defendants had the opportunity to brief and argue their opposition to the application, and where they refused to appear at the hearing, the defendants did not establish the loss of any substantial right with regard to the time frame involved. *Federal Land Bank v. Parsons*, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

Review.

Where the finder of fact was the court, not a jury, even greater restraint is applied in appellate review. *Wood v. State, Dep't of Health & Welfare*, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

Substantial Right.

Error which does not affect a substantial right of a party is considered harmless and is to be disregarded. *L & L Furn. Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991).

Even though the trial court should not have allowed cross-examination about the two citations received by plaintiff in motor vehicle accident the admission of the testimony in the personal injury action did not require a new

trial because it did not affect plaintiff's substantial rights. *Martin v. Hackworth*, 127 Idaho 68, 896 P.2d 976 (1995).

A judgment may not be disturbed on appeal due to error in an evidentiary ruling unless the error affected the substantial rights of a party. *Wood v. State, Dep't of Health & Welfare*, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

In malpractice action, trial court did not abuse its discretion in excluding evidence regarding plaintiff's medical history of sexually-transmitted diseases (STDs) and the testimony of plaintiff's expert concerning the use of a fetal scalp monitor where expert's testimony regarding the monitor would necessarily have included discussion of plaintiff's STD history. To refuse to allow the defense to present evidence regarding plaintiff's history of STDs and also to refuse to strike expert's testimony regarding use of the monitor would have impaired the substantial rights of the defendant. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Trial court should have permitted cross examination of defense's accident reconstruction expert concerning defendant's statement to an insurance adjuster; the error affected plaintiff's substantial rights and was grounds for granting a new trial. *Dabestani ex rel. Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

Because the opportunity for an applicant to adequately and appropriately respond to a district court's notice of proposed dismissal is a substantial right, where that right was affected by a defective notice, the error was not harmless, and the order summarily dismissing the application was vacated. *Downing v. State*, 132 Idaho 861, 979 P.2d 1219 (Ct. App. 1999).

Summary Judgment.

—Procedural Defects.

The district court properly disregarded procedural defects in a notice for hearing on union's motion for summary judgment where employee failed to object that such procedure violated his substantial rights. *Heer v. J.R. Simplot Co.*, 123 Idaho 889, 853 P.2d 634 (Ct. App. 1993).

Cited in: *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *Rowett v. Kelly Canyon Ski Hill, Inc.*, 102 Idaho 708, 639 P.2d 6 (1981); *Williams v. Christiansen*, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985); *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985); *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986); *State v. Chilton*, 112 Idaho 823, 736 P.2d 1277 (1987); *Jones v. Whiteley*, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987); *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987); *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987); *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990); *State ex rel. Dep't of Labor & Indus. Servs. v. Hill*,

118 Idaho 278, 796 P.2d 155 (Ct. App. 1990); *Idaho Dep't of Law Enforcement v. \$34,000 United States Currency*, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991); *Twin Lakes Village Property Ass'n v. Crowley*, 124 Idaho 132, 857 P.2d 611 (1993); *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995); *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133 (1996); *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000); *State v. Daniels*, 134 Idaho 896, 11 P.3d 1114 (2000); *Evans v. Bd. of Comm'rs*, 137 Idaho 428, 50 P.3d 443 (2002); *Doe v. Doe*, 138 Idaho 893, 71 P.3d 1040 (2003); *Baker v. State*, 142 Idaho 411, 128 P.3d 948 (Ct. App. 2005); *Schneider v. Schneider*, — Idaho —, 258 P.3d 350 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Abstract Error.
Admission of Evidence.
Amendment of Answer.
Cross-Examination.
Determination of Damages.
Discretion of Court.
Eminent Domain.
—Erroneous Valuation Date.
Erroneous Instruction.
Errors in Pleadings or Proceedings.
Exclusion of Evidence.
Failure to Appoint Guardian.
Failure to Raise Objections.
Filing of Transcript.
Findings of Fact.
Instructions.
Jurisdictional Facts.
Limitations on Leave to Amend.
Notice of Appeal.
Replevin Action Judgment.
Ruling on Venue.
Service of Notice of Judgment.

Abstract Error.

Mere showing of an abstract error will not suffice to sustain a contention that prejudice has resulted. *Williamson v. Wilson*, 55 Idaho 337, 42 P.2d 290 (1935).

Admission of Evidence.

Nonprejudicial error in the admission or rejection of evidence as harmless. *Hawkins v. Pocatello Water Co.*, 3 Idaho 766, 35 P. 711 (1894); *Work v. Kinney*, 8 Idaho 771, 71 P. 477 (1902); *In re McVay's Estate*, 14 Idaho 56, 93 P. 28 (1907); *Sponberg v. First Nat'l Bank*, 15 Idaho 671, 99 P. 712 (1909); *Rosnagle v. Armstrong*, 17 Idaho 246, 105 P. 216 (1909); *Marysville Mercantile Co. v. Home Fire Ins. Co.*, 21 Idaho 377, 121 P. 1026 (1912); *Sweeney v. Johnson*, 23 Idaho 530, 130 P. 997

(1913); *In re O'Brien's Estate*, 44 Idaho 729, 262 P. 152 (1927).

There was no prejudicial error in permitting directors to testify concerning transactions and discussions in meetings of the directors without first requiring the minutes of such meetings to be placed in evidence as a foundation for such testimony where the corporation secretary and directors testified that such minutes were sketchy and incomplete as to the matters covered by such testimony. *Knutsen v. Frushour*, 92 Idaho 37, 436 P.2d 521 (1968).

If the objecting party has himself earlier in the action presented evidence to the same effect as evidence erroneously admitted over his objection, such error will be deemed harmless. *Rogers v. Hendrix*, 92 Idaho 141, 438 P.2d 653 (1968).

The admission in evidence of a survey by the county surveyor, since deceased, which was merely cumulative of other competent evidence on the matter upon which it was admitted, was not prejudicial to defendant. *County of Bonner v. Dyer*, 92 Idaho 699, 448 P.2d 986 (1968).

Amendment of Answer.

Amendment of answer on day before trial, which does not affect substantial rights of party, is harmless error. *Vollmer Clearwater Co. v. Union Whse. & Supply Co.*, 43 Idaho 37, 248 P. 865 (1926).

Cross-Examination.

Trial court committed error in permitting plaintiff to call defendant for cross-examination in foreclosure of mechanic's lien proceeding where matter inquired into was available to plaintiff through correspondence and plaintiff's own testimony, but error was not reversible where other evidence preponderantly

supported judgment in favor of the plaintiff. *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956).

There was no prejudicial error by the trial court in limiting defendants' cross-examination of plaintiff's witness on matters relating to their counterclaim where the matter sought to be elicited by such cross-examination was fully elicited on rebuttal. *Giese v. Tarp*, 92 Idaho 243, 440 P.2d 521 (1968).

Determination of Damages.

A judgment awarding a contractor a lien for construction of a residence would not be reversed because the complaint alleged that the contractor was employed to draw plans and specifications for repair and reconstruction of a residence, for which the contractor was not entitled to a lien, where the trial court found that the reasonable value of the labor and materials furnished by the contractor amounted to a lump sum, and it was impossible to determine from the record that the trial court actually allowed the contractor anything for drawing the plans and specifications. *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938).

Discretion of Court.

The trial court did not abuse its discretion in permitting plaintiff to amend his complaint, showing a change in the status of the plaintiff, as it did not appear that defendant was prejudiced or surprised thereby. *Citizens Auto. Inter-Insurance Exch. v. Andrus*, 70 Idaho 114, 212 P.2d 406 (1949).

Eminent Domain.

—Erroneous Valuation Date.

In eminent domain proceeding wherein court and parties used date of possession by plaintiff instead of the date of summons as the valuation date, without objection at the trial or thereafter, ruling on this point was not necessary on appeal; if there was error it was not reversible error, since there was less than three months' difference between the two dates. *State ex rel. Symms v. Collier*, 93 Idaho 19, 454 P.2d 56 (1969).

Erroneous Instruction.

Where at most the instruction in question tended only to confuse the jury but nothing appeared to indicate the jury was misled, the error in giving the instruction on the doctrine of last clear chance when the time had passed when either party had a last clear chance to avoid the accident would not warrant a reversal. *Lallatin v. Terry*, 81 Idaho 238, 340 P.2d 112 (1959).

Where instruction to jury inaccurately stated the law and was prejudicial to plain-

tiff's case, trial judge was correct in granting a new trial. *Corey v. Wilson*, 93 Idaho 54, 454 P.2d 951 (1969).

Errors in Pleadings or Proceedings.

Errors in pleadings or proceedings which do not affect substantial rights of the party cannot be made the basis of reversal. *Hartley v. Bohrer*, 52 Idaho 72, 11 P.2d 616 (1932); *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

Errors in proceedings which do not affect substantial rights of the parties cannot be made the basis of reversal. *Hooton v. Burley*, 70 Idaho 369, 219 P.2d 651 (1950).

Any error in the proceedings which does not affect the substantial rights of the parties cannot be the basis of reversal. *Morford v. Brown*, 85 Idaho 480, 381 P.2d 45 (1963).

Error in requiring the party objecting to a guardian's sale of real estate on appeal to the district court from a probate court order confirming the sale to present her case first did not require reversal where the record showed that the objector was in no way limited in her presentation of evidence material to the issue of confirmation and had the advantage of an opportunity for rebuttal. *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967).

Action to foreclose mortgage on real property brought and tried before last due date on note secured by mortgage was not dismissed for procedural irregularity where case had already been tried and argued on appeal, the judgment of the lower court was rendered after the last possible due date for the note, and to have reversed the judgment or dismissed the action at the appellate level would have resulted in prolonged, expensive, and unnecessary litigation. *Biersdorff v. Brumfield*, 93 Idaho 569, 468 P.2d 301 (1970).

In wife's suit for loss of services of husband who had been made permanent paraplegic, wife's use of word "support" in claim was harmless error and award of \$15,000 was easily justified and where there was substantial evidence to support verdict of jury, judgment would not be reversed on appeal by reason of errors or defects in proceedings which did not affect substantial rights of parties. *Rindlisbaker v. Wilson*, 95 Idaho 752, 519 P.2d 421 (1974).

Exclusion of Evidence.

Failure in admitting the testimony of the officer as to statements made by companion of injured plaintiff in reference to the accident was not reversible error since it did not affect the substantial rights of the parties, such statements of the companion being substantially those which he also made to an insurance investigator and such companion having

been given every opportunity to correct his testimony or explain the contradictory statements in action involving injuries sustained in an automobile accident. *Gayhart v. Schwabe*, 80 Idaho 354, 330 P.2d 327 (1958).

Alleged error of the trial court in denying offering of proof of mortality tables would not affect the substantial rights of the parties in view of the jury's finding of no negligence on the part of any of the parties to this action. *Morford v. Brown*, 85 Idaho 480, 381 P.2d 45 (1963).

Failure to Appoint Guardian.

Failure to appoint a guardian ad litem must affect the substantial rights of the infant before the judgment will be set aside, reversed or vacated. *Trolinger v. Cluff*, 56 Idaho 570, 57 P.2d 332 (1936).

Failure to Raise Objections.

A party to an action will not be permitted to stand by and neglect or refuse to raise seasonable objections to mere defects in pleadings or proceedings and thereafter take advantage of such defects on appeal. *Nobach v. Scott*, 20 Idaho 558, 119 P. 295 (1911).

Filing of Transcript.

Clerk's delivery of reporter's transcript to Supreme Court before the expiration of the statutory period allowed, after receipt of the reporter's transcript, to point out errors is not ground for striking such transcript where the appellant was not responsible for the premature filing and no prejudice was shown. *Williamson v. Wilson*, 55 Idaho 337, 42 P.2d 290 (1935).

Findings of Fact.

Where it appears upon rehearing that the trial court has failed to make findings of fact upon each and all of the material issues made by the pleadings, the judgment will be reversed and the cause remanded for additional findings. *American Mining Co. v. Trask*, 28 Idaho 642, 156 P. 1136 (1915).

Where there was no evidence in the record to support finding by trial court that restoration of benefits by defendant prior to maintaining defense based on fraud was impossible, error was harmless, since necessity for such showing is based on an outmoded concept. *Nab v. Hills*, 92 Idaho 877, 452 P.2d 981 (1969).

Trial court's denominating a conclusion of law as a finding of fact was harmless because trial court had jurisdiction to make both findings of fact and conclusions of law. *Clark v. Gneiting*, 95 Idaho 10, 501 P.2d 278 (1972).

Instructions.

Refusal of court to give requested instruc-

tion by defendant on issue of contributory negligence tendered for purpose of correcting court instruction was not error where court corrected its instruction by giving another written requested instruction of defendant on issue, which was more favorable than the instruction refused. *Bates v. Siebrand Bros. Circus & Carnival*, 71 Idaho 318, 231 P.2d 747 (1951).

Where no formal request for instruction that testimony of a witness as to what a second witness had told him was not to be regarded as evidence but used only for the purpose of impeachment was made at the commencement of or during the course of the trial as required by court rules, in view of a failure to make such request the failure of the court to instruct as to the effect to be given such impeaching testimony was not reversible error. *Gayhart v. Schwabe*, 80 Idaho 354, 330 P.2d 327 (1958).

A party was not prejudiced by the act of the court in answering a question of the jury orally, where the purpose of reducing instructions to writing in order to avoid uncertainty as to what instructions the jury has been given was served by the court reporter's recording and transcribing the actual language of the court. *Meyer v. Brown*, 91 Idaho 369, 421 P.2d 740 (1966).

An instruction on punitive damages, even if erroneous, was not prejudicial to defendant where the jury refused to award punitive damages. *McLean v. City of Spirit Lake*, 91 Idaho 779, 430 P.2d 670 (1967).

A jury instruction on the statute governing speed, which quoted parts of the statute applicable to conditions not present in the case on trial, such as railway grade crossings, intersections, hill crests, and narrow or winding roadway, was erroneous, but such error was not reversible where it was clear that the jury could not have been misled by the instruction to believe that such special hazards existed at the time and place of the accident. *Fawcett v. Irby*, 92 Idaho 48, 436 P.2d 714 (1968), overruled on other grounds, *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985).

Jurisdictional Facts.

Former section did not authorize the court to disregard a defect in proof of a jurisdictional fact such as service of notice of appeal. *Warner v. Teachenor*, 2 Idaho 38, 2 P. 717 (1884).

Limitations on Leave to Amend.

Where application for leave to file an amended complaint was not made in the trial court but was granted by the Supreme Court, under these circumstances, leave to amend was limited to amending it in the particulars

pointed out by latter court. *General Hosp. v. City of Grangeville*, 69 Idaho 6, 201 P.2d 750 (1949).

Notice of Appeal.

A defect in a notice of appeal which in no way affects any substantial right of the respondent is a harmless error. *Taylor v. McCormick*, 7 Idaho 524, 64 P. 239 (1901).

Replevin Action Judgment.

Even if a judgment in an action of replevin is not in the alternative and makes no provision for the return of the property, if it clearly appears from the record that return cannot be had, money judgment will be sustained. *Cady v. Keller*, 28 Idaho 368, 154 P. 629 (1916).

Ruling on Venue.

Where defendant made appearance but did

not answer or demur and failed to initiate proceedings for a change of venue at its first appearance and trial court erroneously ruled that defendant had waived its right to a change of venue, the error was harmless because the ruling was still correct on other grounds. *Banning v. Minidoka Irrigation Dist.*, 89 Idaho 506, 406 P.2d 802 (1965).

Service of Notice of Judgment.

Delay of several days in service of notice of judgment as required by I.R.C.P. 77(d) was not sufficient ground for reversal where court considered on appeal all possible error in trial of case and record disclosed no substantial injustice to appellants because of the delay. *Gardner v. Fliegel*, 92 Idaho 767, 450 P.2d 990 (1969).

RESEARCH REFERENCES

A.L.R. Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 A.L.R.4th 1170.

Rule 62(a). Stay of proceedings to enforce a judgment — Stay upon entry of judgment.

Execution or other proceedings to enforce a judgment may issue immediately upon the entry of judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. Unless otherwise ordered by the court an interlocutory or final judgment in an action for an injunction or writ of mandate, or in a receivership action, shall not be stayed during the period after its entry and until the appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction or writ of mandate during the pendency of an appeal.

STATUTORY NOTES

Cross References. Execution in general, Rule 69.

Injunction or writ of mandate pending appeal, Rule 62(c).

Power of Supreme Court not limited, Rule 62(f).

Stay in favor of state, subdivision or agency thereof, waiver, Rule 62(e).

Stay of judgment upon multiple claims, Rule 62(g).

Stay on appeal, Rule 62(d).

Stay on motion for new trial or for judgment, Rule 62(b).

JUDICIAL DECISIONS

Pending Appeal.

Magistrate did not err in granting a partial stay of execution pending appeal of divorce

judgment. *Shumway v. Shumway*, 106 Idaho 415, 679 P.2d 1133 (1984).

Cited in: *Ustick v. Ustick*, 104 Idaho 215,

657 P.2d 1083 (Ct. App. 1983); Bernard v. Roby, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987); Haley v. Clinton, 123 Idaho 707, 851

P.2d 1003 (Ct. App. 1993); Idaho Schs. for Equal Educ. Opportunity v. State, 140 Idaho 586, 97 P.3d 453 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE

Writ of Execution for Enforcement.

The party in whose favor a judgment is given may at any time within five years after

the entry thereof have a writ of execution issued for its enforcement. Bashor v. Beloit, 20 Idaho 592, 119 P. 55 (1911).

Rule 62(b). Stay on motion for new trial or for judgment.

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

STATUTORY NOTES

Cross References. Amendment of findings of court, Rule 52(b).

Motion for directed verdict, Rule 50(a).

New trials, amendment of judgments, Rule 59(a).

Relief from judgment or order, Rule 60(a).

DECISIONS UNDER PRIOR RULE OR STATUTE

Enjoining Execution.

Execution will not be enjoined on ground of payment, settlement, or discharge of claim, unless judgment debtor was prevented by

fraud, circumvention, deceit, or accident from making such defense in the action period. Lewis v. Warren & Anderson Furn. Co., 31 Idaho 4, 168 P. 1142 (1917).

Rule 62(c). Injunction — Writ of mandate pending appeal.

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction or writ of mandate, the court in its discretion may suspend, modify, restore, or grant an injunction or writ of mandate during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

JUDICIAL DECISIONS

ANALYSIS

Authority to Expand Scope.
Imposition of Lien.

Authority to Expand Scope.

In a nuisance action brought by citizens claiming that the neighboring feedlot operation was a nuisance because of recent expansions, after the initial measures to reduce the

noxious odor failed, the district court had authority to expand the scope of injunctive relief and to employ other means to abate the nuisance. Payne v. Skaar, 127 Idaho 341, 900 P.2d 1352 (1995).

Imposition of Lien.

The imposition by a district court of a "lien" on a mining partnership's machinery and claims was justified with respect to an appeal

taken from the district court's order enjoining the defendant partnership's activities, in view of the powers granted the court through this rule to impose sufficient security through bonds or other means to preserve the subject

matter of the litigation and the rights of the parties. *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

Rule 62(d). Stay upon appeal.

When an appeal is taken from the district court to the Supreme Court, the proceedings in the district court upon the judgment or order appealed from shall be stayed as provided by the Idaho Appellate Rules (I.A.R.). (Amended March 31, 1978, effective July 1, 1978.)

STATUTORY NOTES

Cross References. Record of proceeding of magistrates division, Rule 83(d).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Power of Court.
Receivership Pending Appeal.

Power of Court.

Trial court has power and jurisdiction to suspend operation of a judgment during pendency of an appeal. Court has discretionary power to define and enforce an injunctive judgment and to suspend its operation pending an appeal period. *Waters v. Dunn*, 18 Idaho 450, 110 P. 258 (1910).

Receivership Pending Appeal.

Court has inherent power to preserve the property in litigation pending an appeal, and,

if necessity requires it, may place same in hands of a receiver for that purpose. Giving an appeal bond does not suspend appointment of a receiver, or supersede his functions during appeal. *Morbeck v. Bradford-Kennedy Co.*, 18 Idaho 458, 110 P. 261 (1910).

Where a judgment was entered holding certain sales and transfers of personal and other property fraudulent and void, and a receiver was appointed to take charge of such property and an appeal was taken by the defendant and undertaking on appeal in the sum of three hundred dollars was filed, the receivership may be continued pending the appeal. *Morbeck v. Bradford-Kennedy Co.*, 18 Idaho 458, 110 P. 261 (1910).

Rule 62(e). Stay in favor of the state, subdivision, or agency thereof — Waiver.

When an appeal is taken by the state of Idaho or an officer or agency or governmental subdivision thereof, and the operation or enforcement of the judgment is stayed, no security shall be required from the appellant. In all cases, the parties may by written stipulation waive the filing of security.

DECISIONS UNDER PRIOR RULE OR STATUTE

State Officials.

Whenever an action is brought by or against state officers and such officers prosecute or defend in said action in their official capacity, acting for or defending rights of state, or any legal subdivision thereof, they

are permitted to so act without furnishing costs or undertakings on appeal. This same rule applies to all state, county, district, and municipal officers, while engaged in protecting rights of people in court. *Coon v. Sommercamp*, 26 Idaho 776, 146 P. 728 (1915).

Rule 62(f). Powers of Supreme Court and district court not limited.

The provisions in this rule do not limit any power of the Supreme Court or a district court acting in its appellate capacity or the judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Extraordinary Writs.
Jurisdiction of Court After Appeal.
Stay of Child Custody Order.

Extraordinary Writs.

Supreme Court has jurisdiction to issue extraordinary writs in aid of its appellate jurisdiction, and a writ of prohibition is available to arrest the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. *Coeur d'Alene Turf Club, Inc. v. Cogswell*, 93 Idaho 324, 461 P.2d 107 (1969).

Jurisdiction of Court After Appeal.

While appeal divests court of jurisdiction to proceed in any manner that would affect merits of appeal, it does not follow that there is nothing in court below from which appeal could be taken; simply taking appeal does not wholly remove case from trial court. *Bedal v.*

Johnson, 37 Idaho 359, 218 P. 641 (1923); *Sharp v. Brown*, 37 Idaho 582, 217 P. 593 (1923).

The contention, that the appeal transfers the entire jurisdiction of a case from the district court to the Supreme Court, is unsound; in some instances, where an appeal is taken, it will be necessary for the trial court to retain and exercise its jurisdiction, as indicated by the clause: "but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed therefrom." *Sherwood v. Porter*, 58 Idaho 523, 76 P.2d 928 (1938).

Stay of Child Custody Order.

Regardless of whether an appeal from an order awarding custody of a child pursuant to a writ of habeas corpus stays the enforcement of the order, the Supreme Court has authority to stay proceedings during the pendency of the appeal. *Brookshier v. Hyatt*, 91 Idaho 305, 420 P.2d 788 (1966).

Rule 62(g). Stay of judgment upon multiple claims.

When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

STATUTORY NOTES

Cross References. Judgment upon multiple claims, Rule 54(b).

JUDICIAL DECISIONS

Discretion of Court.

Since loss of or damage to property of auto dealership held by bank on which it had foreclosed gave rise to no rights in surety on indemnity bond to bank for termination of sale of property by bank, there was no abuse

of discretion of court in denying surety's motion for stay of execution. *Bank of Idaho v. Nesselth*, 104 Idaho 842, 664 P.2d 270 (1983).

The use of the word "may" in this rule demonstrates that the rule was intended to provide the court with discretionary power to

stay enforcement of a judgment. *Bank of Idaho v. Nesseth*, 104 Idaho 842, 664 P.2d 270 (1983).

Rule 63. Disability of a judge.

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that the judge cannot perform those duties because the judge did not preside at the trial or for any other reason, the judge may in the judge's discretion grant a new trial.

STATUTORY NOTES

Cross References. Findings by the court, Rule 52(a). New trials, grounds, Rule 59(a).

JUDICIAL DECISIONS

Cited in: *State, Dep't of Health & Welfare v. Holt* (In Interest of Holt), 102 Idaho 44, 625 P.2d 398 (1981).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Death Sentence.
District Judges.
Jurisdiction of Acting Judge.
Motion for New Trial—Successor Judge.
Powers of Acting Judge.
Validity of Acts.

Death Sentence.

Upon the death of a judge any other judge of the district may carry into effect the execution of a death sentence under § 19-2715. *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937).

District Judges.

Former section was applicable to a junior district judge of the same district, as well as to judges from other districts. *Ball v. Parma*, 49 Idaho 40, 286 P. 24 (1930).

Jurisdiction of Acting Judge.

Jurisdiction is conferred upon judge of any other district to same extent as judge of district for whom he is acting; he is also bound by the same limitations. *Callahan v. Dunn*, 30 Idaho 225, 164 P. 356 (1917).

Motion for New Trial—Successor Judge.

In cases tried without jury, general rule is

that a litigant is entitled to a decision on the facts by judge who heard and saw the witnesses, and that a deprivation of that right is a denial of due process; however, where successor judge, in resolving the issues raised by a motion for new trial, is not required to weigh conflicting evidence or pass on the credibility of witnesses, but can resolve such issues upon questions of law, or upon evidence which is not materially in conflict, he may exercise the same authority as could the judge who tried the case. *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960).

If successor to trial judge is not satisfied with the findings, conclusions, and decree of his predecessor, and thinks such should be vacated or modified, but cannot do so because he did not see and hear witnesses, then he is limited to granting a new trial. *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960).

Where a motion for new trial is heard by a successor to the trial judge, such successor may make new findings and conclusions and direct the entry of a new judgment, subject only to the limitation that he cannot perform those duties for any reason, he may grant a new trial. *Roberts v. Bonneville County*, 125 Idaho 588, 873 P.2d 842 (1994).

Powers of Acting Judge.

A judge of one district called into another district to try a case pending in the latter district has all the powers of the judge of that district for the purposes of that case, and may make an order extending the time for preparing and presenting any and all papers necessary therefor, or for the filing of affidavits and motions for a new trial. *Morris v. Lemp*, 13 Idaho 116, 88 P. 761 (1907).

It is clear that if the trial judge has rendered a decision in the form of findings and conclusions, his successor has the power to render judgment thereon without a trial de novo. *Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962).

Validity of Acts.

A judgment rendered by a judge of another

county or district called in by a disqualified judge is not invalid because he signed his findings and conclusions and order for the judgment at home, and was not in the county of the trial when the judgment was entered. *Greene v. Edgington*, 37 Idaho 1, 214 P. 751 (1923).

Where the judge of the second judicial district was temporarily unable to act on a verified complaint and affidavit filed in said second district for the appointment of the receiver orally requested the judge of the eighth judicial circuit to act upon said application, the ex parte granting of the application by the judge of the eighth circuit, while within the confines of the tenth circuit, was valid. *Murphy v. McCarty*, 69 Idaho 193, 204 P.2d 1014 (1949).

RESEARCH REFERENCES

A.L.R. Power of successor or substituted judge, in civil case, to render decisions or

enter judgment on testimony heard by predecessor. 84 A.L.R.5th 399.

Rule 64. Seizure of person or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law.

STATUTORY NOTES

Cross References. Execution in general, Rule 69.

RESEARCH REFERENCES

A.L.R. What is "necessary" furniture entitled to exemption from seizure for debt. 41 A.L.R.3d 607.

Rule 65(a). Injunctions — Preliminary injunction.

(1) **Notice.** No preliminary injunction shall be issued without notice to the adverse party.

(2) **Consolidation of hearing with trial on merits.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

STATUTORY NOTES

Cross References. Divorce and related proceedings, Rule 65(g).

Employer and employee laws unaffected by, Rule 65(f).

Injunction, form and scope of Rule 65(d).

Granting or refusing interlocutory injunctions, findings of fact on, Rule 52(a).

Injunction or writ of mandate pending, Rule 62(c).

Security, Rule 65(c).

Stay of judgment, Rule 62(g).

Temporary restraining order, Rule 65(b).

JUDICIAL DECISIONS

Discretion of Court.

District Court did not err in awarding a preliminary injunction for property owners in an easement dispute where erection of con-

crete barriers by neighbors, which narrowed a road, would result in waste if the injunction had not been granted. *Walker v. Boozer*, 140 Idaho 451, 95 P.3d 69 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adequate Remedy at Law.

Amended Injunction.

Application.

Discretion of Court.

Effective When.

Grounds for Dissolution.

Irreparable Injury.

Matter of Right.

Ministerial Acts of Public Officers.

Municipal Officers.

Notice.

Purpose of Issuance.

Remedy Preventive.

Restraining Order.

Restraining Order and Injunction Distinguished.

Temporary Injunction.

Writ Distinguished from Order.

Adequate Remedy at Law.

Fact that action for damages would lie does not forbid issuance of writ, since party need not wait until his property has been damaged or destroyed before acting in its protection. *Nielson v. Peterson*, 37 Idaho 171, 215 P. 836 (1923).

Under Idaho statute, adequate remedy at law does not bar issuance of injunction. *Staples v. Rossi*, 7 Idaho 618, 65 P. 67 (1901); *Goble v. New World Life Ins. Co.*, 57 Idaho 516, 67 P.2d 280 (1937).

Amended Injunction.

Where an amended preliminary injunction was so much more restrictive than the original preliminary injunction that it in effect was a completely new injunction, it could not issue without notice to the adverse party. *Lyon v. Cascade Commodities Corp.*, 94 Idaho 714, 496 P.2d 951 (1972).

Application.

Application of the former similar rule to § 8-301 et seq. was solely within the court's discretion. *Massey-Ferguson Credit Corp. v. Peterson*, 96 Idaho 94, 524 P.2d 1066 (1974).

Discretion of Court.

Where the facts are disputed the granting or dissolving of an injunction is within the discretion of the court, although the answer denied all the equities of the complaint. *Price v. Grice*, 10 Idaho 443, 79 P. 387 (1904); *Harriman v. Woodall*, 31 Idaho 750, 176 P. 565 (1918); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

Large discretion is vested in the trial court in the granting of a temporary injunction to hold property in status quo pending a determination of the action, and its exercise of such discretion will not be reversed on appeal unless a clear abuse of such discretion is shown. *Shields v. Johnson*, 10 Idaho 454, 79 P. 394 (1904); *Weber v. Della Mt. Mining Co.*, 11 Idaho 264, 81 P. 931 (1905).

Where complaint is sufficient to warrant granting of injunctive relief prayed for, granting of such relief is in discretion of court and will not be interfered with save for abuse. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

It is within sound discretion of court to dissolve preliminary restraining order and exercise of such discretion will not be interfered with except in case of clear abuse. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

The granting or refusing of injunctive relief rests in the sound discretion of the court. The exercise of such discretion by a trial court will not be reversed on appeal unless a clear abuse of discretion is shown. *Unity Light & Power*

Co. v. City of Burley, 83 Idaho 285, 361 P.2d 788 (1961); Milbert v. Carl Carbon, Inc., 89 Idaho 471, 406 P.2d 113 (1965).

Effective When.

An injunction may be issued on a complaint before it has been filed, though the order allowing the writ does not take effect until the complaint and undertaking have been filed. Elmore County Irrigated Farms Ass'n v. Stockslager, 22 Idaho 420, 126 P. 616 (1912).

Grounds for Dissolution.

Damage resulting to an employee of the real party in interest by stoppage of his work and insufficiency of the undertaking to compensate him is not ground for dissolution of the injunction. Smith v. Alberta & British Columbia Exploration or Reclamation Co., 9 Idaho 399, 74 P. 1071 (1903).

Irreparable Injury.

A preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal. Evans v. District Court, 47 Idaho 267, 275 P. 99 (1929).

Matter of Right.

Under Const., art. 5, § 1, the obtaining of injunction is a matter of right. Staples v. Rossi, 7 Idaho 618, 65 P. 67 (1901).

Ministerial Acts of Public Officers.

Injunction will not lie to restrain a ministerial act by a public official where no property rights are involved. Donovan v. Dougherty, 31 Idaho 622, 174 P. 701 (1918).

Municipal Officers.

The terms "general" and "ordinary" business of the corporation include the collection of municipal taxes to be applied to payment for construction of sewers, and therefore, in an action to enjoin the city from the sale of property at sewerage assessment sale, it is error to grant such injunction without due notice of application therefor to proper municipal officers. Wilson v. City of Boise City, 7 Idaho 69, 60 P. 84 (1900).

Issuance ex parte of temporary injunction, which required city employees to refrain from issuing city warrants, and forbade payment of funds under certain contract was error. Mountain States Power Co. v. City of Sandpoint, 49 Idaho 569, 290 P. 400 (1930).

Notice.

Where the effect of a temporary injunction was to suspend the general and ordinary business of a road district and it was issued without notice it was void. Kimbley v. Adair, 32 Idaho 790, 189 P. 53 (1920).

Utility complied with former section where

it gave a three day notice to commission and other parties in proceeding before commission that it would apply to district court for a temporary injunction. Mountain States Tel. & Tel. Co. v. Jones, 75 Idaho 78, 267 P.2d 634 (1954).

Purpose of Issuance.

Injunction issues to restrain the commission or continuance of some act which would produce "great or irreparable injury" to the moving party. Fischer v. Davis, 19 Idaho 501, 116 P. 412 (1911); Nielson v. Peterson, 37 Idaho 171, 215 P. 836 (1923).

Remedy Preventive.

An injunction can only issue to restrain the commission of a future or contemplated action, and the writ will not be granted to restrain an act which has already occurred. Wilson v. City of Boise City, 7 Idaho 69, 60 P. 84 (1900); Roberts v. Kartzke, 18 Idaho 552, 111 P. 1 (1910).

An injunction is a writ to restrain a contemplated act and not a writ commanding a person to do a certain act. Brinton v. Steele, 19 Idaho 71, 112 P. 319 (1910); Fischer v. Davis, 19 Idaho 501, 116 P. 412 (1911); Beem v. Davis, 31 Idaho 730, 175 P. 959 (1918).

Where it appears that the act sought to be enjoined has been done, the court will not upon appeal review an order of the trial court dissolving a preliminary injunction. Abels v. Turner Trust Co., 31 Idaho 777, 176 P. 884 (1918).

Restraining Order.

A restraining order may be granted on a verified complaint, the principal allegations of which are made on information or belief without stating the source of information and basis of belief, where such source of information and basis of belief are set forth in an affidavit filed by the plaintiff in the case. Price v. Grice, 10 Idaho 443, 79 P. 387 (1904).

Restraining Order and Injunction Distinguished.

Restraining order is distinguished from injunction in that former is intended only as restraint until propriety of granting injunction, temporary or perpetual, can be determined, and it does no more than restrain proceedings until such determination. Scholtz v. American Sur. Co., 35 Idaho 207, 206 P. 187 (1922).

Temporary Injunction.

A temporary injunction issued without a hearing and without an opportunity for defendants to present evidence in opposition thereto was issued without due process. Law-

rence Whse. Co. v. Rudio Lumber Co., 89 Idaho 389, 405 P.2d 634 (1965).

Writ Distinguished from Order.

The order directing the writ of injunction to

issue is not the writ. Elmore County Irrigated Farms Ass'n v. Stockslager, 22 Idaho 420, 126 P. 616 (1912).

RESEARCH REFERENCES

A.L.R. Injunction against procuring contract. 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Mandatory injunction to compel removal of encroachments by adjoining landowner. 65 A.L.R.4th 603.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 A.L.R.3d 426.

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices. 49 A.L.R.3d 1239.

Proceedings for injunction or restraining order as basis of malicious prosecution action. 70 A.L.R.3d 536.

Rule 65(b). Temporary restraining order — Notice — Hearing — Duration.

A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be heard in opposition, and (2) the applicant's attorney certified to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if that party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. (Amended March 31, 1978, effective July 1, 1978.)

STATUTORY NOTES

Cross References. Time computation, Rule 6(a).

JUDICIAL DECISIONS

Validity of Order.

While the validity of the contempt order was a close issue, the order was not so lacking in merit as to be "transparently invalid";

therefore, attorney could not attack the contempt order on the ground of alleged invalidity. *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal.

Construction of Writ.

Discretion of Court.

Dissolution.

Entry of Undertaking.

Granted When.

Issuance When.

Hearing.

Restraining Order Distinguished from Injunction.

Review on Appeal.

Sale of Corporate Stock.

Sufficiency of Verification.

Appeal.

Supreme Court did not have jurisdiction to review temporary restraining order on a certified copy of the records and files used on the hearing as if on appeal where the order was issued on ex parte affidavit and the trial judge had refused to certify the proceeding under the Labor Disputes Act. *Boise Grocery Co. v. Stevenson*, 58 Idaho 344, 73 P.2d 947 (1937).

Construction of Writ.

The writ authorized by the words "and the defendant may, in the meantime, be restrained" amounts to, and is, a temporary injunction. *MacWatters v. Stockslager*, 29 Idaho 803, 162 P. 671 (1917); *Williams v. Koelsch*, 67 Idaho 341, 180 P.2d 237 (1947).

Discretion of Court.

Under the statutory provisions where the facts are in dispute the granting of a temporary injunction is within the sound discretion of the court. *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

Dissolution.

Application to dissolve a temporary injunction may be made as follows: (1) By defendant upon papers on which plaintiff obtained the injunction; (2) by plaintiff upon papers (cross-complaint) on which defendant obtained in-

junction; (3) by either party upon affidavits, with or without answer. When the adverse party moves to dissolve temporary injunction upon the papers on which it was granted, no notice is required to be given to the party who obtained the injunction, and no further showing can be made in opposition to such motion. On the other hand, where any countershowing is made by the moving party, notice of time and place of hearing must be given, and upon such hearing, the party resisting the motion may present affidavits in opposition thereto, and is entitled to have such affidavits considered by the court or judge hearing the same. *Thayer v. Bellamy*, 9 Idaho 1, 71 P. 544 (1903).

Where adverse party moves to dissolve a temporary injunction upon the papers upon which it is granted, no notice is required to be given to party who obtained injunction and no further showing can be made in opposition to such motion. *Meyer v. First Nat'l Bank*, 10 Idaho 175, 77 P. 334 (1904).

On motion to dissolve temporary restraining order, court will consider complaint and affidavits only for the purpose of determining whether plaintiff was entitled to the temporary order until hearing of order to show cause; to determine whether he has made a prima facie case upon the hearing, court does not make findings of fact or grant relief. *Beech v. United States Fid. & Guar. Co.*, 54 Idaho 255, 30 P.2d 1079 (1934).

A temporary injunction will not usually be allowed where its effect is to give a plaintiff the principal relief he seeks, without bringing the cause to trial; neither should a preliminary injunction be dissolved or stayed, where its effect would be such as to give the defendant the relief he seeks without bringing the cause to trial. *Gilbert v. Elder*, 65 Idaho 383, 144 P.2d 194 (1943).

An order dissolving part of a temporary restraining order is not appealable. *Wood v. Wood*, 96 Idaho 100, 524 P.2d 1072 (1974).

Entry of Undertaking.

A restraining order is an injunction and is void unless plaintiff gives an undertaking. *MacWatters v. Stockslager*, 29 Idaho 803, 162 P. 671 (1917); *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

Granted When.

An injunction will issue to temporarily restrain an act which will result in great damage to the plaintiff although the injury is not irreparable, and although other remedies by way of damages are open to the plaintiff. *Meyer v. First Nat'l Bank*, 10 Idaho 175, 77 P. 334 (1904); *Price v. Grice*, 10 Idaho 443, 79 P. 387 (1904).

The rule adopted by courts in granting an injunction pendente lite is more liberal than is applied upon the trial of the cause upon the merits. *Boise Dev. Co. v. Idaho Trust & Sav. Bank*, 24 Idaho 36, 133 P. 916 (1913); *Buena Vista Gold Mines Co. v. Boise Basin Imp. Co.*, 29 Idaho 789, 162 P. 330 (1916); *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

When complaint is filed, judge may deny plaintiff's application until notice thereof is given to defendants, or he may then grant an order requiring defendants to show cause why the injunction should not be granted. In either case he may restrain the defendants in the meantime. *Scholtz v. American Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922).

Temporary injunction will not usually be allowed where its effect is to give plaintiff principal relief he seeks without bringing cause to trial. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

To entitle a party to an injunction pendente lite, it is not necessary that such a showing be made as would entitle him to relief on a final hearing. It is sufficient to show a state of facts that makes the transaction proper subject of investigation by court of equity, justifying protection of property during pendency of action. *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

Issuance When.

An injunction may be issued on a complaint before it has been filed, though the order allowing the writ does not take effect until the complaint and undertaking have been filed. *Elmore County Irrigated Farms Ass'n v. Stockslager*, 22 Idaho 420, 126 P. 616 (1912).

Hearing.

The former rule concerning temporary restraining orders did not appear to compel the court to limit the scope of hearing if both sides

are prepared at that time to litigate the principal issues. *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

Restraining Order Distinguished from Injunction.

Restraining order is distinguished from injunction in that former is intended only as restraint until propriety of granting injunction, temporarily or perpetually, can be determined, and it does no more than restrain proceedings until such determination. *Scholtz v. American Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922).

Terms "temporary injunction" and "restraining order" are often used synonymously; however, restraining order is effective only until hearing is had upon order to show cause, and upon such hearing, injunction pendente lite is granted. This latter supersedes restraining order which has served its purpose and becomes functus officio. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

Review on Appeal.

Where, upon a hearing in district court on an order to show cause why a temporary restraining order should not be continued, the only matters before court were the verified complaint and an affidavit in support thereof, and the showing so made was sufficient to justify court in continuing order in force, the order therefor would not be reversed on appeal. *Pfirman v. Success Mining Co.*, 32 Idaho 125, 179 P. 50 (1919).

Sale of Corporate Stock.

Where the proposed action of a corporation to sell the stock of an insane stockholder for the payment of an assessment is founded upon and instigated by the wrongful acts and conduct of a person who controls a majority of the capital stock, and a part of the stock going to make up such majority was procured by such person from the insane stockholder, and a cause of action for fraud and wrongful conduct is charged against the person so controlling a majority of the stock, a temporary restraining order against the corporation making such sale is incidental to the main action, and is a proper relief to be granted in the sound discretion of the court until the case can be heard on its merits. *Weber v. Della Mt. Mining Co.*, 11 Idaho 264, 81 P. 931 (1905).

Sufficiency of Verification.

A restraining order may be granted on a verified complaint, the principal allegations of which are made on information or belief without stating the source of information and basis of belief, where such source of information and basis of belief are set forth in an

affidavit filed by the plaintiffs in the case. *Price v. Grice*, 10 Idaho 443, 79 P. 387 (1904).

Where a temporary restraining order is issued upon a verified complaint, it will not be

vacated on appeal, where the allegations of the complaint are sufficient to justify the issuance of the order. *Pfirman v. Success Mining Co.*, 32 Idaho 125, 179 P. 50 (1919).

Rule 65(c). Security given with injunction or restraining order.

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any political subdivision, or of an officer or agency thereof.

A surety upon a bond or undertaking under this rule submits the surety to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribed may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

JUDICIAL DECISIONS

ANALYSIS

Amount of Security.

Applicability.

Attorney's Fees.

Improper Party.

Notice.

Premature Presentation.

Specific Findings.

What Fees Are Recoverable.

When Order Must Be Contested.

Amount of Security.

Setting a bond amount which the court "deems proper" under this rule is an exercise of discretion. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987).

Applicability.

This rule is applicable both to temporary restraining orders issued ex parte and to preliminary injunctions issued following a hearing. *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

Even if order for interim payments constituted a preliminary injunction, argument of tenant/alleged purchasers that order for interim payments to be made by them to landlord/alleged vendors required the posting of security was without merit because the order did not subject tenant/alleged purchasers to

any risk of loss or damage under any potential ultimate disposition of the parties' respective claims. *Hinkle v. Winey*, 126 Idaho 993, 895 P.2d 594 (Ct. App. 1995).

Attorney's Fees.

This rule allows recovery of attorney fees without forcing the wrongfully restrained party somehow to distinguish among services that are truly indistinguishable. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987).

Where no injunction was issued there was no basis for an award of attorney fees under this rule. *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 983 P.2d 212 (1999).

Improper Party.

Where a complaint is dismissed as to defendant because she was not a proper party, there could be no adjudication on the merits as against defendant, and since defendant was not a proper party to the action, any injunction or restraint against her was wrongful and she was entitled to an award of fees under this rule. *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990).

Notice.

Where the prevailing party requested costs and attorney fees and filed a memorandum of costs and attorney fees, accompanied by affi-

davits and by a motion to enforce liability upon the injunction bond, this procedure gave due notice to all concerned and it was proper; due process did not require damages in the form of attorney fees to be pleaded and proved at trial. *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

Premature Presentation.

The district court did not err in denying defendants motion for judgment on bond where the motion was prematurely presented before there had been any final determination that plaintiff was not entitled to an injunction, and after obtaining dismissal of plaintiff's injunction action, defendant did not renew its request for a judgment against the surety. *Phoenix Aviation, Inc. v. MNK Enters., Inc.*, 128 Idaho 819, 919 P.2d 348 (Ct. App. 1996).

Specific Findings.

Where the trial court made no specific finding based upon competent evidence that costs, damages or attorney fees would not be incurred by the restrained party as a result of a wrongful issuing of an injunction or restraining order, and where the plaintiff did not offer any proof that there would be no such costs, he was required to post security and was not entitled to an exception. *Miller v. Board of Trustees*, 132 Idaho 244, 970 P.2d 512 (1998), cert. denied, 526 U.S. 1159, 119 S. Ct. 2050, 144 L. Ed. 2d 216 (1999).

What Fees Are Recoverable.

Generally, the recoverable attorney fees are those incurred in a proceeding to dissolve a temporary restraining order or a preliminary injunction, rather than those earned through defending the merits of the action which result in dissolution of the injunction. *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

The appellate court did not err in failing to award the prevailing party the fees incurred in his successful defense of the trial court's

award of attorney fees where the fight over the validity of the injunction itself did not continue on from the trial court to the appellate court; such fees, incurred in appellate court, were not "costs and damages" which were incurred because the party was "wrongfully enjoined or restrained." *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

This rule allows recovery of attorney fees if legal services necessary to defend the merits of the case were identical to services performed in dissolving a restraining order; thus, assuming there was an adjudication on the merits, recovery of attorney fees would be appropriate provided the trial court found the restraining order and merit issues were identical. *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990).

When Order Must Be Contested.

In light of the provision in I.R.C.P. 65(a)(2) allowing the consolidation of the preliminary injunction hearing and the trial on the merits in order to conserve time and costs, the plain meaning of this rule cannot be interpreted so narrowly as to deprive a wrongfully enjoined party of the right to attorney fees merely because the party failed to contest the restraining order before trial on the merits. *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

The prevailing party did not lose his right to claim costs and attorney fees by failing to resist the preliminary injunction prior to trial; however, in such a situation, the party could only recover attorney fees applicable to the restraining order, not for the other legal services involved in the trial on its merits. *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985).

Cited in: *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 757 P.2d 205 (Ct. App. 1988); *Sinclair & Co. v. Gurule*, 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988); *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Action on Bond.

Attorney's Fees.

Costs.

Dissolution.

Divorce Suits.

Effect of Failure to Give.

Issuance on Complaint.

Liability of Surety.

Municipal Corporations.

Necessity for Security.

Presumption of Compliance.

Sufficiency of Bond.

Action on Bond.

Where a claim is made against the sureties on an injunction bond for costs, damages and counsel fees, the sureties are entitled to their day in court and to defend against the claim, and it is error to summarily enter judgment against the sureties on the dissolution of the injunction. *Dougal v. Eby*, 11 Idaho 789, 85 P. 102 (1906).

Attorney's Fees.

Under this section, in order for a defendant to collect attorney's fees on a bond after dissolution of the injunction, it is necessary that he show that the service rendered was performed in securing the dissolution of the injunction, or that the service was rendered principally and mainly for that purpose. *Miller v. Donovan*, 13 Idaho 735, 92 P. 991 (1907).

Reasonable compensation paid or contracted as counsel fees in procuring dissolution of an injunction may be recovered in an action upon the injunction bond, but compensation thus allowed must be limited to services rendered in procuring the dissolution. *Ferrell v. Coeur d'Alene & St. Joe Transp. Co.*, 29 Idaho 118, 157 P. 946 (1916).

Fees paid for services either in resisting order to show cause or in preparing for or trying main case are not proper items for which recovery may be had. *Scholtz v. American Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922).

In order to recover attorney's fees upon bond supporting restraining order, defendant must take some affirmative action against order before it has become defunct by operation of law. *Scholtz v. American Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922).

Attorneys' fees are recoverable on bond posted for issuance of temporary restraining orders. *Davidson Grocery Co. v. United States Fid. & Guar. Co.*, 52 Idaho 795, 21 P.2d 75 (1933).

Services rendered by defendant's attorneys before bond was filed are not chargeable to the surety but services rendered thereafter, in securing a dissolution and on appeal from the order of dissolution, fall within the terms of the bond, and the surety is liable therefor. *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 60 Idaho 127, 90 P.2d 688 (1939).

Where there was no agreement as to the amount of fees to be paid to attorneys who successfully defended an injunction proceeding, and the parties thereafter agreed upon a reasonable fee which was paid, an action to recover the amount so paid could be maintained on the injunction bond. *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 62 Idaho 683, 115 P.2d 401 (1941).

A city was not entitled to recover an attorney's fee for securing the dissolution of a restraining order in an action which was defended by the city attorney, who was employed on a fixed salary and received no additional fee for his services in the injunction case. *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968).

This rule does not authorize an award absent entry of an injunction or restraining

order. Thus, where no injunction was ever entered, the district court's award of attorney fees under this rule was in error. *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997).

Costs.

Costs and counsel fees on motion to dissolve injunction or restraining order are considered natural consequences of its existence and are proper damages. They must, however, relate in some manner to dissolution of order rather than to action to which order is ancillary. *Scholtz v. American Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922).

Court costs incurred in dissolving injunction subsequently held illegal are properly charged against bond. *Pattee v. Mahaffey*, 48 Idaho 200, 280 P. 1038 (1929).

Dissolution.

Liability on injunction bond is not dependent on the form of procedure pursued to procure a dissolution of the injunction. *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 60 Idaho 127, 90 P.2d 688 (1939).

Divorce Suits.

Order authorizing husband to withhold alimony payments is not an injunction and no bond is required. *McDonald v. McDonald*, 55 Idaho 102, 39 P.2d 293 (1934).

Effect of Failure to Give.

A failure to give a bond before the restraining order becomes operative does not preclude the court from granting a temporary injunction on the hearing of the order to show cause. *Price v. Grice*, 10 Idaho 443, 79 P. 387 (1904).

Former similar statute was mandatory and it was error to grant a temporary injunction without requiring a proper undertaking. *Wiles v. Northern Star Mining Co.*, 13 Idaho 326, 89 P. 1053 (1907).

Issuance on Complaint.

An injunction may be issued upon the complaint itself, before it has been filed, and the judge may make an order directing the writ to issue; but the order allowing the writ does not take effect until the filing of the complaint and the required undertaking. *Elmore County Irrigated Farms Ass'n v. Stockslager*, 22 Idaho 420, 126 P. 616 (1912).

Liability of Surety.

Liability of surety is measured by terms of contract, and extends to such damages and reasonable counsel fees as may be sustained or incurred by reason of injunctive order. *Scholtz v. American Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922).

Liability of surety upon bond for restrain-

ing order or upon injunction pendente lite is measured by terms of contract in instrument, and court has no authority to modify or change terms or conditions stated in bond. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

Municipal Corporations.

A municipal corporation is not required to give an undertaking on the issuance of an injunction and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation. *Doyle v. City of Sandpoint*, 18 Idaho 654, 112 P. 204 (1910).

Necessity for Security.

A restraining order issued under statutory provision is void unless an undertaking is given by the plaintiff as required by the law. *MacWatters v. Stockslager*, 29 Idaho 803, 162 P. 671 (1917); *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

There is no exception to the statutory provisions as to requirement for bond in action to contest right of mortgagee to foreclose chattel mortgage and for injunctive relief. *Wakefield v. Griffiths*, 45 Idaho 51, 261 P. 665 (1927).

Before an injunction is issued the giving of

security by the applicant for the payment of costs, damages and attorney's fees is mandatory, unless the trial court makes a specific finding that no such costs, damages or attorney's fees would result to the restrained party as a result of a wrongful issuing of the injunction or restraining order. *Hutchins v. Trombly*, 95 Idaho 360, 509 P.2d 579 (1973).

Presumption of Compliance.

There is presumption that proper undertaking was required before issuance of injunction. *Jones v. Stauffer*, 49 Idaho 387, 288 P. 419 (1930).

Sufficiency of Bond.

The bond given for the temporary restraining order recited that it was an undertaking for a restraining order and since the undertaking recited it was for solely a restraining order, upon the court entering an order continuing it in full force and effect until the final determination of the cause, such order continuing the original restraining order during the pendency, the action became in legal effect an injunction pendente lite which was void and ineffective as an injunction since the original bond had served its purpose upon the entry of the second order. *Holders Mfrs., Inc. v. Cudd*, 80 Idaho 557, 335 P.2d 890 (1959).

Rule 65(d). Form and scope of injunction or restraining order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

JUDICIAL DECISIONS

ANALYSIS

Failure to Object.

Statement of Findings Required.

Failure to Object.

Because defendant did not object to the specificity of the injunction's language at the hearing held to determine the language to be employed in the injunction, defendant could not later claim that the trade secret was too vague to comport with the specificity requirement of this rule. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999).

Statement of Findings Required.

By accepting the order, by attorney's signature, for interim payments as to form to be made by tenant/alleged purchaser to landlord/alleged vendors, the tenant/alleged purchaser waived objection that such order constituted a preliminary injunction and findings of fact or statement of reasons in the order were required pursuant to I.R.C.P. 52(a) and this rule. *Hinkle v. Winey*, 126 Idaho 993, 895 P.2d 594 (Ct. App. 1995).

Cited in: *Howard v. Cornell*, 134 Idaho 403, 3 P.3d 528 (2000).

DECISIONS UNDER PRIOR RULE OR STATUTE

Necessary Parties.

In an action to enjoin defendant from obstructing county road that crossed his land, other landowners whose lands the road also

crossed were not necessary parties. *County of Bonner v. Dyer*, 92 Idaho 699, 448 P.2d 986 (1968).

Rule 65(e). Grounds for preliminary injunction.

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

(3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

(4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

(5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

(6) The district courts, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which the person or persons may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which the person or persons are kept out of possession by threats whenever such possession was taken from them by entry of the adverse party on Sunday or a legal holiday, or in the nighttime, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ had issued: provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five (5) days of the time and place of making application therefor.

JUDICIAL DECISIONS

ANALYSIS

Action to Enjoin Waste.
Discretion of Court.
Irreparable Injury.
Water Rights.

Action to Enjoin Waste.

Where lessee was not farming the leased real property in a good and farmerlike manner as he covenanted in the lease to do, he was committing waste, and the lessor could seek injunctive relief as well as damages. *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

Discretion of Court.

Injunctive relief is not granted as a matter of discretion of the district court; the court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion. *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984).

Irreparable Injury.

A preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable

injury will flow from its refusal. *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984).

A preliminary injunction would have been a proper remedy to prohibit a hospital district from placing levies it obtained pursuant to § 39-1333 in a capital improvement fund or using the funds to help in renovation. Property owners alleged that the funds were being used in violation of the statute and they showed the clear right they had for relief and the irreparable injury necessary for the issuance of an injunction. *Idaho County Property Owners Ass'n v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 805 P.2d 1233 (1991).

Water Rights.

Inasmuch as water rights are real property which may be protected by injunction, mandamus or prohibition when threatened, lessor's complaint, which alleged that as a result of lessees' failure to use water rights they were in danger of being lost, stated a claim for equitable relief and should not have been dismissed. *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

Cited in: *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adequacy of Complaint.
Criminal Offenses.
Discretion of Court.
Indefinite Order.
Insurance.
Irreparable Injury.
Liquor Licenses.
Mining Cases.
Nature of Relief.
Nuisances.
Picketing.
Preserving Property.
Removal of Fixtures.
Sheriff's Sales.
Successive Writs.
Title to Realty.
Trespass.
Unfair Competition.
Water Rights.

Adequacy of Complaint.

On application for preliminary injunction it is not necessary that case should be made out that would entitle complainant to relief at all events on final hearing. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

To entitle a party to an injunction pendente lite, it is not necessary that such a showing be made as would entitle him to relief on a final hearing. It is sufficient to show a state of facts that makes the transaction proper subject of investigation by court of equity, justifying protection of property during pendency of action. *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

Criminal Offenses.

An injunction will not lie to prevent the violation of § 25-1907, which prohibits and makes criminal the grazing of sheep on cattle range. *McGinnis v. Friedman*, 2 Idaho (Hasb.) 393, 17 P. 635 (1888); *Bradshaw v. Burstedt*, 50 Idaho 54, 293 P. 330 (1930).

Discretion of Court.

Where the facts are in dispute, the granting of a temporary injunction is within sound discretion of court. *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

Indefinite Order.

An injunction restraining and enjoining the owner of an irrigation canal from "operating and conducting its canal so as to further flood

the plaintiff's basement" was too indefinite as to the act enjoined to be valid. *Harris v. Preston-Whitney Irrigation Co.*, 92 Idaho 398, 443 P.2d 482 (1968).

Insurance.

Where complainant in action against insurance company showed that his insurance would be lost if he were denied the right to injunctive relief, injunction would lie. *Goble v. New World Life Ins. Co.*, 57 Idaho 516, 67 P.2d 280 (1937).

Irreparable Injury.

An injunction will issue to temporarily restrain an act which will result in great damage to the plaintiff although the injury is not irreparable, and although other remedies by way of damages are open to the plaintiff. *Meyer v. First Nat'l Bank*, 10 Idaho 175, 77 P. 334 (1904); *Price v. Grice*, 10 Idaho 443, 79 P. 387 (1904).

Injunction issues to restrain the commission or continuance of some act which would produce "great or irreparable injury" to the moving party. *Fischer v. Davis*, 19 Idaho 501, 116 P. 412 (1911); *Nielson v. Peterson*, 37 Idaho 171, 215 P. 836 (1923).

A preliminary mandatory injunction will be granted only in extreme cases when the right is very clear and it appears that irreparable injury will result from its refusal. *Evans v. District Court*, 47 Idaho 267, 275 P. 99 (1929).

Where a suit for injunction had been transferred to the federal court because of diversity of citizenship and plaintiff secured its remand of the case to the state court by arguing that the amount in controversy did not exceed \$10,000 and that any pecuniary damage to plaintiff from the act sought to be enjoined would be negligible, it was error for the trial court to grant a temporary injunction. *Farm Serv., Inc. v. United States Steel Corp.*, 90 Idaho 570, 414 P.2d 898 (1966).

Liquor Licenses.

An injunction will not issue upon the application of a person holding a liquor license authorizing such person to sell and dispose of intoxicating liquors in a county to restrain the prosecuting attorney from enforcing the local option statute in such county upon the ground that such statute has not been legally adopted by the electors of such county. *Nims v. Gilmore*, 17 Idaho 609, 107 P. 79 (1910).

Mining Cases.

Where a title to a mine is in litigation and the plaintiff by his complaint shows title thereto, an injunction may be granted to restrain working the mine pending the determination of the litigation. *Gilpin v. Sierra*

Nev. Consol. Mining Co., 2 Idaho 696, 23 P. 547 (1890).

The practice is to be liberal in granting injunctive relief in mining litigation in order that neither party may get the advantage of the other during litigation by force or violence. *Safford v. Flemming*, 13 Idaho 271, 89 P. 827 (1907).

Where an action is brought to determine the right of possession to and the ownership of certain mining ground, and it appears from the complaint and affidavit of one of the plaintiffs that the defendants have threatened to assault the plaintiffs and their employees if they appeared upon or undertook to do any work upon such claim, it is proper for the court to grant an injunction pendente lite, enjoining the defendants, their agents or employees from in any manner interfering with the plaintiffs and their employees in performing the necessary discovery work and other work upon said claim necessary to hold the same, although all of the allegations of the complaint and affidavit are denied by the defendants. *Safford v. Flemming*, 13 Idaho 271, 89 P. 827 (1907); *Stewart Mining Co. v. Ontario Mining Co.*, 23 Idaho 280, 129 P. 932 (1913).

Nature of Relief.

Temporary injunction will not usually be allowed where its effect is to give plaintiff principal relief he seeks without bringing cause to trial. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936).

A temporary injunction will not usually be allowed where its effect is to give the plaintiff the principal relief he seeks, without bringing the cause to trial; neither should a preliminary injunction be dissolved or stayed, where its effect would be such as to give the defendant the relief he seeks without bringing the cause to trial. *Gilbert v. Elder*, 65 Idaho 383, 144 P.2d 194 (1943).

Nuisances.

Where the complaint and affidavits for an injunction against a city allege a nuisance especially injurious to the plaintiff, and the defendant does not deny the existence of the nuisance but alleges that it has taken steps to abate the same, and that it intends to prevent any recurrence thereof, but affidavits are produced showing that conditions have not been materially changed and that the cause of complaint still exists, it is error to deny a temporary injunction. *Schreck v. Village of Coeur d'Alene*, 12 Idaho 708, 87 P. 1001 (1906).

Picketing.

Where stationing of pickets in front of or near respondents' places of business is necessarily intimidating to prospective customers, it will be enjoined; but appellants are not to be debarred from the use of the streets generally, or from displaying truthful placards and banners, or using other legitimate means of appealing for support. *Robison v. Hotel & Restaurant Employees Local No. 782*, 35 Idaho 418, 207 P. 132 (1922).

Preserving Property.

Where both parties to an action to quiet title to certain land are each claiming to be the owner, upon a proper showing an injunction will be granted to preserve the property in status quo pending the litigation. *Castelbury v. Harte*, 15 Idaho 399, 98 P. 293 (1908).

Removal of Fixtures.

Where tenant is proceeding to remove furniture and fixtures from leased premises without consent of lessor he may be restrained from so doing. *Nielson v. Peterson*, 37 Idaho 171, 215 P. 836 (1923).

Sheriff's Sales.

The foreclosure of a chattel mortgage executed by the husband alone upon exempt property contrary to S. L. 1899, p. 292, may be enjoined. *Kindall v. Lincoln Hdwe. & Implement Co.*, 8 Idaho 664, 70 P. 1056 (1902).

An injunction will issue to restrain the sheriff from selling personal property where it is shown that the plaintiff has no plain, speedy or adequate remedy at law, or that the defendant is insolvent and not able to respond in damages. *Kester v. Schuldt*, 11 Idaho 663, 85 P. 974 (1905).

Successive Writs.

Successive writs of injunction may be granted on the complaint alone without any supplementary affidavits, where all are of the same tenor and effect, except that they extend the time within which the defendant may appear and show cause, and the reason for issuing the later writs is the inability of the sheriff to find the defendant or any person upon whom to serve the prior writs. *Powell v. Springston Lumber Co.*, 12 Idaho 723, 88 P. 97 (1906).

Title to Realty.

Upon application for injunction questions of title to real estate will not be passed upon, though rights will be protected pendente lite, even though title is doubtful. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925).

Trespass.

A temporary injunction may issue to re-

strain a trespasser from removing timber which he has cut upon land claimed by the plaintiff, pending suit to establish plaintiff's title, when the case is one of urgency and where the cutting and removal of such timber would result in great injury to the plaintiff, although the injury might not be irreparable, the defendant being solvent, and notwithstanding that other remedies lie in behalf of the plaintiff. *Staples v. Rossi*, 7 Idaho 618, 65 P. 67 (1901).

Courts should hesitate before granting injunctions to restrain trespasses committed under color of title or right. In this case it was observed in support of such an injunction that strong evidence was submitted tending to show the inability of the defendants to respond to any judgment for damages. *Shields v. Johnson*, 10 Idaho 454, 79 P. 394 (1904).

Plaintiff was not entitled to an injunction to restrain defendant from blasting stone, encroachment upon the waters of the river between their properties, and to compel defendant to clear the bed of the river where the evidence showed defendant's blasting had only once hurled rock onto plaintiff's land, for which damage had been promptly paid, and the river did not flood plaintiff's land except during abnormally high water. *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 406 P.2d 113 (1965).

The new owner of a farm was entitled to an injunction restraining the tenant of the former owner, who had made preparations to vacate the farm, even to the sale of much of his equipment, household furniture, and dairy cattle pursuant to an advertisement which recited "we are leaving the farm," and asserted his right to continue in tenancy after the new owner had started planting, from trespassing and interfering with the new owner's possession of the farm. *Iest v. Gartin*, 90 Idaho 246, 409 P.2d 490 (1965).

Unfair Competition.

The sale of goods of one manufacturer or vendor as those of another is "unfair competition" and constitutes a "fraud" which a court may lawfully prevent by injunction. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

The words "farm service" were held to be descriptive and generic and a corporation including such words in its corporate name was not entitled to have their use by another corporation engaged in a similar business enjoined. *Farm Serv., Inc. v. United States Steel Corp.*, 90 Idaho 570, 414 P.2d 898 (1966).

Water Rights.

Where the complaint alleges great and ir-

reparable injury to growing crops, the damage to which cannot be justly estimated, resulting from checking the flow in the irrigation ditch conveying water to desert lands on which

such crops are growing, a temporary injunction to restrain the obstruction of such flow of water, pending litigation, is authorized. *Wilson v. Eagleson*, 9 Idaho 17, 71 P. 613 (1903).

Rule 65(f). Employer and employee actions exempt from rules as to injunctions or restraining orders.

These rules do not modify any statute of the state of Idaho relating to restraining orders or injunctions in actions affecting employer and employee in labor disputes.

Rule 65(g). Divorce and related proceedings — Bond or notice discretionary in prohibitive or mandatory orders.

In suits for divorce, annulment, alimony, separate maintenance or custody of children, the court may make prohibitive or mandatory orders, with or without notice or bond as may be just. If a party applies for an order without notice to the adverse party, the party or the party's attorney must certify to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required. Any party may elect to produce testimony and evidence at any hearing, or to cross-examine the adverse party or the party's affiants, by first giving at least twenty-four (24) hours notice to the court and opposing counsel before the hearing, which requirement shall be stated in the body of the notice. If such notice is timely given it shall not be necessary to subpoena the adverse party or the party's affiants and the adverse party shall appear with the party's designated affiants without further notice unless otherwise ordered by the court. If the adverse party and the adverse party's affiants designated in the notice are not excused by the court and do not appear as requested, the court may impose such sanctions as it deems appropriate including attorney's fees for the requesting party. (Amended March 31, 1998, effective July 1, 1998.)

JUDICIAL DECISIONS

ANALYSIS

Due Process.
Temporary Custody.
Testimony of Parent.
Validity of Order.

Due Process.

If adequate justification for an ex parte order temporarily transferring custody to a noncustodial parent is shown, and if a full hearing is provided within ten days on the question of which parent should maintain custody pending a motion to modify a custody decree, there is no due process violation. *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127 (1980).

Temporary Custody.

The district court did not abuse its discretion by entering an ex parte order awarding temporary custody of children to the natural father for a period not exceeding 10 days, where the possibility existed that the mother would remove the couple's children from the state and the order merely shifted custody until a full hearing would be held. *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127 (1980).

Testimony of Parent.

Where district court issued ex parte order granting temporary custody of children for ten days under this rule, such action did not violate former I.R.C.P. 6(c)(3) in not allowing custodial parent to testify, since I.R.C.P.

6(c)(3) (now repealed) only governs procedure to be followed in plenary hearing on modification of child custody provisions of a divorce decree. *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127 (1980).

Validity of Order.

While the validity of the contempt order was a close issue, the order was not so lacking in merit as to be “transparently invalid”; therefore, attorney could not attack the contempt order on the ground of alleged invalidity. *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

Where the magistrate issued the order enjoining the mother from removing the minor child from the country, the injunction entered by the magistrate did not effect a modification

of the divorce decree because in suits for divorce and related proceedings, including disputes involving the custody of children, the court may make prohibitive or mandatory orders, with or without bond as may be just, and every order granting an injunction and every restraining order shall set forth the reasons for its issuance, pursuant to Rule 65(d). *Howard v. Cornell*, 134 Idaho 403, 3 P.3d 528 (2000).

Court erred in entering an order preventing the mother from moving out of state, even without the child. This rule does not grant a court authority to make any order it believes to be just. The court’s authority comes from, and is limited by, § 32-717. *Allbright v. Allbright*, 147 Idaho 752, 215 P.3d 472 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

Alimony Payments.

Order authorizing husband to withhold alimony payments is not an injunction and no

bond was required. *McDonald v. McDonald*, 55 Idaho 102, 39 P.2d 293 (1934).

Rule 66(a). Justification of sureties on bond.

If a bond or undertaking is required to be given by statute or these rules, the general form of such bond or undertaking and the justification of the sureties thereon shall be in accordance with chapter 6 of title 12, Idaho Code.

Rule 66(b). Counsel not acceptable as surety.

No attorney will be accepted as surety upon any bond or undertaking furnished in any action or proceeding in which the attorney appears as an attorney of record, or is a member or associate of a firm or corporation which appears as the attorneys of record.

Rule 67. Deposit in court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party and by leave of court, may deposit with the court all or any part of such sum or thing. When it is admitted by the pleading, or shown upon the examination of a party, that a party has possession, or control of, any money or other thing capable of delivery, which, being the subject of litigation, is held by the party as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just. Money or any other thing deposited into court under this rule shall be deposited and withdrawn, subject to the further directions of the court, and as provided by the statutes of this state.

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Amount Deposited.
Stipulation of Tender.
Tender of Redemption.
Trustee Holding Moneys.

Amount Deposited.

In an action to collect rentals, the amount of which was in dispute, the order of the trial court requiring the deposit into court of the full amount of rentals claimed was in error and a misapplication of the former identical rule. *Hutchins v. Trombley*, 95 Idaho 360, 509 P.2d 579 (1973).

Stipulation of Tender.

Where no tender is made in the answer and there is no deposit in court, stipulation that before trial defendant tendered to plaintiff the amount sued for, did not entitle defendant to costs. *Randall v. United States Fid. & Guaranty Co.*, 53 Idaho 310, 23 P.2d 319 (1933).

Tender of Redemption.

Where creditor failed to tender redemption money to the sheriff or to the other creditors, the creditor failed to meet the statutory requirement of tender. Creditor's deposit of money to the clerk of court did not excuse this requirement because at the time there was no action taking place and the creditor did not have leave of the court to deposit the money. *Jenkins v. Barsalou*, 145 Idaho 202, 177 P.3d 949 (2008).

Trustee Holding Moneys.

Where it appears from pleadings, and by admission of a trustee, that trustee holds certain moneys in trust, and that he holds such moneys subject to order of court and has no interest or claim in same, an application for deposit of such moneys into court, made by all parties claiming an interest in same, will be granted. *Reid v. Steele*, 7 Idaho 571, 64 P. 892 (1901).

RESEARCH REFERENCES

A.L.R. Eminent domain: Payment or deposit of award in court as affecting condemnor's right to appeal. 40 A.L.R.3d 203.

Voluntary payment into court of judgment against one joint tortfeasor as release of others. 40 A.L.R.3d 1181.

Rule 68. Offer of judgment.

(a) At any time more than 14 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, which offer of judgment shall be deemed to include all claims recoverable, including any attorneys fees awardable under Rule 54(e)(1), and any costs awardable under Rule 54(d)(1), which have accrued up to the date of the offer of judgment. The offer of judgment shall not be filed with the court, except as stated herein. If within 14 days after the service of the offer the offeree serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon the judgment shall be entered for the amount of the offer without costs. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 14 days prior to the commencement of hearings to determine the amount or extent of liability.

(b) In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against the offeree must be based upon a comparison of the offer and the “adjusted award.” The adjusted award is defined as (1) the verdict in addition to (2) the offeree’s costs under Rule 54(d)(1) incurred before service of the offer of judgment and (3) any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment. Provided, in contingent fee cases where attorney fees are awardable under Rule 54(e)(1), the court will pro rate the offeree’s attorney fees to determine the amount incurred before the offer of judgment in reaching the adjusted award.

If the adjusted award obtained by the offeree is less than the offer, then:

- (i) the offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer;
- (ii) the offeror must pay those costs of the offeree, as allowed under Rule 54(d)(1), incurred before the making of the offer; and
- (iii) the offeror shall not be liable for costs and attorney fees awardable under Rules 54(d)(1) and 54(e)(1) of the offeree incurred after the making of the offer.

If the adjusted award obtained by the offeree is more than the offer, the offeror must pay those costs, as allowed under Rule 54(d)(1), incurred by the offeree both before and after the making of the offer.

After a comparison of the offer and the adjusted award, in appropriate cases, the district court shall order an amount which either the offeror or the offeree must ultimately pay separate and apart from the amount owed under the verdict. A total judgment shall be entered taking into account both the verdict and the involved costs.

(c) In cases involving claims for relief other than monetary damages, if the judgment, including attorney fees awardable under Rule 54(e)(1) incurred before service of the offer of judgment, and costs incurred before service of the offer of judgment, finally obtained by the offeree is not more favorable than the offer, the offeree must pay the offeror’s costs, as allowed under Rule 54(d)(1), incurred after the making of the offer. If the judgment including such attorney fees and costs is more favorable than the offer, the offeror must pay all costs of the offeree allowable under Rule 54(d)(1) both before and after the making of the offer. (Adopted February 26, 1997, effective July 1, 1997.)

STATUTORY NOTES

Compiler’s Notes. Former Rule 68 which comprised Adoption January 1, 1975, amended effective July 1, 1977, amended December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1,

1982; amended June 15, 1987, effective November 14, 1987, was rescinded by Supreme Court of February 26, 1997, effective July, 1997.

JUDICIAL DECISIONS

ANALYSIS

Costs.

Costs After Rejection of Offer.

Costs and Attorneys Fees.

Dismissal Without Prejudice.

Effect of Filing Delay.

Offers Tested Independently.

Purpose.

Timely Offer.

Costs.

While the trial court stated that all costs claimed were necessary and exceptional, it emphasized that its view of Idaho R. Civ. P. 68 was that the ski instructor was responsible for all costs incurred after the skier made an offer which was rejected by the ski instructor; therefore, it was apparent from the record that the trial court failed to correctly apply Idaho R. Civ. P. 54(d)(1)(D) where it did not individually consider whether each discretionary cost claimed was necessary and exceptional. *Stewart v. McKarnin*, 141 Idaho 930, 120 P.3d 748 (Ct. App. 2005).

Costs After Rejection of Offer.

A party who has made an offer of judgment under this rule is entitled to recover its costs, as allowable under Rule 54(d)(1), incurred after the making of the offer, if the judgment finally obtained by the offeree is not more favorable than the offer. *Mountain Restaurant Corp. v. Parkcenter Mall Assocs.*, 122 Idaho 261, 833 P.2d 119 (Ct. App. 1992).

Costs and Attorneys Fees.

Where plaintiff filed an assault and battery suit seeking general damages of \$200,000, punitive damages of \$50,000 and special damages of \$1,000, and defendant prior to trial made an offer of judgment of \$1,700 which was refused, which the jury found in plaintiff's favor, awarding him nominal damages of \$1.00, it was proper for the trial court to award the defendant costs exceeding \$800 and attorney fees exceeding \$5,800 pursuant to § 12-121, since this rule clearly entitles a party tendering offer of judgment to those costs accrued following an offer of judgment where the damages awarded are less than the offer of judgment, and since the trial court correctly found pursuant to subsection (B) of I.R.C.P., Rule 54(d)(1) that the defendant was the prevailing party. *Odziemek v. Wesely*, 102 Idaho 582, 634 P.2d 623 (1981).

Where a party has made an offer of judgment greater than the opponent's recovery and the offeror also is the prevailing party at trial, that party may receive its justified costs

under I.R.C.P. 54(d). *Masters v. Dewey*, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985).

The district court should have explicitly stated which costs were recoverable under this rule and which costs were recoverable under Rule 54(d)(1), together with a statement of reasons supporting award of any discretionary costs under rule 54, in the event the defendants were found to be the prevailing party at trial. *Masters v. Dewey*, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985).

Where the defendants made two offers of judgment, both more favorable than the result obtained by the plaintiff at trial, the judge was instructed to award the partnership the costs it incurred after the first offer of judgment was rejected, pursuant to this rule. *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986).

Where no motion was made to alter or amend judgment which awarded attorney fees within ten days, the district judge did not have jurisdiction to amend that judgment to change it from a Rule 68 award of attorney fees to a § 12-121 and Rule 54(e) award. *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987).

Where partnership and contractor each prevailed on one of the two issues between them, but each received far less than the respective relief they sought, the court did not abuse its discretion in concluding that neither party prevailed against the other. *Weaver v. Millard*, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991).

The defendants apparently intended the issue for award of costs incurred after their offer of judgment under this rule to be part of their cross-appeal, but the appellate court could not address that issue because the defendants did not comply with the requirements of I.A.R. 35(a)(6). *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887 (1996).

Since defendant had the option to take the judgment with the additur or proceed to a new trial, the additur was included in the final judgment amount which is to be compared to the offer of judgment for the purposes of subsection (b) of this rule; therefore since plaintiff's jury award plus the additur exceeded the offer of judgment, the district court was correct in denying defendant an award under subsection (b) of this rule. *Collins v. Jones*, 131 Idaho 556, 961 P.2d 647 (1998).

A "settlement proposal" was submitted, not an offer of judgment, and nothing in the language of the letter offering a proposal to resolve the dispute would meet the requirements of Rule 68, even assuming there was a

statutory basis for awarding fees; thus, the district judge did not err in denying attorney fees on that basis. *Brown v. Miller*, 140 Idaho 439, 95 P.3d 57 (2004).

This rule is not intended to provide for an award of attorney fees. This rule applies only to judgments obtained by plaintiffs, putting a special burden on prevailing plaintiffs to whom a settlement offer is made to show that they are entitled to costs. *Ireland v. Ireland*, 123 Idaho 955, 855 P.2d 40 (1993), overruled on other grounds, *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009).

Dismissal Without Prejudice.

Magistrate court did not err in holding that a contractor was the prevailing party under I.R.Civ.P. 54(d)(1)(B) for the purpose of awarding costs and attorney fees in customers' action for damage to their boat because while the customers recovered \$600 on their claim for \$2,820, the contractor recovered the entirety of the \$400 that the contractor sought in damages pursuant to a stipulation; the magistrate court did not err in considering the contractor's offer of judgment in its prevailing party analysis. *Crump v. Bromley*, 148 Idaho 172, 219 P.3d 1188 (2009).

Because the order of dismissal did not specify otherwise, the dismissal was without prejudice, therefore, defendant was not entitled to costs under this rule, even though plaintiff had earlier rejected defendant's settlement offer. *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991).

Effect of Filing Delay.

Where a cause was completed in the trial court on May 17, 1977, with a notice of appeal filed July 13, 1977, but where the record disclosed that defendant's written offer of judgment was not filed with the trial court until November 23, 1977, such unwarranted delay prevented the trial court from considering said offer of judgment and precluded defendant from claiming error by the trial court

concerning a matter never presented to it. *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978).

Offers Tested Independently.

This rule should be read to test the offer and recovery from each party independently; only if its own offer exceeded its individual liability can the particular defendant be said to have made a fair offer. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

Purpose.

This rule is designed to encourage settlement and to avoid the expense and time of unnecessary trials. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

This rule is intended to protect a defendant against a plaintiff's claim for costs where the defendant has made a reasonable offer of judgment and where the verdict recovered by the plaintiff is less favorable than the offer; it does not include attorney fees. *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987).

Timely Offer.

Where the trial did not begin until 12 days after the offer was made, the offer was timely even though it was made less than 12 days before the trial was originally scheduled. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

Cited in: *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983); *Spreader Specialists, Inc. v. Monroc, Inc.*, 114 Idaho 15, 752 P.2d 617 (Ct. App. 1987); *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988); *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991); *Czerwinsky v. Lieske*, 122 Idaho 96, 831 P.2d 564 (Ct. App. 1992); *Leavitt v. Swain*, 131 Idaho 765, 963 P.2d 1202 (Ct. App. 1998); *Schaefer v. Ready*, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000); *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Judgment by Confession.
Method of Making Offer.
Stipulation of Tender.

Judgment by Confession.

A judgment entered pro forma by consent of the defendant, reserving the right of appeal, given in writing by his attorney, is not a judgment by confession. *Harvey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 2 Idaho 765, 24 P. 30 (1890).

Method of Making Offer.

Offer of judgment, to save costs, may be made in answer. It need not be made in separate writing. *Rich v. Stephenson*, 54 Idaho 423, 32 P.2d 848 (1934).

Stipulation of Tender.

Where no offer of judgment is made in compliance with the statute, stipulation that, prior to trial, defendant tendered the amount sued for, is of no avail. *Randall v. United States Fid. & Guaranty Co.*, 53 Idaho 310, 23 P.2d 319 (1933).

RESEARCH REFERENCES

A.L.R. Construction of state offer of judgment rule — Sufficiency of offer and contract formation issues. 118 A.L.R.5th 91.

Allowance and determination of attorney's fees under state offer of judgment rule. 119 A.L.R.5th 121.

State offer of judgment rule — Construction, operation, and effect of acceptance and resulting judgment. 120 A.L.R.5th 559.

Disallowance of award under state offer of

judgment rule due to lack of good faith. 121 A.L.R.5th 325.

Application of state offer of judgment rule — Apportionment issues in multiple party setting. 125 A.L.R.5th 193.

Application and construction of state offer of judgment rule—Determining whether offer is entitled to award. 2 A.L.R.6th 279.

Recoverable Costs Under State Offer of Judgment Rule. 34 A.L.R.6th 431.

Rule 69. Execution — In general.

Process to enforce an appealable final judgment or partial judgment certified as final under Rule 54(b) for the payment of money, or a court order for the payment of money, shall be a writ of execution, unless the court directs otherwise; but no writ of execution may issue on a partial judgment which is not certified as final under Rule 54(b). Provided, a writ of execution shall not issue for an amount other than the face amount of the judgment, and costs and attorney fees approved by the court, without an affidavit of the party or the party's attorney verifying the computation of the amount due under the judgment. The clerk may rely upon such an affidavit in issuing a writ of execution. After service of the writ of execution, the sheriff shall make a return to the clerk of the court and indicate thereon the amount of the service fees and whether all of such fees were collected by the sheriff upon the service of the writ of execution. Any balance of the service fees of the writ of execution not collected by the sheriff shall be added to the judgment by the clerk as provided in Rule 54(d). The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the statutes of the state of Idaho. In aid of the judgment or execution, the judgment creditor or successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided by the practice of this state. (Amended January 8, 1976, effective March 1, 1976; amended July 2, 1976, effective October 1, 1976; amended March 23, 1983, effective July 1, 1983; amended June 15, 1987, June 17, 1987, effective July 1, 1987.)

STATUTORY NOTES

Cross References. Judgment, stay of proceedings to enforce, Rules 62(a)-62(g).

Person or property, seizure of, Rule 64.
Title, judgment vesting, Rule 70.

JUDICIAL DECISIONS

ANALYSIS

Breach of Contract Action.
Certification of Judgments.

Child Support.

Breach of Contract Action.

In a breach of contract action, a writ of

execution was not allowed against city funds. *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993).

Certification of Judgments.

An uncertified partial summary judgment, not being final or appealable, will not support a writ of execution; only a partial summary judgment which has been properly certified as final under I.R.C.P. 54(b) will support a writ of execution. Furthermore, it is not sufficient for a trial court merely to enter an order that it will certify a partial summary judgment as final; before any such order is effective it must have appended to the summary judgment a certificate which complies with I.R.C.P. 54(b). *CIT Fin. Servs. v. Herb's Indoor RV Ctr.*, 108 Idaho 820, 702 P.2d 858 (Ct. App. 1985).

Child Support.

Where both parties were seeking a determination of the amount of child support due under a divorce decree, the judge improperly upheld a lower court's decision by instructing wife's attorney to submit an affidavit comput-

ing the amount of delinquency based upon the clerk's record; the judge should have made his own finding of the amount due. Without such finding the lower court's decision was not supported by the record. *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990).

It would be unwise to place a burden upon court clerks to compute daily interest on every child support payment, deducting that amount from each payment received after the due date, and crediting only the remainder against the payor's support obligation. The better approach, in the court's view, is for court clerks simply to maintain records of support payments due and payments received. If a payee of support wishes to collect interest accrued on a support obligation, due to late payment of support, that party may seek and obtain from the court a writ of execution based upon an affidavit which sets forth a calculation of interest included in "the amount due under the judgment." *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Corporate Stock Shares.
Injunction.
Notice of Sale of Real Estate.
Statutory Right of Redemption.
Supplemental Proceedings.
Time for Writ of Execution.

Corporate Stock Shares.

Shares of corporate stock can be subjected to a debt only by seizure under attachment or execution. *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899).

Injunction.

Execution will not be enjoined on ground of payment, settlement, or discharge of claim, unless judgment debtor was prevented by fraud, circumvention, deceit, or accident from making such defense in the action. *Lewis v. Warren & Anderson Furn. Co.*, 31 Idaho 4, 168 P. 1142 (1917).

Notice of Sale of Real Estate.

Notice of sale of real estate levied upon by execution may be made either by posting notices or by publication, in the discretion of sheriff or attorney for execution plaintiff. *Ollis v. Kirkpatrick*, 3 Idaho 247, 28 P. 435 (1891).

Statutory Right of Redemption.

Statutory right to redeem must be exercised within period provided by statute; otherwise, right to redeem is lost and absolute title vests in purchaser. *Steinour v. Oakley State Bank*, 45 Idaho 472, 262 P. 1052 (1928).

Supplemental Proceedings.

In proceedings supplemental to execution by judgment creditors in a justice of peace court wherein judgment creditors summon in third-party relative to certain property allegedly belonging to judgment debtor and in the possession of the third-party, and the third-party claimed the property belonged to it, the justice did not abuse his discretion by continuing the hearing and ordering the third-party to bring in books and records, hence district court had no right to issue writ of prohibition restraining further action by justice. *Hubbard v. Morse*, 76 Idaho 494, 285 P.2d 483 (1955).

Time for Writ of Execution.

Under § 11-101 the party in whose favor a judgment is given may at any time within five years after the entry thereof have a writ of execution issued for its enforcement. *Bashor v. Beloit*, 20 Idaho 592, 119 P. 55 (1911).

Rule 70. Judgment for specific acts — Vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

STATUTORY NOTES

Cross References. Execution in general, Rule 69.

Person or property, seizure of, Rule 64.

JUDICIAL DECISIONS**Conveyance Under Marital Property Settlement.****—Agreement.**

Divorce decree that, in accordance with the parties' agreement, divided their community property, both real and personal, and vested title to their marital home in the husband, effectuated the conveyance under Idaho R.

Civ. P. 70. The agreement did not have to contain formalized language of conveyance. *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (2008).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Attachment.
Deeds—Ordering Clerk to Make.
Methods of Exercising Power.
Power Coupled with Grant of Jurisdiction.

Attachment.

The statute provides in what actions an attachment may issue, and if complaint discloses that action is not such, and attachment is issued, then it was improperly issued, and upon proper motion it will be dissolved. *Ross v. Gold Ridge Mining Co.*, 14 Idaho 687, 95 P. 821 (1908).

Deeds—Ordering Clerk to Make.

Court was empowered to order clerk to make deed to purchaser complying with con-

tract for sale of property. *Glancy v. Williams*, 50 Idaho 109, 293 P. 665 (1930).

Methods of Exercising Power.

In the exercise of its inherent judicial power the court may use the common law or other appropriate method if the statute or rule does not prescribe the procedure. *J.I. Case Co. v. McDonald*, 76 Idaho 223, 280 P.2d 1070 (1955).

Power Coupled with Grant of Jurisdiction.

When jurisdiction is conferred upon a court, as an incident of such grant, there is conferred the power to make same effective by suitable process or mode of procedure. *Fox v. Flynn*, 27 Idaho 580, 150 P. 44 (1915).

Rule 71. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, the person may enforce obedience to the order by the same process as if the person were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, the person is liable to the same process for enforcing obedience to the order as if the person were a party.

STATUTORY NOTES

Cross References. Execution in general, Rule 69.

Person or property, seizure of, Rule 64.
Process in general, Rules 4(a)-4(i).

JUDICIAL DECISIONS**Award of Costs.**

Where the purchasers of property at a partition sale could not continue to effectively protect their interests absent involvement, as *amicus curiae*, in an appeal from a decision

enforcing the partition judgment and finalizing the sale, the purchasers would be awarded costs and attorney fees. *Mendenhall v. Caine*, 101 Idaho 628, 619 P.2d 146 (1980).

Rule 72(a). Uniform probate code — Guardians and conservators.

A guardian appointed previous to the effective date of the Uniform Probate Code on July 1, 1972, shall have the following powers and duties:

(1) Guardians of the person, only, of a minor or incompetent shall have all the powers and duties of guardians under chapters 2 and 3, article V of the Uniform Probate Code [§§ 15-5-201 — 15-5-313].

(2) Guardians of the estate, only, of a minor or incompetent shall have all of the powers and duties of a conservator under chapter 4, article V of the Uniform Probate Code [§§ 15-5-401 — 15-5-432].

(3) Guardians of the person and estate of a minor or incompetent shall have all of the powers and duties of a guardian under chapters 2 and 3, article V and of a conservator under chapter 4, article V of the Uniform Probate Code [§§ 15-5-201 — 15-5-432].

(4) No order of a magistrate or judge shall be necessary to grant these powers and duties to the existing guardians upon the effective date of the Uniform Probate Code.

Rule 72(b) — 72(z). Reserved for probate rules.**Rule 73. Receivers.**

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the appointment of and administration of estates by receivers or other similar officers shall be in accordance with the Idaho Code and with the practice heretofore followed in the courts of this state. In all other respects, the action in which the appointment of the receiver is sought or which is brought by or against a receiver is governed by these rules. (Amended December 19, 1975, effective January 1, 1976.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Authority to Appoint.
Collateral Attack of Appointment.

Authority to Appoint.

Courts of equity have the power and authority to appoint receivers of property and direct them to care for, protect, and preserve the property and decree the charges and expenses therefor as prior and preferred liens to that of all other liens, mortgages, or encumbrances, and to direct the property sold for the payment of the same. *Dalliba v. Riggs*, 11 Idaho 364, 82 P. 107 (1905); *Hewitt v. Great W. Beet Sugar Co.*, 20 Idaho 235, 118 P. 296 (1911); *Commercial Trust Co. v. Idaho Brick Co.*, 25 Idaho 755, 139 P. 1004 (1913).

Statutory provisions authorized the district

court to appoint a receiver to receive and take charge of notes, accounts, certificates of the capital stock of corporations, and choses in action, and other personal property, where the necessity and occasion for such appointment is shown. *Utah Ass'n of Credit Men v. Budge*, 16 Idaho 751, 102 P. 390 (1909).

A receiver cannot be appointed until an action is pending or has passed through judgment. *Elmore County Irrigated Farms Ass'n v. Stockslager*, 22 Idaho 420, 126 P. 616 (1912).

Collateral Attack of Appointment.

Appointment of receiver cannot be attacked collaterally unless it is shown that order of appointment was void. *Weil v. Defenbach*, 36 Idaho 37, 208 P. 1025 (1922).

RESEARCH REFERENCES

A.L.R. Action for malicious prosecution based on institution of involuntary bank-

ruptcy, insolvency or receivership proceedings. 40 A.L.R.3d 296.

Rule 74(a). Mandate and prohibition.

The procedure for obtaining a writ of prohibition or a writ of mandate shall be in accordance with these civil rules. An application for a peremptory or alternative writ of mandate or prohibition shall be commenced by filing of a petition or complaint with a court of competent jurisdiction.

STATUTORY NOTES

Cross References. Commencement of action, Rule 3(a).

Writs of mandate, §§ 7-301 — 7-305, 7-308 — 7-314.

Writs of prohibition, §§ 7-401 — 7-404.

JUDICIAL DECISIONS

Consolidation of Claims.

Although a litigant may combine a claim for damages with a petition for a writ of mandamus, it is not mandatory that the damage and

mandamus proceedings be consolidated. *Heaney v. Board of Trustees*, 98 Idaho 900, 575 P.2d 498 (1978).

RESEARCH REFERENCES

A.L.R. Summary judgment in mandamus or prohibition cases. 3 A.L.R.3d 675.

Judgment granting or denying writ of mandamus or prohibition as res judicata. 21 A.L.R.3d 206.

Mandamus to compel disciplinary investi-

gation or action against physician or attorney. 33 A.L.R.3d 1429.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation. 68 A.L.R.3d 166.

Rights and remedies of parents inter se

with respect to the names of their children. 40
A.L.R.5th 697.

Compelling assertedly disqualified judge to

excuse self or to certify his disqualification. 45
A.L.R.2d 937, 56 A.L.R. Fed. 494.

Rule 74(b). Application for writ.

When any complaint or petition for a peremptory writ of mandate or prohibition prays that an alternative writ first be issued, the court in its discretion may issue such alternative writ based upon a verified complaint or affidavit showing grounds therefor. Such alternative writ shall command the party to do or refrain from doing the act sought to be required by a writ of mandamus or sought to be prohibited by writ of prohibition, or to show cause before the court at a specified time and place why the party has not elected to comply with the alternative writ. Copies of the summons, petition, any affidavits, and the alternative writ must be served upon the defendant at least 10 days prior to the date of the hearing. No contested trial of a petition or a complaint for writ of prohibition or mandamus shall be had on the merits at a show cause hearing pursuant to an alternative writ, and no peremptory writ shall issue as a result of such contested hearing. If the party on whom the alternative writ was served appears at the time specified to show cause, the court shall at such hearing determine and set a time for the trial of the action on its merits for a determination of whether a peremptory writ shall issue in the action, and the court may hear limited testimony, in its discretion, as to whether the alternative writ should remain in force and effect so as to require the party to perform an act or to refrain from performing an act pending final hearing on the merits.

STATUTORY NOTES

Cross References. Form of writ of mandamus, § 7-304.

When and by what court a writ of mandate is issued, § 7-302.

Rule 74(c). Opposing writ.

Any party wishing to contest an application for a peremptory writ of mandate or writ of prohibition must file a responsive pleading to the complaint or petition in the same manner as an answer to any other complaint in a civil action. The plaintiff or petitioner may proceed against such responsive pleading in the same manner as in any other civil action.

Rule 74(d). Trial — Judgment.

Upon trial of the complaint or petition for writ of mandamus or writ of prohibition, the plaintiff or petitioner shall have the burden of proof in the proceedings as in other civil actions and upon conclusion of the trial the court shall enter its decision and judgment granting or denying a peremptory writ together with a determination of damages, if applicable. If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation on which the application for the writ is based, the court may, in its discretion, order the

question to be tried before a jury and postpone the final hearing until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the plaintiff may have sustained in case they find for the plaintiff. Upon entry of the judgment, if the writ is awarded it shall be issued immediately upon application of the plaintiff or petitioner as a peremptory writ ordering the party to whom it is directed to perform an act or refrain from performing an act and shall have the force and effect of a judgment. A writ issued by the court shall be served upon the party to whom it is directed in the same manner as service of process under these rules.

STATUTORY NOTES

Cross References. Certification of verdict and argument in mandamus proceeding, § 7-310.

Damages in mandamus proceeding, § 7-312.
Service of writ of mandate, § 7-313.

DECISIONS UNDER PRIOR RULE OR STATUTE

Discretion of Court.

Where issues of fact are raised by return to alternative writ of mandate, neither of the parties is entitled to a jury trial of such issues as matter of right, but question of submitting issues to jury is left to the sound discretion of trial court. *Nelson v. Steele*, 12 Idaho 762, 88 P. 95 (1906); *Fenton v. King Hill Irrigation Dist.*, 67 Idaho 456, 186 P.2d 477 (1947).

It was clearly the intent of the legislature, in the enactment of former provision, to leave the matter to the discretion of the court as to

whether questions of fact raised on an application for a writ of mandate were to be tried to a jury. *Silver Bowl, Inc. v. Equity Metals, Inc.*, 93 Idaho 487, 464 P.2d 926 (1970).

The record revealed no abuse of discretion on the part of the trial court in proceeding to hear arguments on application for writ of mandate, especially in the absence of any request by the appellants for a preliminary jury trial on issues of fact. *Silver Bowl, Inc. v. Equity Metals, Inc.*, 93 Idaho 487, 464 P.2d 926 (1970).

RESEARCH REFERENCES

A.L.R. Allowance of damages to successful plaintiff or relator in mandamus. 34 A.L.R. 4th 457.

Rule 75. Contempt.

This rule shall govern all contempt proceedings brought in connection with a civil lawsuit or as a separate proceeding. It shall not apply to the prosecution of misdemeanor contempt under section 18-1801, Idaho Code, or any other criminal statute. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(a). Definitions.

(1) **Petitioner.** A petitioner is the person or legal entity initiating a nonsummary contempt proceeding.

(2) **Respondent.** A respondent is the person or legal entity alleged to have committed an act of contempt.

(3) **Contemnor.** A contemnor is a person or legal entity adjudged to have committed an act of contempt.

(4) **Summary proceeding.** A summary proceeding is one in which the contemnor is not given prior notice of the charge of contempt and an opportunity for a hearing to determine whether the charge is true.

(5) **Nonsummary proceeding.** A nonsummary proceeding is one in which the contemnor is given prior notice of the contempt charge and an opportunity for a hearing.

(6) **Civil sanction.** A civil sanction is one that is conditional. The contemnor can avoid the sanction entirely or have it cease by doing what the contemnor had previously been ordered by the court to do. A civil sanction can only be imposed if the contempt consists of failing to do what the contemnor had previously been ordered by the court to do.

(7) **Criminal sanction.** A criminal sanction is one that is unconditional. The contemnor cannot avoid the sanction entirely or have it cease by doing what the contemnor had been previously ordered by the court to do. A suspended sanction with probationary conditions is a criminal sanction, as is a sanction that includes provisions that are both conditional (civil) and unconditional (criminal). A criminal sanction may be imposed for any contempt. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(b). Summary proceedings.

(1) A summary proceeding may be used only if the contempt was committed in the presence of the court. A contempt is committed in the presence of the court if:

- a. The conduct occurs in open court in the immediate presence of the judge;
- b. The judge has personal knowledge, based upon personally observing and/or hearing the conduct, of the facts establishing all elements of the contempt; and
- c. The conduct disturbs the court's business.

(2) The court may summarily impose a sanction for contempt that is committed in its presence. Before doing so, the court must:

- a. Give the contemnor notice of the alleged contempt, which can be oral; and
- b. Give the contemnor a brief opportunity to be heard in order to present matters in mitigation or to otherwise attempt to make amends with the court.

(3) Promptly after announcing the sanction, the court must enter in the record a written order, signed by the judge, which:

- a. States that the judge saw and/or heard all of the conduct constituting the contempt and that it was committed in the actual presence of the court;
- b. Recites each of the specific facts upon which the contempt conviction rests;
- c. Adjudges that the contemnor is guilty of contempt; and

d. Sets forth the sanction for that contempt.

Before imposing incarceration as a sanction for summary contempt, the court should consider whether a lesser sanction would be effective. If the sanction includes incarceration, the court may immediately remand the contemnor into custody to begin serving such incarceration and later file the written order. If the sanction includes a civil sanction, the written order must recite precisely what the contemnor must do in order to avoid the sanction or have it cease. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(c). Nonsummary proceedings — Commencement.

Nonsummary contempt proceedings may be commenced only as provided herein.

(1) **Contempt initiated by a judge—Written charge of contempt.** A judge may initiate contempt proceedings by issuing a written charge of contempt and having it served upon the respondent. The charge may be prepared by the court or by a party at the court's direction. The written charge must be supported by an affidavit unless the facts recited in it are based upon the judge's personal knowledge and/or upon information from the court file contained in documents prepared by court personnel.

(2) **Contempt not initiated by a judge—Motion and affidavit.** All contempt proceedings, except those initiated by a judge as provided above, must be commenced by a motion and affidavit. Contempt proceedings shall not be initiated by an order to show cause.

(3) **Factual allegations.** The written charge of contempt or affidavit must allege the specific facts constituting the alleged contempt. Each instance of alleged contempt, if there is more than one, must be set forth separately. If the alleged contempt is the violation of a court order, the written charge or affidavit must allege that either the respondent or the respondent's attorney was served with a copy of the order or had actual knowledge of it. The written charge or affidavit need not allege facts showing that the respondent's failure to comply with the court order was willful.

(4) **Notice to appear.** The respondent shall be served with written notice of the time, date, and place to appear to answer to the charge of contempt. (Adopted March 24, 2005, effective July 1, 2005; amended March 17, 2006, effective July 1, 2006.)

Rule 75(d). Nonsummary proceedings — Service — Time limits.

(1) If the contempt proceedings are initiated in connection with a pending action to which the respondent is a party, the written charge of contempt or motion and affidavit and written notice of the time, date, and place to appear may be served upon the respondent as provided in Rule 5(b), unless the court orders personal service.

(2) If the respondent is not a party to the pending action in which the contempt proceedings are brought, service shall be as provided in Rule 4, but the respondent need not be served with a summons.

(3) Notice of the time, date, and place to appear, together with the documents commencing the contempt proceedings, shall be served no later than seven (7) days before the date set for the initial appearance, unless otherwise ordered by the court. (Adopted March 24, 2005, effective July 1, 2005; amended March 17, 2006, effective July 1, 2006.)

Rule 75(e). Nonsummary proceedings — Warrant of attachment and bail.

(1) **Warrant of attachment.** The court shall not issue a warrant of attachment unless the court finds that there is probable cause to believe that the respondent committed the contempt and determines that there are reasonable grounds to believe that the respondent will disregard a written notice to appear. The form of the warrant may be the same as a warrant of arrest issued in a criminal case.

(2) **Bail.** When issuing a warrant of attachment, the court shall set a reasonable bail, to be endorsed upon the warrant at the time it is issued.

(3) **Execution and return.** The execution and return of the warrant shall be in the same manner as a warrant of arrest issued in a criminal case. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(f). Nonsummary proceedings — Initial appearance of respondent.

(1) **Advice to respondent.** At the respondent's first appearance in court to answer to the charge of contempt in nonsummary proceedings, the court shall inform the respondent of:

- a. The charge(s) of contempt against the respondent;
- b. The possible sanctions for contempt;
- c. That the respondent is not required to make a statement and that any statement made may be used against the respondent;
- d. The respondent's right to a trial;
- e. The respondent's right to confront the witnesses against the respondent, including watching the witnesses testify in court and questioning them; and
- f. The respondent's right to bail, if the respondent has been arrested under a warrant of attachment.

(2) **Additional advice in order to impose incarceration as a sanction.** If the respondent appears without counsel and the court desires to have the option of imposing incarceration as a sanction, the court must inform the respondent that the respondent has the right to be represented by an attorney and that if the respondent desires an attorney and cannot afford one, an attorney will be appointed at public expense.

(3) **Appearance by respondent through counsel.** A respondent may also appear and respond to the charge through an attorney, who shall either appear in person or shall file, at or before the initial appearance, a written appearance and response to the charge on behalf of the respondent. The court may, in its discretion, require the presence of the respondent at any

stage of the proceeding. (Adopted March 24, 2005, effective July 1, 2005; amended March 17, 2006, effective July 1, 2006.)

Rule 75(g). Nonsummary proceedings — Plea.

After being informed of the applicable rights, the respondent shall admit or deny the charge of contempt.

(1) **Admission of contempt.** Before an admission of the charge can be accepted, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show:

- a. The respondent was informed of the nature of the charge(s) of contempt;
- b. The respondent was informed of the maximum sanctions, including the possibility, if applicable, that sanctions for multiple contempts could be consecutive;
- c. The voluntariness of the admission; and
- d. The respondent was advised that by admitting the contempt, the respondent would be waiving the applicable rights specified in subsection (f) above.

(2) **Denial of contempt.** If the respondent denies the charge of contempt, the matter shall be set for a trial. The respondent must be given at least fourteen (14) days to prepare for trial, unless otherwise ordered by the court. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(h). Nonsummary proceedings — Defenses to the contempt.

Defenses to the charge of contempt must be raised as follows:

(1) **Written response.** In order to assert an affirmative defense to the contempt, the respondent must file and serve a written response stating such defense, including any of the following: the respondent was unable to comply with the court order at the time of the alleged violation (only a defense to a criminal sanction), the respondent lacks the present ability to comply with the court order (only a defense to a civil sanction), the respondent was unaware of the order allegedly violated, the court lacks personal jurisdiction over the respondent, or the court lacked jurisdiction to issue the order allegedly violated. The written response must be filed within seven (7) days after entering a plea denying the contempt charged, unless otherwise ordered by the court.

(2) **Burden of proof regarding affirmative defenses.** In order to prevent a civil sanction from being imposed, the respondent must prove the affirmative defense by a preponderance of the evidence. In order to prevent a criminal sanction from being imposed, the respondent need only create a reasonable doubt as to whether the respondent is guilty of the contempt. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(i). Nonsummary proceedings — Trial.

(1) **Court trial or jury trial.** The trial shall be before the court without a jury, provided, that if the respondent is charged with multiple counts tried

in one proceeding, the court cannot impose consecutive criminal sanctions totaling more than six months in jail unless the respondent was given, or voluntarily waived, the right to a jury trial.

(2) **Trial rights required to impose a criminal sanction.** The court cannot impose a criminal sanction following a trial unless the respondent was provided the following rights: a public trial, compulsory process, the presumption of innocence, the privilege against self-incrimination, the right to call and cross-examine witnesses, the right to testify in one's own behalf, the right to exclude evidence that was obtained in violation of the respondent's Fourth Amendment rights, the right to counsel, if applicable, and the right to a unanimous verdict if there was a jury trial. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(j). Nonsummary proceedings — Burden of proof.

(1) **Civil sanction.** In order to impose a civil sanction, the court must find, by a preponderance of the evidence, that all of the elements of contempt have been proven and that the contemnor has the present ability to comply with the order violated, or with that portion of it required by the sanction.

(2) **Criminal sanction.** In order to impose a criminal sanction, the trier of fact must find that all of the elements of contempt were proven beyond a reasonable doubt. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(k). Nonsummary proceedings — Findings of fact.

If the contempt allegation is tried to the court without a jury, the court shall make specific findings of fact. In order to impose either a civil sanction or a conditional (civil) provision as part of a criminal sanction, the findings must include the facts upon which the court bases its determination that the contemnor has the present ability to comply with the order violated, or with that portion of it required by the sanction. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(l). Nonsummary proceedings — Imposition of sanctions.

If the respondent admits the contempt or is found in contempt following a trial, the court may impose sanctions as permitted by law.

(1) **Right to counsel.** The court cannot impose incarceration as a sanction unless the contemnor was represented by counsel or had knowingly and voluntarily waived the right to counsel.

(2) **Right to call witnesses and speak regarding the sanction.** The court cannot impose a criminal sanction without first giving the contemnor the right to call witnesses in mitigation of the sanction and the right to be heard in order to present matters in mitigation or to otherwise attempt to make amends with the court.

(3) **Written order.** The court shall issue a written order reciting the conduct upon which the contempt conviction rests; adjudging that the contemnor is guilty of contempt; and setting forth the sanction for that contempt. If the sanction is civil or includes a conditional provision, the order must specify precisely what the contemnor must do in order to avoid

that sanction or have it cease. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(m). Nonsummary proceedings — Attorney fees.

In any contempt proceeding, the court may award the prevailing party costs and reasonable attorney fees under Idaho Code § 7-610, regardless of whether the court imposes a civil sanction, a criminal sanction, or no sanction. The procedure for awarding such costs and fees shall be as provided in Rule 54(e) of the Idaho Rules of Civil Procedure, except that the determination of the prevailing party shall be based upon who prevailed in the contempt proceeding rather than in the civil action as a whole. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 75(n). Other rules of civil procedure.

Rules regarding discovery and other rules of civil procedure, to the extent that they are not in conflict with this rule, shall apply to nonsummary contempt proceedings. The Idaho Criminal Rules shall not apply. (Adopted March 24, 2005, effective July 1, 2005.)

Rule 76. Decree of adoption.

A decree of adoption shall not be entered by the court unless and until counsel for the adopting parents furnishes to the court a completed certificate of adoption on the form furnished by the department of vital statistics. (Adopted January 8, 1976, effective March 1, 1976.)

Rule 77(a). Court in continuous session — Terms abolished.

All courts shall be deemed to be in continuous session. Any hearings or proceedings may be continued to a time and place certain by order of the court upon motion of any party, upon stipulation of the parties, or upon motion of the court. For purposes of these rules governing procedure in civil actions, the definitions of chambers of court, terms of court, vacation of court and adjournments of hearings are hereby abolished.

STATUTORY NOTES

Cross References. Administrative judges, § 1-907.

Courts and court officials, §§ 1-1603, 1-1606, 1-1607, 1-1613 — 1-1616, 1-1622.

District court judges, §§ 1-905, 1-907.

District courts, §§ 1-701 — 1-705, 1-711.

JUDICIAL DECISIONS

Speedy Trial.

The action of the legislature in repealing former § 1-706, governing terms of court, and the action of the Supreme Court in promulgating this rule, abolishing terms of court, precludes determining the right to a speedy

trial by reference to terms of court for cases filed after the effective date (March 31, 1975) of the repeal of § 1-706. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981); *State v. Talmage*, 104 Idaho 249, 658 P.2d 920 (1983).

Cited in: *State v. Campbell*, 104 Idaho 705,

662 P.2d 1149 (Ct. App. 1983); *State v. Fairchild*, 108 Idaho 225, 697 P.2d 1239 (Ct. App. 1985).

Rule 77(b). Trials and hearings.

All trials upon the merits of every court of justice shall be conducted in open court and so far as convenient in a regular courtroom; except that in an action for a divorce, annulment, criminal conversation, seduction, civil protection order or breach of promise of marriage, the court may exclude all persons from the courtroom except the officers of the court, the parties, their witnesses, and counsel, provided that in any cause the court may exclude witnesses as provided in the Idaho Rules of Evidence. All trials or hearings of any court held before a judge or magistrate assigned thereto, and all judgments and orders issued by such courts shall be deemed to have been done in open court regardless of the place held. In the discretion of the court, any hearing except a trial or evidentiary hearing may be held outside the county in which the action was filed or transferred for change of venue. By stipulation of the parties, a trial or evidentiary hearing may be held outside the county in which the action was filed or transferred for change of venue. A minute entry shall be made by the clerk of the court under the direction of the court of all court proceedings and filed in the official file of the action. (Amended March 24, 1982, effective July 1, 1982; amended March 20, 1985, effective July 1, 1985; amended June 15, 2006, effective July 1, 2006.)

JUDICIAL DECISIONS

Additional Instructions.

If, after start of its deliberations, a jury wishes further instructions, it must communicate this desire in open court, and counsel for both parties have a right to be present unless, by absenting themselves or by expressly so stating, they waive this right; and while the trial judge may, in his discretion,

give or refuse to give any further instructions, all communication must be made a matter of record and a minute entry must be made to note the occurrence. *Rueth v. State*, 100 Idaho 203, 596 P.2d 75 (1978).

Cited in: *Mendes Bros. Dairy v. Farmers Nat'l Bank*, 111 Idaho 511, 725 P.2d 535 (Ct. App. 1986).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

- Change of Building.
- Exclusion of Witnesses.
- Noticed Orders — Place of Hearing.
- Place of Making Orders Out of Court.
- Receiver Ex Parte — Appointment.
- Writs of Review.

Change of Building.

Statutes authorized district judge to change place of holding court to another building in same town. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, 57 Idaho 240, 65 P.2d 156 (1937).

Exclusion of Witnesses.

Whatever the interest of a witness in a case

may be, if he is not a party his exclusion is a matter wholly within the discretion of the court. *Paine v. Strom*, 51 Idaho 532, 6 P.2d 849 (1931).

In prosecution of defendant for committing of lewd and lascivious act on eleven year old daughter, trial court did not abuse its discretion in refusing to exclude daughter and her mother for crying while fourteen year old son was testifying on stand. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953).

Noticed Orders — Place of Hearing.

All motions of which notice must be given and which may be contested must be made and heard in county in which action is pending or in any county in the same judicial

district. Orders which may be made in any part of state as provided in the statutory provision are ex parte orders which may be made without notice. *Callahan v. Dunn*, 30 Idaho 225, 164 P. 356 (1917).

Place of Making Orders Out of Court.

Orders made out of court and at chambers may be made by the judge of the court in any county of his district. *Exchange Nat'l Bank v. Northern Idaho Pine Lumber Co.*, 24 Idaho 671, 135 P. 747 (1913).

Orders made out of court may be made by the judge of the court in any part of the state. *Exchange Nat'l Bank v. Northern Idaho Pine Lumber Co.*, 24 Idaho 671, 135 P. 747 (1913).

Receiver Ex Parte — Appointment.

In an action appointing a receiver ex parte, in the second judicial district the judge was temporarily unable to act, therefore the judge of the tenth judicial circuit was requested to serve, and the matter was presented to such judge, and he had jurisdiction in the appointment of a receiver ex parte. *Murphy v. McCarty*, 69 Idaho 193, 204 P.2d 1014 (1949).

Writs of Review.

Statutory provisions confer jurisdiction on district judges to issue writs of review at chambers. *Gans v. Steele*, 7 Idaho 143, 61 P. 286 (1900).

Rule 77(c). Clerk's office and orders by clerk.

The office of the clerk of the district court with the clerk or a deputy in attendance shall be open for the transaction of business on such days and during such hours as the administrative district judge of the judicial district in which the county is located may prescribe. All motions and applications in the clerk's office for issuing process, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

JUDICIAL DECISIONS

Cited in: *Crooks v. Maynard*, 112 Idaho 312, 732 P.2d 281 (1987).

Rule 77(d). Notice of orders or judgments.

Immediately upon the entry of an order or judgment the clerk of the district court, or magistrates division, shall serve a copy thereof, with the clerk's filing stamp thereon showing the date of filing, by mail on every party affected thereby by mailing or delivering to the attorney of record of each party, or if the party is not represented by an attorney, by mailing to the party at the address designated by the prevailing party as most likely to give notice to such party. The prevailing party, or other party designated by the court to draft an order or judgment, shall provide and deliver to the clerk sufficient copies for service upon all parties together with envelopes addressed to each party, as provided above, with sufficient postage attached, unless otherwise ordered by the court. The clerk shall make a note in the court records of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party preparing an order or judgment shall in addition serve a copy on each party in the manner provided in Rule 5 for the service of papers. Lack of notice of entry of an order or judgment does not affect the time to appeal or to file a post-judgment motion, or relieve or authorize the court to relieve a

party for failure to appeal or file a post-trial motion within the time allowed, except where there is no showing of mailing by the clerk in the court records and the party affected thereby had no actual notice. (Amended effective March 1, 1976; amended effective October 1, 1976; amended effective July 1, 1977; amended March 24, 1982, effective July 1, 1982; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987; effective November 1, 1987.)

STATUTORY NOTES

Cross References. Entry of judgment, Rule 58(a).

Service, how made, Rule 5(b).
Service of notice, when required, Rule 5(a).

JUDICIAL DECISIONS

ANALYSIS

Actual Notice.
Certification of Address.
Delay of Notice.
Receipt of Actual Notice.
Timely Entry of Judgment.

Actual Notice.

Although there was no showing in the court records of a mailing of notice of entry of judgment, where appellants' counsel had actual notice of entry of judgment 13 days prior to expiration of the time for filing an appeal, appellants' notice of appeal filed 44 days after the entry of judgment was not timely. *Tanner v. Estate of Cobb*, 101 Idaho 444, 614 P.2d 984 (1980).

Where the trial court found that the defendants had actual notice of the judgment against them on November 13, 1979, when they received a writ of execution which specifically set forth the case and the amount of damages awarded, this was sufficient notice to constitute "actual notice" and defendants were not denied their right to appeal. *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982).

Certification of Address.

Where the clerk of the court mailed a notice of default pursuant to this rule to defendant's address as listed in the plaintiffs' complaint and as listed as a matter of record with the office of the Secretary of State, such mailing was legally sufficient, and the omission of a certification of address by the plaintiffs was harmless error, since the court in fact used the same address as would have been stated in a certification of address. *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984).

Delay of Notice.

Where the trial court entered a partial

summary judgment against the plaintiff on June 3, but the clerk of the court did not mail the order denying the plaintiff's motion for reconsideration until November 30, and there was no evidence in the record to indicate that the plaintiff or his attorney actually knew that the court denied the motion for reconsideration prior to November 30, the 42-day appeal period under subdivision (a) of I.A.R. 14 could not have commenced to run until at least November 30, despite the fact that the district court filed judgment and certified the case for appeal under I.R.C.P. 54(b) after the plaintiff filed the motion for reconsideration. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986).

Receipt of Actual Notice.

When the original time for appeal expires before the appellant receives actual notice, the appellant is deprived of any opportunity to appeal an adverse decision and, under these circumstances, the time for appeal begins to run anew from the date the appellant receives actual notice; however, where the appellant receives actual notice while the original period still has time to run, the appellant has sufficient notice to file his appeal before the original period expires and it is not necessary to toll the period, even though the clerk does not give notice. *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983).

Where appellant received actual notice of the adverse judgment through his counsel, while the original appeal period was still running and while opportunity to file an appeal still existed, the time for appeal began to run from entry of judgment and notice of appeal filed 13 days after the expiration of the period was not timely and the district court therefore lacked jurisdiction to hear the appeal. *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983).

When the original time for appeal expires before an appellant receives actual notice of a judgment, the time for appeal begins to run anew from the date the appellant actually receives such notice. *Cunningham v. State*, 117 Idaho 428, 788 P.2d 243 (Ct. App. 1990).

In a malpractice action brought by client against former attorney the evidence was undisputed that the trial court's law clerk sent a copy of the summary judgment order to client the day before the district court clerk placed the clerk's filing stamp on the order, and that the trial court records did not show that the clerk of the district court ever sent client a copy of the order bearing the filing stamp. Since the placement of the filing stamp on the summary judgment order determined when the entry of judgment occurred the trial court's finding that client did not have actual notice of the entry of judgment

dismissing client's claims against his former attorney was not clearly erroneous. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992).

Timely Entry of Judgment.

Although a judge may seek assistance from a prevailing party in preparing the judgment, it remains emphatically the province and the responsibility of the judge to ascertain that the judgment is timely entered. *Ward v. Lupinacci*, 111 Idaho 40, 720 P.2d 223 (Ct. App. 1986).

Cited in: *Radioear Corp. v. Crouse*, 97 Idaho 501, 547 P.2d 546 (1976); *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977); *Swayne v. Otto*, 99 Idaho 271, 580 P.2d 1296 (1978); *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Contempt Proceedings.

Delay of Notice.

Extension of Time.

Failure to Give Notice.

Contempt Proceedings.

An affidavit by the clerk of the court charging a party with contempt of court by violation of a support order in a divorce case which did not allege that the party was served with the order or that he had actual knowledge of it was insufficient even though the record showed that the party had appeared personally in the case. *Jones v. Jones*, 91 Idaho 578, 428 P.2d 497 (1967).

Delay of Notice.

Delay of several days in service of notice of judgment was not sufficient ground for reversal where court considered on appeal all possible error in the trial of case and record disclosed no substantial injustice to appellants because of the delay. *Gardner v. Fliegel*, 92 Idaho 767, 450 P.2d 990 (1969).

Extension of Time.

Respondent is not entitled to notice of application by appellant for an extension of time within which to prepare and file a statement of faith. *White v. Whitcomb*, 13 Idaho 490, 90 P. 1080 (1907), *aff'd*, 214 U.S. 15, 29 S. Ct. 599, 53 L. Ed. 889 (1909).

Failure to Give Notice.

Failure of the clerk to give notice of the entry of judgment does not affect an appeal taken before the entry of judgment. *Hamblen v. Goff*, 90 Idaho 180, 409 P.2d 429 (1965).

Where the clerk failed to give real estate broker notice of summary judgment entered against him on October 31, 1972, in plaintiff's action to recover amount paid broker as down payment on property, but where broker had actual knowledge of the judgment since at least February 15, 1973, when broker moved the court to set aside the judgment, the time for appeal from the judgment began to run as of the date broker received actual notice of judgment. *Cline v. Roemer*, 97 Idaho 666, 551 P.2d 621 (1976).

Rule 78. Motion day.

Unless local conditions make it impractical, the judges of each judicial district shall establish for each district court regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which time motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

Rule 79(a) — 79(d). Register of actions — Judgment book — Indices and calendars — Court property. [Rescinded.]

STATUTORY NOTES

Compiler's Notes. These rules which were adopted by order of the Supreme Court and which become effective January 1, 1975 were rescinded by order of the Supreme Court, December 27, 1979, effective July 1, 1980.

Rule 79(e). Reclaiming exhibits, documents or property.

At any time after the expiration of the time for appeal, the determination of an appeal, or the determination of a proceeding following an appeal and the expiration of the time for any subsequent appeal, whichever is later, any party or any interested person may apply to the trial court for an order permitting a reclamation by such party of exhibits offered or admitted in evidence, or any other documents or property displayed or considered in connection with the action. The trial court in its discretion may grant such an order on such conditions and under such circumstances as it deems appropriate, including but not limited to the substitution of a copy, photograph, drawing, facsimile, or other reproduction of the original exhibit, document or property, or the posting of a bond that the exhibit, document or property will be returned to the court if the court later finds it necessary.

Rule 79(f). Other books and records of the clerk.

The clerks of the district courts and all judges shall also keep such other books and records as are required by the statutes of the state, or as may be requested by the director of the administrative office of the courts of the state of Idaho.

JUDICIAL DECISIONS

Cited in: Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987).

Rule 80. Stenographic report or transcript as evidence.

Whenever the testimony of a witness at a trial or hearing in district court or in the magistrates division of the district court which was stenographically or electronically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony or transcribed the testimony from an electronic device.

STATUTORY NOTES

Cross References. Proof of official record, I.R.E., Rule 1005. Public records, authentication, I.R.E. 901, 902.

Rule 81(a). Small claims — Defaults.

Small claims shall be prepared by the claimant upon a form furnished by the court and shall be filed by the clerk upon payment of the statutory filing fees, but the clerk may assist in the preparation of the claim form when requested by the claimant. Any individual, partnership, corporation or association may file a small claim as a plaintiff in the action which may be signed by an employee of the plaintiff. The court shall furnish to the plaintiff a form of answer at the time of filing the claim. Plaintiff must show by return of service or affidavit that instructions and form of answer were served upon the defendant(s) at the time of service of their claim. The instructions and answer shall notify the defendant that defendant must file the answer with the court, and unless filed within 20 days of service, default will be entered against the defendant(s).

In the event defendant(s) fails to file an answer or request for trial, plaintiff may secure entry of default as provided in Rule 55, I.R.C.P. No judgment by default shall be entered for a plaintiff in a small claims hearing unless the plaintiff or employee establishes the claim by evidence satisfactory to the court. If the plaintiff or employee does not appear at the time set for hearing, or at any continuance thereof, the court may dismiss the claim with or without prejudice. (Adopted April 11, 1979, effective May 1, 1979; amended March 28, 1986, effective July 1, 1986; amended February 10, 1993, effective July 1, 1993; amended April 14, 2000, effective January 1, 2001.)

JUDICIAL DECISIONS

Cited in: Williams v. Christiansen, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985);

Freeman v. State, Dep't of Corr., 115 Idaho 78, 764 P.2d 445 (Ct. App. 1988).

DECISIONS UNDER PRIOR RULE OR STATUTE**Denial of Right to Counsel.**

Procedural due process is not denied either a plaintiff or a defendant in a small claims court where each cannot be represented by counsel, because a plaintiff, by knowingly commencing his action therein cannot there-

after object to denial of counsel, and a defendant may avail himself of the right to appeal to the district court and a trial de novo with assistance of counsel. Foster v. Walus, 81 Idaho 452, 347 P.2d 120 (1959).

Rule 81(b). Counterclaims prohibited.

There shall be no counterclaims filed to a claim in the small claims department, provided this shall not prevent the filing of a separate claim in the small claims department, regardless of the residence of the original plaintiff; and such small claim may be consolidated for hearing with the original small claim in the discretion of the magistrate hearing the initial small claim. (Adopted April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS**Consolidation of Separate Claim.**

Though a defendant in a small claims ac-

tion may not file a counterclaim, the relevant procedural rule provides a mechanism for the

defendant to file a separate claim and have it consolidated with the original claims. *Berning v. Drumwright*, 122 Idaho 203, 832 P.2d 1138 (Ct. App. 1992).

Rule 81(c). Transfer to magistrates division — When permitted.

In the event the defendant in a small claim filed in the small claims department files an action in the magistrates division of the district court or the district court, which action arises out of the same transaction or occurrence, or is in the nature of a compulsory counterclaim as defined by Rule 13(a), I.R.C.P., then and in such event the judge or magistrate presiding over the non-small claim action shall order the small claim transferred to the magistrates division or district court and consolidated with that action for trial under the I.R.C.P. Except as provided above, a defendant in a small claim shall have no right to have the small claim transferred to the magistrates division or the district court. (Adopted April 11, 1979, effective May 1, 1979.)

Rule 81(d). Appearance and witnesses at small claim proceeding.

(1) **Appearance and Attorneys.** Any party in a small claim action may appear in person or by an authorized non-attorney employee. No attorney can appear with or for a party in any hearing on a small claim action; provided, an attorney may appear in any proceeding after entry of a small claims judgment relating to the execution of the judgment, including any proceeding for the examination of the judgment debtor in aid of execution of the judgment. Any attorney at law or law firm may be a party to a small claims proceeding and may prosecute any claim the attorney or law firm may have, except any claim obtained by assignment, and may appear before the court as any other plaintiff or defendant in the case.

(2) **Witnesses.** Any party to a small claim proceeding may bring to the hearing witnesses who shall be sworn and may testify on behalf of either party to the small claim. Any party to a small claim may also subpoena witnesses to the small claim proceeding by a subpoena issued and served in the manner provided by the I.R.C.P., but all costs of service of the subpoena and all witnesses costs shall be paid for by the party issuing the subpoena to the witness and shall not be taxed as costs in the small claim proceeding. (Adopted June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended March 27, 1989, effective July 1, 1989; amended March 29, 2001, effective July 1, 2001.)

Rule 81(e). Disqualification of magistrate in small claim proceeding.

The presiding magistrate in a small claim proceeding may be disqualified in the same manner as a presiding judge of a civil action under the I.R.C.P. (Adopted April 11, 1979, effective May 1, 1979.)

Rule 81(f). Dismissal of small claims for inactivity or lack of service.

Small claims may be dismissed for inactivity in the same manner as provided for the dismissal of inactive cases under the I.R.C.P. In those cases where service on the defendant(s) has not been perfected within 30 days of filing, the case may be dismissed without prejudice, subject to being reopened without additional filing fees within six months from the date the original claim was filed, if it appears that service upon the defendant(s) can be completed. (Adopted April 11, 1979, effective May 1, 1979; amended April 14, 2000, effective January 1, 2001; amended March 29, 2001, effective July 1, 2001.)

Rule 81(g). Nature of trial.

The trial of a small claims action shall be informal, and the court may in its discretion adjourn the trial from time to time in the interest of justice and to allow the parties to present further relevant evidence. The court may in its discretion allow the parties to appear in any hearing by telephone and present witnesses' testimony by telephone. The court hearing a small claims action shall be required to make a verbatim record or recording of any proceeding or hearing upon the small claim in the small claims department of the magistrates division of the district court. (Adopted April 11, 1979, effective May 1, 1979; amended March 22, 2002, effective July 1, 2002; amended April 27, 2011, effective July 1, 2011.)

Rule 81(h). Judgment on small claim.

As soon as the court has arrived at a decision in a small claim, after a hearing as provided by statute, the court shall forthwith enter judgment in accordance with its decision upon a form furnished by the court, and the clerk shall serve copies of such judgment or notices of judgment upon both the plaintiff and the defendant either by personal delivery or by mailing to their addresses determined by the court most likely to give notice to such parties. (Adopted April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS**Filing of Appeal.**

The time for appeal from a small claims decision begins to run upon the filing of the judgment in the clerk's office and not upon the signing of the judgment by the judge; accord-

ingly, where notice of appeal was filed more than 30 days after judgment was signed but within 30 days after judgment was filed by clerk, appeal was timely. *Smethers v. Wilson*, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984).

Rule 81(i). Vacating, reconsidering, or correcting clerical errors of a judgment in a small claim.

The magistrate entering a judgment in a small claim may thereafter vacate, reconsider, or correct clerical errors in the judgment, at any time including during the pendency of an appeal, upon the grounds provided by Rules 55(c), 60(a) and (b), I.R.C.P. or for other good cause shown; provided, such action may be taken by the magistrate on the informal application of

any party, or upon the magistrate’s own initiative, and such application and decision shall be made in an informal manner without the necessity of a formal notice and hearing. Any action taken by the magistrate under this rule shall be done by written order of the magistrate and copies thereof served upon all parties in the same manner as a judgment on a small claim as provided above under Rule 81(h) and if an appeal is pending in the district court a copy thereof shall be mailed to the clerk of the district court in which the appeal is pending. (Adopted April 11, 1979, effective May 1, 1979; amended December 27, 1979, effective July 1, 1980; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.
Grounds for Reversal.

Discretion of Court.

The grant or denial of relief under this rule is a discretionary decision for the court. Williams v. Christiansen, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985).

Grounds for Reversal.

Failure to provide notice of the reconsideration of the small claims action is not grounds for reversal unless it resulted in some prejudice to the losing party. Williams v. Christiansen, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985).

Rule 81(j). Execution.

Execution upon a judgment entered in the small claims department shall be in the same manner as in the district court and shall be prepared by the claimant and issued by the clerk of the court upon request of the successful party; provided the clerk may assist in the preparation of the execution form when requested by the claimant. Execution upon a small claim judgment may not issue until any appeal has been rendered final or the 30-day statutory appeal period has expired without the filing of a notice of appeal; provided, if the small claim judgment was entered by reason of default of the defendant, execution may issue thereon immediately as there is no right to appeal. An execution may be served by the designated official anywhere in the state. Fees for the issuance, service and enforcement of the execution shall be paid by the party enforcing the judgment and taxed against the unsuccessful party in the same amount and in the same manner as execution issued out of the district court. (Adopted April 11, 1979, effective May 1, 1979; amended March 30, 1984, effective July 1, 1984.)

Rule 81(k). Who may appeal a small claim judgment.

Any aggrieved party from a small claim judgment may appeal to the district court as provided in these rules and by law; provided, however, any party who defaults or does not appear at the small claim proceeding shall have no right to appeal the judgment in the small claim proceeding to the district court. (Adopted April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS

ANALYSIS

Default.

Failure to Pursue Claim.

Default.

This rule, which provides that defaulting parties have no right to appeal to the district court, would not operate to bar a party who defaulted in the small claims court from appealing to the district court from the small claims court's denial of its motion to set aside the default judgment; to hold otherwise would insulate any decision of a magistrate sitting in the small claims court from review, regardless of lack of jurisdiction or of how outra-

geous or erroneous that decision might be. *Nelson v. Property Mgt. Servs.*, 105 Idaho 578, 671 P.2d 1041 (1983).

Failure to Pursue Claim.

Where there were two successive small claims actions initiated by the plaintiff, each based on the same claim, and each action was set for trial and each time plaintiff did not proceed with his claim, the district court properly held that plaintiff could not use the appeal process to obtain a de novo trial in the district court. *Enneking Bldg. Constr., Inc. v. Clark*, 105 Idaho 802, 673 P.2d 402 (1983).

Cited in: *Williams v. Christiansen*, 109 Idaho 393, 707 P.2d 504 (Ct. App. 1985).

Rule 81(l). Notice of appeal and appeal bond.

Any aggrieved party desiring to appeal the judgment in a small claim proceeding to the district court shall do so by filing a notice of appeal with the magistrates division wherein the small claim proceeding was held in the manner, within the 30-day statutory appeal period and in the form provided by law. The notice of appeal shall not be filed by the clerk of the court without the prepayment of the filing fee, except as provided by section 31-3220, Idaho Code. (Adopted April 11, 1979, effective May 1, 1979; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984.)

JUDICIAL DECISIONS

ANALYSIS

Commencement of Filing Period.

Constitutionality.

Jurisdiction of District Court.

Taking Without Due Process.

Timely Filing.

Commencement of Filing Period.

This rule, governing small claims appeals, formerly required a notice of appeal to be filed within "the time provided by law"; this rule is broad enough to encompass the definition of "entry of judgment" found in I.R.C.P. 58(a), which states that the placing of the clerk's filing stamp on the judgment constitutes entry, since I.R.C.P. 58(a) is the only provision of the law which defines entry of judgment. The entry of judgment, in turn, commenced the "time provided by law" for filing an appeal under the former provisions of this rule. *Smethers v. Wilson*, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984) (decision prior to 1984 amendment).

Constitutionality.

Since §§ 1-2311 and 1-2312 and this rule

require that a person be deprived of his property before he has had a full due process hearing, the bond requirements of said sections are unconstitutional. However, the filing fee (\$20.00) is not in the nature of a bond, which anticipates an outcome unfavorable to the party appealing and secures his property to guarantee payment of costs, attorney fees and judgment, but is a nonrecoverable fee, waiveable pursuant to § 31-3220 and therefore is not unconstitutional. *Frizzell v. Swafford*, 104 Idaho 823, 663 P.2d 1125 (1983) (decision prior to 1984 amendment).

The appeal bond requirements of §§ 1-2311 and 1-2312 and this rule, governing small claims appeals to the district court, violate the constitutional rights of indigent appellants to due process. *Skogerson v. McConnell*, 104 Idaho 863, 664 P.2d 770 (1983) (decision prior to 1984 amendment).

Jurisdiction of District Court.

The district court had jurisdiction to pass upon the constitutionality of §§ 1-2311 and 1-2312 and this rule requiring posting of bonds for appeals from small claims court to

district court. *Skogerson v. McConnell*, 104 Idaho 863, 664 P.2d 770 (1983).

Taking Without Due Process.

To allow execution on a small claims judgment before either an appeal has been made final or the time for filing such appeal has expired is a taking without due process. *Frizzell v. Swafford*, 104 Idaho 823, 663 P.2d 1125 (1983) (decision prior to 1984 amendment).

Timely Filing.

The time for appeal from a small claims decision begins to run upon the filing of the judgment in the clerk's office and not upon the signing of the judgment by the judge; accordingly, where notice of appeal was filed more than 30 days after judgment was signed but within 30 days after judgment was filed by clerk, appeal was timely. *Smethers v. Wilson*, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984).

Rule 81(m). Stay of execution. [Rescinded effective July 1, 1985.]

STATUTORY NOTES

Compiler's Notes. This rule (adopted April 11, 1979, effective May 1, 1979; amended March 30, 1984, effective July 1,

1984) was rescinded by order of the Supreme Court of March 20, 1985, effective July 1, 1985.

Rule 81(n). Appeal of small claims judgment.

Any appeal of a small claim judgment of the small claims department of the magistrate division shall be conducted as a trial de novo by an attorney magistrate. (Adopted April 11, 1979, effective May 1, 1979; amended March 20, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Failure to Pursue Claim.

Where there were two successive small claims actions initiated by the plaintiff, each based on the same claim, and each action was set for trial and each time plaintiff did not proceed with his claim, the district court properly held that plaintiff could not use the appeal process to obtain a de novo trial in the

district court. *Enneking Bldg. Constr., Inc. v. Clark*, 105 Idaho 802, 673 P.2d 402 (1983).

Cited in: *Skogerson v. McConnell*, 104 Idaho 863, 664 P.2d 770 (1983); *Smethers v. Wilson*, 106 Idaho 159, 676 P.2d 734 (Ct. App. 1984); *Daniels v. Anderson*, 113 Idaho 838, 748 P.2d 829 (Ct. App. 1987).

Rule 81(o). Procedure on appeal.

In the de novo trial of a small claims judgment appeal to an attorney magistrate the following procedures shall apply:

(1) When a notice of appeal is filed, the clerk of the magistrates division wherein the small claim was filed shall assign a district court file number of the magistrates division to the appeal and cause it to be assigned to an attorney magistrate in accordance with the assignment procedures of the county and serve copies of the notice of assignment on the parties or their attorneys by mail.

(2) The appeal shall be conducted as a trial de novo as a civil case of the magistrates division of the district court of the county where the small claim was filed.

(3) Except as expressly hereinafter provided in this rule, the I.R.C.P. shall apply to the trial of an appeal of a small claim judgment as a trial de novo except when the attorney magistrate determines that such procedure is not appropriate with the concept of the small claim procedure.

(4) The attorney magistrate in his discretion may permit or require the filing of amended or additional pleadings.

(5) Discovery as provided by the I.R.C.P. shall be allowed only by written leave of the attorney magistrate and then only within such limitations as prescribed in the order granting leave to make such discovery.

(6) The presiding attorney magistrate in an appeal of a small claim may be disqualified in the manner prescribed by the I.R.C.P.

(7) A timely request for a jury in a de novo trial of a small claim appeal in the magistrate's division of the district court, must be made within fourteen (14) days of service of the notice setting the appeal for a hearing. The jury shall consist of six jurors or a lesser number as agreed to by the parties. (Adopted April 11, 1979, effective May 1, 1979; amended March 23, 1983, effective July 1, 1983; amended March 20, 1985, effective July 1, 1985; amended March 30, 1994, effective July 1, 1994; amended March 29, 2001, effective July 1, 2001.)

JUDICIAL DECISIONS

Cited in: Gilbert v. Moore, 108 Idaho 165, 697 P.2d 1179 (1985).

Rule 81(p). Costs on appeal.

Costs on appeal shall be awarded in a sum not to exceed fifty dollars (\$50) and shall be awarded to the prevailing party in the appeal. (Adopted April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS

Fee Improperly Included.

District court erred by including the \$17.50 small claims filing fee as part of the award of \$50 in costs allowed on appeal pursuant to this rule, as the \$17.50 fee for filing the small claims action, which the magistrate awarded in the small claims trial, was not a cost on

appeal, and plaintiff respondent was therefore entitled to the additional \$17.50 awarded by the magistrate; hence the judgment would be modified to add \$17.50 costs to respondent's award. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

Rule 81(q). Attorney fees on appeal.

Attorney fees awarded by the court on appeal shall be in the sum of twenty-five dollars (\$25), and shall be awarded to the prevailing party without any showing required by Rule 54(e). (Adopted April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS

ANALYSIS

Denial of Award of Fees.
In General.

Denial of Award of Fees.

In action for conversion of inventory of

debtor by supplier brought by bank that held a perfected security interest in the inventory, where the case involved a substantial issue as to the concept of sales in the ordinary course of business, such appeal was not brought frivolously, unreasonable or without founda-

tion and attorney fees will not be awarded. First Sec. Bank v. Absco Whse., Inc., 104 Idaho 853, 664 P.2d 281 (Ct. App. 1983).

vision for the award of attorney fees in small claims court found in § 1-2311. Huff v. Uhl, 103 Idaho 274, 647 P.2d 730 (1982).

In General.
This rule merely restates the statutory pro-

Rule 82(a). Jurisdiction and venue unaffected.

These rules shall not be construed to extend or limit the jurisdiction of any court of this state, or the venue of actions therein, except as provided in this Rule 82 and its subparagraphs.

JUDICIAL DECISIONS

Necessary Party Defendants.
The Idaho legislature did not amend or repeal § 5-404 after the Idaho Rules of Civil Procedure were adopted, or when § 5-313 and

§ 5-606 were repealed, to limit venue only to necessary party defendants. Pintlar Corp. v. Bunker Ltd. Partnership, 117 Idaho 152, 786 P.2d 543 (1990).

Rule 82(b). Attorney magistrates.

As used in these rules and referred to in statutes, an attorney magistrate is any magistrate who is admitted to the practice of law before the Idaho Supreme Court.

STATUTORY NOTES

Cross References. Assignments restricted to magistrates who are attorneys, § 1-2210.

JUDICIAL DECISIONS

ANALYSIS

Contempt.
In General.

Contempt.
The attorney magistrate, in conducting habeas corpus proceedings, exercises the judicial power of the State of Idaho and, in order to vindicate his jurisdiction and proper function, the magistrate is vested with the judicial contempt power; while this power has been recognized by statute (Title 7, chapter 6), its

source lies in the Constitution and the common law. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

In General.
An attorney magistrate is a judicial officer of the district court whose jurisdiction is established by legislation, under the Idaho Constitution, by rule of the Idaho Supreme Court, and by the rules of the respective district courts. Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

Rule 82(c)(1). Jurisdiction of all magistrates.

Jurisdiction when approved by a majority of the district judges in the district may be granted all magistrates pursuant to Idaho Code, section 1-2208, as follows:

(A) All of the matters and actions designated in section 1-2208, Idaho Code, including any proceeding under title 66, chapter 3, Idaho Code relating to the hospitalization of the mentally ill or title 66, chapter 4, Idaho Code, relating to the care of the developmentally disabled; provided that

nonattorney magistrates may be assigned only preliminary proceedings under this subparagraph in the following cases:

(1) Preliminary proceedings under the Child Protective Act, title 16, chapter 16, Idaho Code (in sections 16-1628 through 16-1634)

(2) Preliminary proceedings under the Youth Rehabilitation Act, title 16, chapter 18, Idaho Code (in sections 16-1807 through 16-1812)

(3) Preliminary proceedings under the termination of Parent-Child Relationship Act, title 16, chapter 20, Idaho Code (in sections 16-2007 and 16-2008)

(B) All proceedings under Idaho Code Section 18-8002(4) to determine whether a person refused to take an evidentiary test for concentration of alcohol, drugs or other intoxicating substances when properly requested by a police officer.

(C) Those nonattorney magistrates who have been certified by the Supreme Court as having had adequate training and experience may be assigned to all proceedings under the Child Protective Act, title 16, chapter 16, Idaho Code, and the Youth Rehabilitation Act, title 16, chapter 18, Idaho Code.

(D) Such order of the district judges stating the jurisdiction of all magistrates shall be posted in a conspicuous place in the clerk's office in each county in the district and published in the Idaho State Bar Desk Book. (Amended May 27, 1982, effective July 1, 1982; amended March 30, 1994, effective July 1, 1994.)

STATUTORY NOTES

Compiler's Notes. Former §§ 16-1628 through 16-1634, referred to in subdivision (A)(1), were repealed by S.L. 1976, ch. 204, § 1. The Child Protective Act is presently compiled as § 16-1601 et seq.

The Youth Rehabilitation Act, chapter 18, title 16, Idaho Code, referred to in this rule,

has been amended and redesignated by S.L. 1995, ch. 44, as ch. 5, title 20, effective October 1, 1995.

Former §§ 16-1807—16-1812 were amended and redesignated as §§ 20-510—20-517 by §§ 11—18 of S.L. 1995, ch. 44, effective October 1, 1995.

JUDICIAL DECISIONS

ANALYSIS

Objection to Assignment of Magistrates.
Parole Proceeding.
Probate and Estate Administration.
—Jurisdictional Amount.
Procedural Defect.

Objection to Assignment of Magistrates.

Attorney magistrates may be assigned post-conviction proceedings stemming from misdemeanor judgments entered in their courts; furthermore, if there is an objection to the assignment of a case to a magistrate, it must be expressed in writing prior to hearing or trial, or the objection is waived. *Parsons v.*

State, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987).

Parole Proceeding.

Although the Parole Commission's decisions are not directly reviewable under the Administrative Procedures Act, because the appeal was from a denial of habeas corpus petition based on a constitutional challenge, judicial review was available. Therefore the district court, or the magistrate division thereof, had jurisdiction in the habeas corpus proceeding to make a limited review of the Commission's decision to revoke defendant's parole. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Probate and Estate Administration.

Both district judges and magistrate judges have “jurisdiction” to entertain actions for the enforcement or breach of contracts to make wills or devises. Since magistrate judges have been assigned responsibility for probate proceedings, all matters related to decedent’s estates should first be considered and determined by the magistrate judge in the probate proceeding. *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

—Jurisdictional Amount.

This rule and I.R.C.P. 82(c)(2) create independent grounds for magistrate jurisdiction — one based upon subject matter and the other based upon the amount in controversy. Clearly the \$10,000 value limit of subsection (A) of I.R.C.P. 82(c)(2) does not apply to the separate conferral upon magistrates of juris-

diction for probate and estate administration proceedings under subsection (A) of this rule and § 1-2208. *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994).

Procedural Defect.

A complaint which seeks relief available only from the district court, but which is captioned in the magistrate division, may be procedurally irregular but it is not jurisdictionally defective. The magistrate division is not an entity wholly separate from the district court; it is part of the district court, served by the same clerk and by a unitary filing system. *St. Benedict’s Hosp. v. County of Twin Falls*, 107 Idaho 143, 686 P.2d 88 (Ct. App. 1984).

Cited in: *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981); *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986).

Rule 82(c)(2). Assignment of additional cases to attorney magistrates.

The jurisdiction of an attorney magistrate is the same as that of a district judge, but the cases assignable to an attorney magistrate shall be those assignable to all magistrates and the following additional cases may be assigned to attorney magistrates when approved by the administrative district judge of a judicial district:

(A) Civil actions regardless of the nature of the action, where the amount of damages or value of the property claimed does not exceed \$10,000;

(B) All proceedings involving the custody of minors incidental to divorce proceedings, all adoption proceedings pursuant to chapter 15, title 16, Idaho Code, all termination of parent-child relationship pursuant to chapter 20, title 16, Idaho Code, all paternity proceedings, and all actions for change of name;

(C) All proceedings for divorce, separate maintenance or annulment, including orders to show cause, hearings and issuance of restraining orders; and including all proceedings pursuant to the revised Uniform Reciprocal Enforcement of Support Act and Idaho Code, section 32-710A;

(D) Such order of the district judges stating the jurisdiction of attorney magistrates shall be posted in a conspicuous place in the clerk’s office in each county in the district and published in the Idaho State Bar Desk Book;

(E) All habeas corpus proceedings regardless of the nature or origin, including all habeas corpus proceedings involved in a criminal proceeding or conviction. (Amended July 2, 1976, effective October 1, 1976; amended March 31, 1978, effective July 1, 1978; amended November 25, 1980, effective January 1, 1981; amended March 30, 1984, effective July 1, 1984.)

JUDICIAL DECISIONS

ANALYSIS

Construction with Other Law.

Divorce.

Jurisdiction.

—Subject Matter.

Objection to Assignment.

Procedural Defect.

Waiver of Jurisdictional Objections.

Construction with Other Law.

While it is true that subsection (c)(2)(A) of this rule limits the jurisdiction of magistrates to claims under \$10,000, § 1-2208 separately sets forth the general jurisdiction of magistrates, which includes proceedings in the probate of wills and administration of estates of decedents. Clearly, the \$10,000 value limit in subsection (c)(2)(A) of this rule does not apply to the separate conferral upon magistrates of jurisdiction for probate and estate administration proceedings under § 1-2208. *Bingham Mem. Hosp. v. Boyd*, 134 Idaho 669, 8 P.3d 664 (Ct. App. 2000).

Divorce.

Since by virtue of § 1-2210, this rule and a rule of the third judicial circuit, a lawyer magistrate had subject matter jurisdiction in divorce action, where after holding a hearing on the matter he found that a common-law marriage existed and ordered defendant to pay alimony pendente lite and attorney fees, district court erred in issuing writ of prohibition forbidding any further action by the magistrate in the proceedings. *Freiburghaus v. Freiburghaus*, 100 Idaho 730, 604 P.2d 1209 (1980).

Where all of the proceedings involved in a case, including the property division, concerned the divorce action pending between the parties, the magistrate had jurisdiction of the action. *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983).

If an attorney magistrate is properly assigned a particular proceeding, he or she is necessarily assigned all ancillary proceedings incident to the underlying proceeding regardless of the dollar amount of the controversy involved in the ancillary matters; thus, the assignment of the divorce proceeding to the presiding attorney magistrate carried with it the assignment of all ancillary proceedings to that divorce, including accountings between the parties, arising out of or related to the divorce proceedings. *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

Jurisdiction.

The magistrate court erred in summarily

terminating a driver's license suspension proceeding and returning the license to a driver on the ground that the court did not have jurisdiction to proceed on the basis of fact that the affidavit filed by the officer was invalid; with both jurisdiction over the subject matter and personal jurisdiction over the parties, the magistrate court erred when it concluded that "the court does not have jurisdiction to proceed." *Hanson v. State* (In re Hanson), 121 Idaho 507, 826 P.2d 468 (1992).

Although the Parole Commission's decisions are not directly reviewable under the Administrative Procedures Act, because the appeal was from a denial of habeas corpus petition based on a constitutional challenge, judicial review was available. Therefore the district court, or the magistrate division thereof, had jurisdiction in the habeas corpus proceeding to make a limited review of the Commission's decision to revoke defendant's parole. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

The fact that the plaintiff's claims for damages were not properly assignable to the magistrate division was not a jurisdictional bar calling for dismissal of the action, since the remaining claims should have been transferred to the district court. *Martin v. Spalding*, 133 Idaho 469, 988 P.2d 695 (Ct. App. 1999).

Since the district court is permitted to delegate to attorney magistrates the authority granted it to hear paternity and child support cases, the magistrate court had subject matter jurisdiction to determine paternity, enter an order of filiation and order child support. *State Dep't of Health & Welfare ex rel. Oregon v. Conley*, 132 Idaho 266, 971 P.2d 332 (Ct. App. 1999).

—Subject Matter.

This rule and I.R.C.P. 82(c)(1) create independent grounds for magistrate jurisdiction — one based upon subject matter and the other based upon the amount in controversy. Clearly the \$10,000 value limit of subsection (A) of this rule does not apply to the separate conferral upon magistrates of jurisdiction for probate and estate administration proceedings under subsection (A) of I.R.C.P. 82(c)(1) and § 1-2208. *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994).

Questions of subject matter jurisdiction cannot be waived and may be raised at any time, but the issue of propriety and sufficiency of an assignment to an attorney magistrate is not a question of subject matter jurisdiction. *Wilbanks v. State*, 126 Idaho 341, 882 P.2d 996 (Ct. App. 1994).

Objection to Assignment.

Attorney magistrates may be assigned post-conviction proceedings stemming from misdemeanor judgments entered in their courts; furthermore, if there is an objection to the assignment of a case to a magistrate, it must be expressed in writing prior to hearing or trial, or the objection is waived. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987).

Procedural Defect.

A complaint which seeks relief available only from the district court, but which is captioned in the magistrate division, may be procedurally irregular but it is not jurisdictionally defective. The magistrate division is not an entity wholly separate from the district court; it is part of the district court, served by the same clerk and by a unitary filing system. *St. Benedict's Hosp. v. County of Twin Falls*, 107 Idaho 143, 686 P.2d 88 (Ct. App. 1984).

Although a magistrate was correct when he ruled that the plaintiff's claims for damages

exceeded the limit for civil actions assignable to the magistrate division, he erred in finding this to be a jurisdictional bar that called for dismissal of the action, since the proper procedure was to transfer the remaining claims to the district court. *Martin v. Spalding*, 133 Idaho 469, 988 P.2d 695 (Ct. App. 1999).

Waiver of Jurisdictional Objections.

Where, in a civil contempt action based on the defendant father's failure to pay child support, the attorney magistrate ruled that a reciprocal action against the defendant father should be consolidated and heard at the same time, the defendant father's failure to object or raise as an affirmative defense the asserted lack of personal jurisdiction over him was deemed to have been a waiver of his objections to the court's jurisdiction over him. *State v. Aguilar*, 103 Idaho 578, 651 P.2d 512 (1982).

Cited in: *Pyzer v. State*, 109 Idaho 376, 707 P.2d 487 (Ct. App. 1985); *Gawron v. Roberts*, 113 Idaho 330, 743 P.2d 983 (Ct. App. 1987).

Rule 82(c)(3). Objection to assignment to magistrates.

Any irregularity in the method or scope of assignment of a civil action or proceeding to any magistrate under this rule 82, and sections 1-2208 and 1-2210, Idaho Code, and all objections to the propriety of an assignment to a magistrate are waived unless a written objection is filed before the trial or hearing begins. No order or judgment is void or subject to collateral attack [attack] merely because rendered pursuant to an improper assignment to a magistrate. (Adopted July 2, 1976, effective October 1, 1976; amended March 20, 1985, effective July 1, 1985.)

STATUTORY NOTES

Compiler's Notes. The bracketed word "attack" in the last sentence was inserted by the compiler.

JUDICIAL DECISIONS

ANALYSIS

Procedure for Objection.
Subject Matter Jurisdiction.
Waiver.

Procedure for Objection.

Attorney magistrates may be assigned post-conviction proceedings stemming from misdemeanor judgments entered in their courts; furthermore, if there is an objection to the assignment of a case to a magistrate, it must be expressed in writing prior to hearing or trial, or the objection is waived. *Parsons v.*

State, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987).

Subject Matter Jurisdiction.

Questions of subject matter jurisdiction cannot be waived and may be raised at any time, but the issue of propriety and sufficiency of an assignment to an attorney magistrate is not a question of subject matter jurisdiction. *Wilbanks v. State*, 126 Idaho 341, 882 P.2d 996 (Ct. App. 1994).

Waiver.

Where neither of the parties objected to the

Supreme Court's appointment of a magistrate to sit as a district judge for the purpose of trying their case and neither of the parties objected when the appointed judge later proceeded to try the case and rendered his decision, any procedural objections to the appointment were waived. *McGill v. Lester*, 105 Idaho 692, 672 P.2d 570 (Ct. App. 1983).

Failure to object to the assignment of the case to the magistrate prior to the beginning of the trial or hearing constitutes a waiver of any improper assignment to the magistrate. *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

Rule 82(c)(4). Special assignment to attorney magistrates.

The administrative district judge of a judicial district may by order appoint a specific attorney magistrate to hear and try one or more specific actions which are otherwise triable only by a district judge. The clerk of the district court shall cause an order of the assignment to be served upon all parties to that action. (Adopted March 30, 1984, effective July 1, 1984; amended August 16, 2000, effective September 1, 2000; amended April 22, 2008, effective July 1, 2008.)

JUDICIAL DECISIONS

Jurisdiction of Attorney Magistrate.

If an attorney magistrate is properly assigned a particular proceeding, he or she is necessarily assigned all ancillary proceedings incident to the underlying proceeding regardless of the dollar amount of the controversy involved in the ancillary matters; thus, the

assignment of the divorce proceeding to the presiding attorney magistrate carried with it the assignment of all ancillary proceedings to that divorce, including accountings between the parties, arising out of or related to the divorce proceedings. *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

Rule 82(c)(5). Enlargement of dollar amount of cases assignable.

The administrative district judge of a judicial district may by order enlarge the categories of cases assignable under Rule 82(c)(2) as to the attorney magistrates of the judicial district or of a county within the district, or as to specified attorney magistrates. (Adopted March 30, 1984, effective July 1, 1984; amended April 22, 2008, effective July 1, 2008.)

Rule 82(d). Costs — Jurisdictional amounts.

The jurisdictional amounts set forth in sections 1-2208 and 1-2210, Idaho Code and Rules 82(c)(1) and 82(c)(2) shall be exclusive of interest, costs, punitive damages and attorney fees, if any. In determining filing fees and jurisdictional amounts involved in an action, the total amount of all counts shall be added together to determine the amount claimed in the action. If, however, there are several counts to a claim each praying for the same or similar relief, any district judge assigned the case may determine by written order the actual amount in controversy for the purpose of determining whether the case is within the jurisdictional amount for assignment to a magistrate. (Amended April 3, 1981, effective July 1, 1981.)

Rule 82(e). Counterclaims or cross-claims exceeding jurisdiction.

If a counterclaim or cross-claim filed in the magistrate's division exceeds the jurisdiction of the magistrate, the original action and the counterclaim or cross-claim shall be transferred to a magistrate or judge having such jurisdiction. (Amended March 24, 1982, effective July 1, 1982; amended March 30, 1994, effective July 1, 1994.)

Rule 82(f), 82(g). Court facilities — Practice of law. [Rescinded.]**STATUTORY NOTES**

Compiler's Notes. These sections which were rescinded by order of the Supreme Court, December 27, 1979, effective July 1, 1980.
were adopted by order of the Supreme Court and which became effective January 1, 1975,

Rule 83(a). Appeals from decisions of magistrates.

An appeal from any final judgment, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure, granting or denying a petition for termination of parental rights or granting or denying a petition for adoption must be taken to the Supreme Court in accord with Idaho Appellate Rule 11.1. Otherwise, absent an order allowing a permissive appeal pursuant to Idaho Appellate Rule 12.1, an appeal must first be taken to the district judges division of the district court from any of the following judgments or orders rendered by a magistrate:

(1) A final judgment in a civil action or a special proceeding commenced, or assigned to, the magistrate's division of the district court.

(2) Any of the judgments or orders in an action in the magistrate's division which would be appealable from the district court to the Supreme Court under Rule 11 of the Idaho Appellate Rules.

(3) Domestic Violence Protection Orders issued pursuant to I.C. § 39-6306.

(4) Final orders entered upon current forms approved by the Idaho Supreme Court.

(5) Interlocutory orders by permissive appeal accepted by the district court which shall be processed in the same manner as provided by Rule 12 of the Idaho Appellate Rules.

(6) Any order, judgment or decree by a magistrate in a special proceeding for which an appeal is provided by statute.

Provided, however, that whenever an attorney magistrate is assigned by an order issued pursuant to Rule 82(c)(4) or Rule 82(c)(5) to hear any action which may otherwise be tried only by a district judge, any appeal taken from a judgment of such magistrate acting under such order shall be made to the Supreme Court of Idaho, unless otherwise provided by the original order of assignment. (Amended effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 20, 1985, effective July 1, 1985; amended March 19, 2009, effective July 1, 2009; amended April 30, 2010, effective July 1, 2010; amended effective August 12, 2010.)

JUDICIAL DECISIONS

ANALYSIS

Attorney Fees and Costs.

Contempt Order.

—Failure to Request Certification.

Final Judgment.

Purpose.

Reversal Required.

Scope of Review.

Attorney Fees and Costs.

Appellate court reversed the award of attorneys fees and costs granted to respondents, Idaho Commission of Pardons and Parole, commissioners and hearing officer, after the intermediate appeal, as the appellate court determined that the inmate had valid points in his habeas corpus petition and it should not have been dismissed. *Dopp v. Idaho Comm'n of Pardons & Parole*, 139 Idaho 657, 84 P.3d 593 (Ct. App. 2004).

Because the magistrate's order denying the mother's request for attorney fees did not fall within the scope of Idaho App. R. 12.1, her only appellate recourse was an appeal to the district court pursuant to this rule; therefore, the appellate court possessed no jurisdiction to hear her attempted appeal and it had to be dismissed. *Olson v. Montoya*, 147 Idaho 833, 215 P.3d 553 (2009).

Contempt Order.

An appeal may be taken from a judgment of contempt. *Whittle v. Seehusen*, 113 Idaho 852, 748 P.2d 1382 (Ct. App. 1987).

A contempt order of a magistrate judge that is certified by the magistrate judge to be final as provided by I.R.C.P. 54(b) is appealable to the district judge. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

If a contempt order is properly certified to be final, the party who seeks review of the order must appeal, rather than pursuing a writ of review; however, if a party wishes only to challenge the jurisdiction of the court to issue the contempt order, and if the order has not been properly certified as final pursuant to I.R.C.P. 54(b), the party may pursue a writ of review. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

—Failure to Request Certification.

Where defendant did not request certification of the magistrate judge's finding of contempt and order pursuant to I.R.C.P. 54(b), defendant did not have the right to appeal, but only to challenge, by means of a writ of review, the magistrate judge's jurisdiction to

issue a contempt order. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

Final Judgment.

A decision resolving all substantive issues raised before a trial court is final even though the amount of a fee award has yet to be determined, where the court has already decided the question of entitlement to that award. *Harney v. Weatherby*, 116 Idaho 904, 781 P.2d 241 (Ct. App. 1989).

Purpose.

A writ of review is a proper method to seek a higher court's review of a lower court's jurisdiction to issue a contempt order. *Beeman v. Petrie*, 123 Idaho 838, 853 P.2d 583 (1993).

Reversal Required.

Where the district court lacked jurisdiction to hear an appeal from a magistrate's order denying a motion for summary judgment, all subsequent orders entered by the district court based upon the law as established in that proceeding in which the district court acted without jurisdiction would be reversed. *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, — Idaho —, 265 P.3d 502 (2011).

Scope of Review.

When reviewing a decision rendered by a district judge in his appellate capacity under this rule, the court of appeals considers the record before the magistrate independently of the district judge's determination, giving due regard to that court's analysis. *Howard v. Cornell*, 134 Idaho 403, 3 P.3d 528 (2000).

Cited in: *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983); *McGill v. Lester*, 105 Idaho 692, 672 P.2d 570 (Ct. App. 1983); *Spencer v. Idaho First Nat'l Bank* (In re Estate of Spencer), 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984); *Keeven v. Wakley* (In re Estate of Keeven), 110 Idaho 452, 716 P.2d 1224 (1986); *Reeves v. Reynolds*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987); *Suchan v. Suchan*, 113 Idaho 102, 741 P.2d 1289 (1986); *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987); *Morris v. State*, 123 Idaho 549, 850 P.2d 198 (Ct. App. 1993); *Swanson v. Swanson*, 134 Idaho 512, 5 P.3d 973 (2000); *Roe Family Servs. v. Doe* (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004); *Rake v. Rake*, 142 Idaho 83, 123 P.3d 716 (Ct. App. 2005); *Nelson v. Nelson*, 144 Idaho 710, 170 P.3d 375 (2007).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appealable Orders.

Final Judgment.

Nonappealable Orders and Judgments.

Scope of Review.

Appealable Orders.

The order of commitment of an 11-year-old girl to an aid society, taking her from the custody of her parents, was a final judgment and appealable. It conclusively and finally determined the status of the child; concluded all rights of the parents in respect of its care and disposition; and vested complete authority and control over the child in the aid society. It was a final determination of all issues presented or which might have been presented at the hearing, subject only to review by the district court on appeal. *State v. Bombino*, 84 Idaho 554, 374 P.2d 854 (1962).

Final Judgment.

Where at time appeal was taken there was no entry in docket of either verdict of jury or cost of action, there was no rendition of judgment. *Dalton v. Abercrombie*, 35 Idaho 290, 206 P. 1051 (1922).

Nonappealable Orders and Judgments.

An order refusing the appellant's petition for distribution, taking it under consideration and finding and ordering that the estate was not ready in that there were unpaid bills, was not a final order which was appealable. *Lundy v. Lundy*, 79 Idaho 185, 312 P.2d 1028 (1957).

Scope of Review.

No trial of issue of fact may be had on appeal in garnishment proceedings where there has been no trial of issue of fact in court below. *First Nat'l Bank v. Drew*, 37 Idaho 470, 216 P. 1034 (1923).

Rule 83(b). Magistrate appeals — Judicial review.

All appeals from the magistrate's division shall be heard by the district court as an appellate proceeding. If there is not an adequate record of the proceedings in the magistrate's division, the district court may order a trial de novo or remand the matter to the magistrate's division. All appeals from the small claims department of the magistrates division shall be heard by an attorney magistrate as a trial de novo on the merits. (Amended March 26, 1992, effective July 1, 1992; amended April 22, 2004, effective July 1, 2004.)

JUDICIAL DECISIONS

ANALYSIS

Appeal Where Procedure Stipulated.

Augmentation of Trial Record.

Consideration of Settlement Made Pending Appeal.

In General.

Jurisdictional Amount.

Reconsideration of Affirmance of Magistrate's Judgment.

Reversal Required.

Standard of Review.

Trial De Novo.

Appeal Where Procedure Stipulated.

Where original magistrate fell ill following first day of testimony by state on termination of parental rights and second magistrate hearing case by stipulation of both parties heard only testimony on behalf of mother, it was not error for district court to review case as appeal from magistrate level instead of hearing case as trial de novo since counsel of record had implied authority to enter into

stipulation and agreements respecting matters of procedure. *State, Dep't of Health & Welfare v. Holt (In Interest of Holt)*, 102 Idaho 44, 625 P.2d 398 (1981).

Augmentation of Trial Record.

The district court, having undertaken the task of conducting an appellate review, is not as a result precluded from conducting a trial de novo, because when circumstances prevent a decisive, complete, or meaningful appellate review, it may be advisable for the district court to augment the trial record or create a new record in order to completely resolve the controversy. *Winn v. Winn*, 101 Idaho 270, 611 P.2d 1055 (1980).

Consideration of Settlement Made Pending Appeal.

On appeal from award of property by magistrate, the district judge rightly decided to consider the effect of settlement made pending appeal upon the parties' circumstances; however, the district court should have

granted a trial de novo, either in that court or by remand to the magistrate, thereby allowing both parties the opportunity to present further evidence concerning the division of property, assumption or allocation of debts, and the amount of reasonable child support, in light of their changed circumstances. The course of action taken by the district court in taking the settlement into account without notice to either party was tantamount to holding a trial de novo in the absence of both parties and was not authorized under the rules. *Wells v. Wells*, 105 Idaho 575, 671 P.2d 488 (Ct. App. 1983).

In General.

The district court may conduct an appellate review of a magistrate's decision just as the Supreme Court would conduct a review of a district court decision, or the district court may choose to wipe the slate clean by ordering a trial de novo and beginning the case anew. *Winn v. Winn*, 101 Idaho 270, 611 P.2d 1055 (1980).

Jurisdictional Amount.

The limitations on jurisdictional amount in magistrate courts do not apply in district court, a district court hearing a small claims appeal de novo is not a small claims court, and a district court damage award may exceed the limitation of what a small claims court could award. *Gilbert v. Moore*, 108 Idaho 165, 697 P.2d 1179 (1985).

Reconsideration of Affirmance of Magistrate's Judgment.

Where, 11 days after the district court filed its decision affirming the magistrate's judgment against him, the husband applied to the district court for reconsideration of its affirmance, the request of the husband for reconsideration was properly treated by the district court as a petition for rehearing, was timely

filed under I.A.R. 42 as incorporated by I.R.C.P. 83(x), and preserved the merits of the decision of the district court affirming the magistrate's judgment for further appellate review. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

Reversal Required.

Where the district court lacked jurisdiction to hear an appeal from a magistrate's order denying a motion for summary judgment, all subsequent orders entered by the district court based upon the law as established in that proceeding in which the district court acted without jurisdiction would be reversed. *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, — Idaho —, 265 P.3d 502 (2011).

Standard of Review.

A district court reviewing a decision of a magistrate may either conduct a trial de novo or conduct an appellate review on the existing record; where the district court elects to review the existing record as an appellate proceeding, it must apply the same standard of review that is applicable to the Court of Appeal's appellate review. *Pieper v. Pieper*, 125 Idaho 667, 873 P.2d 921 (Ct. App. 1994).

Trial De Novo.

Whether to conduct a trial de novo in a case appealed from the magistrate division is a question addressed to the district court's discretion. *Hoopes v. Bagley* (In re Estate of Bagley), 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990).

Cited in: *Longeteig v. Neal*, 98 Idaho 195, 560 P.2d 866 (1977); *State, Dep't of Health & Welfare v. Holt* (In Interest of Holt), 102 Idaho 44, 625 P.2d 398 (1981); *Roe Family Servs. v. Doe* (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

DECISIONS UNDER PRIOR RULE OR STATUTE

Issue of Material Fact.

Assignment of error claimed by appellant to have been committed by the district court in granting respondent's motion for a summary judgment presented the question whether

there was any genuine issue as to any material fact for determination de novo in the district court. *Killgore v. Killgore*, 84 Idaho 226, 370 P.2d 512 (1962).

Rule 83(c). Administrative appeals. [Rescinded effective July 1, 1995.]

STATUTORY NOTES

Compiler's Notes. Former Rule 83(c) (adopted effective January 1, 1975; amended

June 15, 1987, effective November 1, 1987) was rescinded by Supreme Court Order of

April 19, 1995, effective July 1, 1995. For present rule see I.R.C.P., Rule 84.

Rule 83(d). Record of proceedings of magistrates division.

The court in the magistrate’s division shall make a verbatim record or recording of all proceedings held before a magistrate. (Amended April 27, 2011, effective July 1, 2011.)

STATUTORY NOTES

Cross References. Record of proceedings, costs, § 1-2212.

Rule 83(e). Filing appeal.

Except for the filing of an appeal from a small claim judgment as provided in Rule 81(I), an appeal to a district court from the magistrate’s divisions must be filed with the appropriate district court within 42 days after entry of the judgment or order. Provided, however, that in the magistrate’s division the running of the time for appeal from a final judgment is suspended by (1) a timely motion for a judgment notwithstanding the verdict following a timely motion for a directed verdict, (2) a timely motion to amend or make additional findings of fact or conclusions of law, whether or not alteration of the judgment is required if the motion is granted, (3) a timely motion to alter or amend the judgment (except motions under Rule 60 or motions regarding costs and attorney fees) or (4) a timely motion for new trial; and the full time for appeal from such a final judgment commences to run and is to be computed from the date of the clerk’s filing stamp on any order granting or denying any of the above motions. An appeal is commenced by the filing of a notice of appeal with the district court, and the appellant shall forthwith serve copies of the notice of appeal upon the court appealed from and all other parties to the action. On appeals from judgments or decisions in a juvenile proceeding, a copy of the notice of appeal shall be served upon the prosecuting attorney of the county in which the juvenile proceeding was held. (Amended April 3, 1981, effective July 1, 1981; amended March 30, 1984, effective July 1, 1984; amended April 19, 1995, effective July 1, 1995.)

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion.
Extension of Time.
Timeliness.

Abuse of Discretion.

The dismissal of the appeal will not be overturned on appeal unless the discretion granted the district court by this rule clearly appears to have been exercised unwisely and

to have been manifestly abused. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

Extension of Time.

Where an earlier motion for a new trial was denied, the wife’s “amended motion” for a new trial did not further extend the time to appeal from the judgment, where the amended motion was simply a renewed motion, essentially seeking relief on the same grounds as re-

quested in the earlier, denied motion. *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

Filing of an appeal with the District Court from an administrative or governmental agency, body, or board within the time allowed by the Rules of Civil Procedure or by statute is jurisdictional; a court has no power to avoid a jurisdictional defect caused by a failure to file an appeal by extending the time for the filing. *Grand Canyon Dories, Inc. v. Idaho State Tax Comm'n*, 121 Idaho 515, 826 P.2d 476 (1992).

Timeliness.

When the original time for appeal expires before the appellant receives actual notice, the appellant is deprived of any opportunity to appeal an adverse decision and, under these circumstances, the time for appeal begins to run anew from the date the appellant receives actual notice; however, where the appellant receives actual notice while the original period still has time to run, the appellant has sufficient notice to file his appeal before the original period expires and it is not necessary to toll the period, even though the clerk does not give notice. *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983).

Where appellant received actual notice of the adverse judgment through his counsel, while the original appeal period was still running and while opportunity to file an appeal still existed, the time for appeal began to

run from entry of judgment and notice of appeal filed 13 days after the expiration of the period was not timely and the district court therefore lacked jurisdiction to hear the appeal. *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983).

The time for an appeal from the divorce judgment expired 42 days from the denial of the wife's alternative motion for new trial or for amendment of the judgment, having been extended by the wife's timely motion. *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

District court lacked jurisdiction to hear an appeal from a magistrate's interlocutory order because the notice of appeal was not filed within forty-two days from the entry of the order; the time limit for such a filing is jurisdictional. *Bower v. Mabey* (In re Estate of Bower), 119 Idaho 922, 811 P.2d 847 (Ct. App. 1991).

Because appellant husband did not file a notice of appeal within 42 days after entry of the contempt order, the district court did not have jurisdiction to consider the appeal from that order and properly dismissed it. *Callaghan v. Callaghan*, 142 Idaho 185, 125 P.3d 1061 (2005).

Cited in: In re Lutz, 100 Idaho 45, 592 P.2d 1362 (1979); *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985); *Lindstrom v. District Bd. of Health*, 109 Idaho 956, 712 P.2d 657 (Ct. App. 1985); *Cortez v. Owyhee County*, 117 Idaho 1034, 793 P.2d 707 (1990).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal Before Judgment.
Custody Order.
Failure of Clerk to Release Files.
Perfection of Appeal.
Rendition of Judgment.

Appeal Before Judgment.

Where notice of appeal was filed one day prior to date of entry of judgment such notice of appeal was a nullity. *Heidemann v. Krueger*, 66 Idaho 612, 164 P.2d 591 (1945).

Custody Order.

An appeal from an order of commitment removing a child from its parents' custody and placing the child in the charge of an aid society, not having been taken within 30 days from the commitment was properly dismissed by the district court. *State v. Bombino*, 84 Idaho 554, 374 P.2d 854 (1962).

Failure of Clerk to Release Files.

Appeal will not be dismissed for plaintiff's

failure to perfect it within reasonable time, where clerk held files beyond thirty days without marking them filed, because judge had not sent fee, deposited with him by plaintiff, to clerk. *Elliott v. Rising*, 36 Idaho 137, 209 P. 887 (1922).

Perfection of Appeal.

Order in which various steps in the perfection of an appeal are taken is immaterial, and there is no objection to filing bond and notice prior to service of notice. *Salt Lake Brewing Co. v. Gillman*, 2 Idaho 195, 10 P. 32 (1886); *Reynolds v. Corbus*, 7 Idaho 481, 63 P. 884 (1901).

Rendition of Judgment.

Time for appeal does not begin to run until entry of the judgment. *Perkins v. Bridge*, 10 Idaho 189, 77 P. 329 (1904); *Dalton v. Abercrombie*, 35 Idaho 290, 206 P. 1051 (1922).

A notice of appeal was served on January 21st but the judgment of the court was not entered until January 24th; hence there was

no “rendition” of judgment from which appeal could be taken and the service of such notice of appeal was a nullity. *Haddock v. Jackson*, 51 Idaho 560, 8 P.2d 279 (1932).

Rule 83(f). Notice of appeal — Contents.

A notice of appeal to the district judges division of the district court filed pursuant to this rule shall contain the following information and statement:

- (1) The title of the court from which the appeal is taken.
- (2) The title of the court to which the appeal is taken.
- (3) The date and heading of the judgment or decision from which the appeal is taken.
- (4) A statement as to whether the appeal is taken upon matters of law, or upon matters of fact, or both.
- (5) A statement as to whether the testimony and proceedings of the original trial or hearing were recorded or reported, together with an identification of the method of recording or reporting and the name of the party or person in whose possession such recording or reporting is located.
- (6) A statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, such statement may be filed separately within fourteen (14) days after the filing of the notice of appeal and any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal thereafter discovered by the appellant. (Amended effective July 1, 1977; amended December 27, 1979, effective July 1, 1980; amended April 19, 1995, effective July 1, 1995.)

JUDICIAL DECISIONS

ANALYSIS

Statement of Issues.
 Statutory Grounds.
 Summary of Assignments of Error.

Statement of Issues.

The statement of issues is not a jurisdictional requirement; it simply is a step in the appellate process which, if omitted, affords the district court a discretionary basis to dismiss the appeal or to impose another sanction. *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

The district court, in its discretion, may allow a statement of issues to be enlarged during the pendency of the appeal. *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

Statutory Grounds.

It is clear that § 31-1510 requires only a written notice which specifies the decision which is being appealed. No specific form is

required, and there is no requirement that the statutory basis for the appeal be stated in the notice. A statement of the statutory grounds is not required under either this rule or Idaho Appellate Rule 17; therefore the fact that there was no reference to § 31-1509, in the notice of appeal was insufficient to support a finding of lack of jurisdiction. *Eastern Idaho Health Servs., Inc. v. Burtenshaw*, 122 Idaho 904, 841 P.2d 434 (1992).

Summary of Assignments of Error.

Where a notice of appeal lacked a summary of expected assignments of error as required by this rule prior to the 1977 amendment, such appeal was subject to dismissal under Rule 83(s), I.R.C.P., and the court did not abuse its discretion in granting such dismissal where the appellant did not offer to amend the notice during the five-month period between the magistrate’s decision and the ruling on the motion to dismiss. In re *Estate of Mattson*, 99 Idaho 24, 576 P.2d 1058 (1978).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Parties to Be Served.**Scope of Review.****Waiver of Notice.****Parties to Be Served.**

The heirs of an intestate are interested parties in the sale of the property of such intestate, and where a sale has been confirmed and the purchaser appeals, the heirs are adverse parties and must be served with notice. *Reed v. Stewart*, 12 Idaho 699, 87 P. 1002 (1906).

Scope of Review.

Where notice of appeal states that it is

taken upon both questions of law and fact, and it appears that no questions of fact were presented or tried in lower court, the appeal will be treated upon questions of law alone, as appellant cannot change or alter the nature of appeal or the questions to be determined on appeal by any statement contained in notice of appeal. *Smith v. Clyne*, 15 Idaho 254, 97 P. 40 (1908).

Waiver of Notice.

Where notice of appeal is not served but party opposing voluntarily appears and asks leave to file answer and proceeds to trial, such procedure amounts to waiver of notice of appeal. *Bates v. Price*, 30 Idaho 521, 166 P. 261 (1917).

Rule 83(g). Cross appeals.

When an appeal is filed and served upon all parties required by this rule more than 28 days from the entry of a judgment or order, a cross appeal may be filed by any opposing party within 14 days from the date such party is served with a copy of the notice of appeal. (Amended June 15, 1987, effective November 1, 1987; amended April 19, 1995, effective July 1, 1995.)

Rule 83(h). Filing of bond. [Rescinded.]

STATUTORY NOTES

Compiler's Notes. This rule was rescinded by order of the Idaho Supreme Court dated May 25, 1977, effective July 1, 1977.

Rule 83(i). Stay during appeal — Powers of magistrate.

(1) **Stay of Proceedings.** — The filing and perfection of an appeal to the district court shall automatically stay the proceeding and execution of any judgment or order appealed from by the appellant for a period of fourteen (14) days. Any further stay shall be only by order of the presiding magistrate or the district court.

(2) **Powers of Magistrate.** — During the pendency of an appeal from the magistrate's division to the district court, and any further appeal to the Supreme Court, the magistrate shall have the same powers and authority granted to a district judge by Rule 13(b) of the Idaho Appellate Rules during an appeal to the Supreme Court. (Adopted June 15, 1986, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended April 19, 1995, effective July 1, 1995; amended August 12, 2010, effective September 1, 2010.)

JUDICIAL DECISIONS

ANALYSIS

Attorney Fees.
Authority of District Judge.
Child Custody and Support Matters.

Attorney Fees.

Where the advancement of attorney fees was within the discretion of the magistrate, and no argument or authority was presented to the appellate court in support of the cross-claimant's contention that the advancement was in error, the order advancing fees for appeal was affirmed. *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 979 P.2d 605 (1999).

Authority of District Judge.

During the pendency of the appeal, the district court's authority is limited to the extent set out in I.A.R. 13(b). The same pow-

ers and authority granted to a district judge by I.A.R. 13(b) are conferred on a magistrate during the pendency of an appeal. The district court is empowered to take any action or enter any order required for the enforcement of any judgment, order or decree. *DesFosses v. DesFosses*, 120 Idaho 27, 813 P.2d 366 (Ct. App. 1991), *aff'd*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992).

Child Custody and Support Matters.

The authority of trial courts under this rule to act on child custody and support matters during pendency of an appeal is extended to magistrates by this rule; therefore, the pursuit of an appeal need not delay action by magistrate to resolve issues of child custody, visitation or support. *Dooley v. Dooley*, 128 Idaho 703, 918 P.2d 287 (Ct. App. 1996).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

No Order Staying Enforcement.
Stay of Execution.

No Order Staying Enforcement.

Where the record did not contain any order staying enforcement of the divorce judgment entered by the magistrate following the husband's appeal to the district court, the judgment remained enforceable in the magistrate division while the appeal was pending in the district court, and since the district court

judge refused to process the case as a trial de novo, the district court did not have jurisdiction to entertain or to dispose of issues relating to the enforcement of the magistrate's judgment. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

Stay of Execution.

Magistrate did not err in granting a partial stay of execution pending appeal of divorce judgment. *Shumway v. Shumway*, 106 Idaho 415, 679 P.2d 1133 (1984).

Rule 83(j). Method of appeal — Transcript of proceedings — Listening to recording tapes — Trial de novo.

(1) **Transcript Required.** Unless otherwise ordered by the district judge, a transcript shall be prepared as provided in Rule 83(k) and the appeal shall be heard as an appellate proceeding.

(2) **Alternate Methods of Hearing Appeal.** The district judge assigned the appeal may, on the court's own motion or motion of a party, order an alternate method of hearing the appeal by ordering:

(A) That the appeal involves a question of law only so that no transcript is required and the appeal will be decided on the clerk's record, the briefs of the parties and oral argument; or

(B) That the appeal should be heard as an appellate proceeding by listening to the recording tapes without a transcript; or

(C) That the appeal shall be heard as a trial de novo because there is not an adequate record of the proceedings in the magistrate's division.

(3) **Hearing on Question of Law.** If the district judge determines that the appeal can be heard as a question of law alone, without the necessity of

a transcript or a trial de novo, he shall enter an order to that effect stating the issue of law to be determined on appeal and set a day certain for the filing of the appellant's opening brief based upon the clerk's file and the order of the court.

(4) **Listening to or Viewing Tapes.** If the district judge determines that the appeal should be heard by listening to or viewing the tapes of the trial or proceedings of the trial court, it shall enter an order to that effect and direct a time within which the parties shall review, or view, or listen to the recording tapes and set a date certain for the filing of appellant's opening appellate brief.

(5) **Special Transcript.** If the district judge does not require the preparation of a transcript on appeal, the district judge shall nevertheless, upon motion of any party to the appeal, order the preparation of a transcript of the proceedings at the cost of the moving party which shall require the moving party to pay the estimated transcript fees within fourteen (14) days of entry of such order and the clerk of the court shall serve a copy of such order upon the transcriber of the trial or proceedings of the trial court. (Adopted June 15, 1987, effective November 1, 1987; amended April 19, 1995, effective July 1, 1995; amended April 22, 2004, effective July 1, 2004.)

JUDICIAL DECISIONS

ANALYSIS

Deciding Case from Record.
Transcript.
—Cost.
—Necessity.
Trial De Novo.

Deciding Case from Record.

Where the district court chose to conduct an appellate review of a magistrate's decision just as the Supreme Court would conduct a review of a district court decision, and did not order a trial de novo, by so doing the district court should not have considered matters outside the appellate record presented to it, but should have reviewed the case solely on such record. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

Transcript.

—Cost.

Dismissal for failure to pay transcript costs may be appropriate where all issues on appeal require a transcript, such as those which challenge the sufficiency of the evidence, but not where the appeal includes questions of

law that facially appear not to require a transcript. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

Where an appellant finds it financially or otherwise impractical to pay the cost of the transcript, the appellant should have the option of proceeding on the merits of the questions of law raised in the appeal. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

—Necessity.

The court did not abuse its discretion in ordering preparation of a transcript, where the notice of appeal from the magistrate's judgment clearly included issues requiring a review of the trial record. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

Trial De Novo.

The bare assertion that the defendant was denied a fair trial in the magistrate division did not mandate hearing the appeal as a trial de novo. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

Cited in: *Sivak v. Ada County*, 115 Idaho 762, 769 P.2d 1134 (Ct. App. 1989).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal on Questions of Law.
 Consideration of Settlement Made Pending Appeal.
 Contents of Transcript.
 Deciding Case from the Record.
 Improper Limitation of Appellate Record.
 Showing of Indigency.
 Trial De Novo.

Appeal on Questions of Law.

When appeal is taken on questions of law alone, district court is not authorized to try case de novo after deciding questions of law, unless it is made to appear necessary or proper to try such case anew. If record fails to show grounds for ordering a new trial, the district court being a court of general jurisdiction, proper showing will be presumed to have been made. *Holt v. Gridley*, 7 Idaho 416, 63 P. 188 (1900).

Consideration of Settlement Made Pending Appeal.

On appeal from award of property by magistrate, the district judge rightly decided to consider the effect of settlement made pending appeal upon the parties' circumstances; however, the district court should have granted a trial de novo, either in that court or by remand to the magistrate, thereby allowing both parties the opportunity to present further evidence concerning the division of property, assumption or allocation of debts, and the amount of reasonable child support, in light of their changed circumstances. The course of action taken by the district court in taking the settlement into account without notice to either party was tantamount to holding a trial de novo in the absence of both parties and was not authorized under the rules. *Wells v. Wells*, 105 Idaho 575, 671 P.2d 488 (Ct. App. 1983).

Contents of Transcript.

Although it is within the judge's discretion to order transcripts of proceedings in the magistrate division, a general order for transcripts ordinarily does not include oral arguments by counsel on motions. *Davis v. Davis*, 114 Idaho 170, 755 P.2d 3 (Ct. App. 1988).

Deciding Case from the Record.

A district court judge has the discretion

under subsection (2) of this rule to decide what method of appeal he will use in deciding an appeal from a magistrate's decision; accordingly, where no order for a trial de novo was entered by the district court and no notice of a trial setting was sent to either party or counsel, the action of the district judge in deciding the case solely on the record was proper, despite the appellant's mistaken belief that the appeal would be handled by the district court as a trial de novo. *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

Improper Limitation of Appellate Record.

Where in an action by a hospital against a county to recover the cost of caring for an indigent person, a magistrate found that the county had improperly denied the hospital's written application for reimbursement even though neither the application nor a copy of it was produced as evidence, the district judge on appeal improperly limited the appellate record by disregarding the secondary evidence of the application itself and the district court erred by ruling that the hospital failed to prove the submission of a written application. *St. Benedict's Hosp. v. County of Twin Falls*, 107 Idaho 143, 686 P.2d 88 (Ct. App. 1984).

Showing of Indigency.

A party's "vow of poverty" which stated that he was a pauper because he was unable to own or possess any lawful money of the United States, which he determined to consist only of gold and silver coins was not a sufficient showing of indigency to excuse the payment of the transcript fees. *State ex rel. Goodwin v. Valentine*, 107 Idaho 1033, 695 P.2d 418 (Ct. App. 1985).

Trial De Novo.

Trial de novo implies and signifies the trying anew of issue that has been previously tried; where no issue has been previously raised, there is no issue to try anew. *Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho 681, 95 P. 825 (1908); *Gaiser v. Steele*, 25 Idaho 412, 137 P. 889 (1914); *Albinola v. Horning*, 39 Idaho 515, 227 P. 1054 (1924).

Rule 83(k). Payment of fees — Preparation of transcript.

Unless otherwise ordered by the district judge, the transcript shall be prepared in the following manner:

(1) **Payment of Transcript Fee.** Unless otherwise ordered by the district judge, the appellant shall pay the estimated fee for preparation of the transcript as determined by the transcriber within 14 days after the filing of the notice of appeal, and the appellant shall pay the balance of the fee for the transcript upon its completion. The appellant shall pay a sum per page for the original and (2) copies of the transcript to be prepared by the transcriber equal to the dollar amount per page provided for the cost of a transcript prepared by a court reporter under Section 1-1105, Idaho Code. Such sum shall be paid to the clerk of the court of the magistrate's division and deposited in the district court fund, or such other fund which incurred the expense of the person who prepared the transcript. If the transcript is prepared by a transcriber or reporter privately retained by appellant, the cost therefor shall be paid by the appellant as agreed, but for purposes of taxing costs, the cost shall be deemed to be the same as provided in this rule. The district judge may order a transcript prepared at county expense if the appellant is exempt from paying such fee as provided by statute or law.

(2) **Preparation of Transcript.** Upon the payment of the estimated transcript fees, the transcriber shall give a receipt to the party paying such fees and shall thereafter prepare the transcript and lodge the same with the clerk of the trial court within thirty-five (35) days from the date of payment of the estimated fee. The transcriber may make application to the district judge for an extension of time in which to prepare the transcript, which shall be granted only for good cause shown.

(3) **Certificate.** The transcript must be examined and certified by the typist by a certificate in substantially the following form:

CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he or she correctly and accurately transcribed and typed the above transcript from the recording of the

[Describe hearing: e.g. trial, hearing on motion for summary judgment, etc.] which was recorded on (date) in the above entitled action or proceeding.

Dated and certified this ____ day of _____.

Transcriber

(Adopted June 15, 1985, effective November 1, 1987.)

JUDICIAL DECISIONS

Cited in: Sivak v. Ada County, 115 Idaho 762, 769 P.2d 1134 (Ct. App. 1989).

DECISIONS UNDER PRIOR RULE OR STATUTE

Showing of Indigency.

A party's "vow of poverty" which stated that he was a pauper because he was unable to own or possess any lawful money of the United States, which he determined to consist

only of gold and silver coins, was not a sufficient showing of indigency to excuse the payment of the transcript fees. *State ex rel. Goodwin v. Valentine*, 107 Idaho 1033, 695 P.2d 418 (Ct. App. 1985).

Rule 83(l). Form of transcript.

All transcripts of testimony and proceedings prepared for an appeal to the district court shall be in such form and arrangement as required for appeals to the Supreme Court under statutes and rules of the Supreme Court.

Rule 83(m). Transcript of administrative proceedings. [Rescinded effective July 1, 1995.]

STATUTORY NOTES

Compiler's Notes. Former Rule 83(m) (adopted effective January 1, 1975; amended June 15, 1987, effective November 1, 1987)

was rescinded by Supreme Court Order of April 19, 1995, effective July 1, 1995. For present rule see I.R.C.P., Rule 84.

Rule 83(n). Clerk's record.

The official court file of any court proceeding appealed to the district court, including any minute entries or orders together with the exhibits offered or admitted shall constitute the clerk's record in such appeal. Upon the determination of any appeal to the district court, and the expiration of the time for appeal to the Supreme Court, the original clerk's record shall be returned to the magistrate division together with the order or other disposition rendered by the district court on the appeal. No copies of the clerk's record need be prepared unless ordered by the district court. (Amended April 19, 1995, effective July 1, 1995.)

STATUTORY NOTES

Cross References. Notice of orders or judgments, Rule 77(d).

JUDICIAL DECISIONS

Cited in: *State v. Mason*, 102 Idaho 866, 643 P.2d 78 (1982); *State v. Trumble*, 113 Idaho 835, 748 P.2d 826 (Ct. App. 1987).

Rule 83(o). Settlement of transcript.

Upon receipt of the transcript of the testimony and proceedings, the clerk of the trial court shall mail or deliver a notice of lodging of transcript to all attorneys of record, or parties appearing in person. The original of the transcripts shall be retained by the clerk of the court, but the notice shall advise the plaintiff and defendant that they may pick up a copy of the transcript at the clerk's office and that the parties have 21 days from the

date of the notice in which to file any objections to the transcript; and the notice shall further advise the appellant to pay the balance of the fees for the preparation of the transcript, if any, before the copy of the transcript will be delivered to the appellant. Where there are multiple parties, they shall determine by agreement the manner and time of use of the transcript by each party, or failing such agreement, such determination shall be made by the trial court upon application by any party. Any party may object to the content of the transcript within 21 days from the date of mailing of the notice to the parties that the transcripts have been lodged with the court. Upon failure of the parties to file any objection within such time period, the transcript shall be deemed settled. Any objection made to a trial transcript shall be heard and determined by the trial court in the same manner as a motion. (Amended January 8, 1976, effective March 1, 1976; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended April 19, 1995, effective July 1, 1995.)

JUDICIAL DECISIONS

Cited in: State v. Ruddell, 97 Idaho 436, 546 P.2d 391 (1976).

Rule 83(p). Filing of transcript and record.

Within seven (7) days of the settlement of the transcript, or within seven (7) days of receipt of an order of the district court that no transcript is needed or required, the clerk of the trial court shall file with the district court the transcript, if any, the clerk's record, and all exhibits offered or admitted in the proceeding. The clerk of the trial court shall give notification of such filing to all parties or their attorneys. Any electronic recording tape or belt used to record or transcribe the testimony and proceedings need not be forwarded to the clerk of the district court unless ordered by the district court. (Amended January 8, 1976, effective March 1, 1976; amended June 15, 1987, effective November 1, 1987; amended April 19, 1995, effective July 1, 1995.)

Rule 83(q). Augmentation of the record.

Any party desiring to augment the transcript and record may file a motion with the district court within 21 days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure provided for augmentation of the record in appeals to the Supreme Court. (Amended June 15, 1987, effective November 1, 1987.)

Rule 83(r). Joint use of transcript.

Multiple parties may jointly use a transcript on appeal, or any party desiring a separate copy may obtain the same by paying the transcriber \$1.00 per page. (Amended July 2, 1976, effective October 1, 1976.)

Rule 83(s). Effect of failure to comply with time limits.

The failure to physically file a notice of appeal or notice of cross-appeal with the district court within the time limits prescribed by these rules shall be jurisdictional and shall cause automatic dismissal of such appeal upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the appellate process shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the appeal. (Adopted April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS**ANALYSIS**

Discretion of Court.
Failure to File Transcript.
Proper Appellate Brief.
Sanctions.
Statement of Issues.
Time Limit Jurisdictional.

Discretion of Court.

In light of the judicial policy of encouraging resolution of legal disputes on the merits, the district court did not abuse its discretion by its refusal to dismiss the appeal from the magistrate division even though the appellant's brief was not timely filed with the district court. *Duff v. Bonner Bldg. Supply, Inc.*, 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982), *aff'd*, 105 Idaho 123, 666 P.2d 650 (1983).

The sanctions for failing to diligently prosecute an appeal from the magistrate division are discretionary with the district court; an exercise of sound judicial discretion will not be disturbed on appeal. *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

Failure to File Transcript.

Failure to file a transcript with an appellate court will not invalidate the appeal or deprive the court of jurisdiction. *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987).

Proper Appellate Brief.

Where defendant filed in district court a notice of appeal and a separate document denominated "appeal," where the "appeal," presented an assertion by defendant that the magistrate had been prejudiced against him and that the record supported the issuance of a writ of habeas corpus, trial court erred in determining that no appellate brief was filed; the "appeal" plainly constituted defendant's written argument as to why he had filed a notice of appeal, and as such, these documents constituted a brief — albeit inartfully

drafted. *Sivak v. State*, 115 Idaho 757, 769 P.2d 1129 (Ct. App. 1989).

Sanctions.

In appropriate circumstances, dismissal may be a proper sanction for failure to file a timely appellate brief. *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct. App. 1990).

Dismissal of an appeal is a permissible sanction when the appellant fails to file a timely brief. *Hoopess v. Bagley (In re Estate of Bagley)*, 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990).

Statement of Issues.

The statement of issues is not a jurisdictional requirement; it simply is a step in the appellate process which, if omitted, affords the district court a discretionary basis to dismiss the appeal or to impose another sanction. *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

Time Limit Jurisdictional.

District court lacked jurisdiction to hear an appeal from a magistrate's interlocutory order because the notice of appeal was not filed within forty-two days from the entry of the order; the time limit for such a filing is jurisdictional. *Bower v. Mabey (In re Estate of Bower)*, 119 Idaho 922, 811 P.2d 847 (Ct. App. 1991).

Filing of an appeal with the District Court from an administrative or governmental agency, body, or board within the time allowed by the Rules of Civil Procedure or by statute is jurisdictional; a court has no power to avoid a jurisdictional defect caused by a failure to file an appeal by extending the time for the filing. *Grand Canyon Dories, Inc. v. Idaho State Tax Comm'n*, 121 Idaho 515, 826 P.2d 476 (1992).

Cited in: *State ex rel. Goodwin v. Valentine*, 107 Idaho 1033, 695 P.2d 418 (Ct. App. 1985); *Lindstrom v. District Bd. of Health*, 109 Idaho 956, 712 P.2d 657 (Ct. App. 1985).

DECISIONS UNDER PRIOR RULE OR STATUTE

Discretion of Court.

A trial court did not abuse its discretion under this rule by dismissing an appeal where the notice of appeal lacked a summary of expected assignments of error, as previously required by Rule 83(f), I.R.C.P., and the appellant failed to amend the notice during the five-month lapse between the magistrate's ruling and the ruling on the motion to dismiss. *In re Estate of Mattson*, 99 Idaho 24, 576 P.2d 1058 (1978).

Sound judicial discretion properly exercised

will reflect the judicial policy of this state developed over many years by case law, and lying within the spirit of liberality mandated by Rule 1(a), I.R.C.P. *Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978).

This rule does not require dismissal for failure of an appellant to punctually take any of the required steps; for dismissal is but a sanction, albeit the ultimate one, for failing to diligently process an appeal. *Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978).

Rule 83(t). Motions.

All motions on appeal shall be filed with the district court, except those expressly required to be filed in the trial court, and served upon the parties in the same manner as motions before a trial court under these rules. All motions must be accompanied with a brief in support thereof. The opposing party shall have 14 days from service to file a response or reply brief and the motion shall be determined without oral argument unless ordered by the court. (Amended June 15, 1987, effective November 1, 1987.)

Rule 83(u). Appellate review.

The scope of appellate review on an appeal to the district court shall be as follows:

(1) Upon an appeal from the magistrate's division of the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.

(2) Upon an appeal from the magistrates division of the district court involving a trial de novo, the district court shall render a decision in the action as a trial court as though the matter were initially brought in the district court. (Amended January 8, 1976, effective March 1, 1976; amended April 19, 1995, effective July 1, 1995.)

JUDICIAL DECISIONS

ANALYSIS

Agency Decisions.
Appeal from Magistrate Division.
Attorney Fees.
Augmentation of Trial Record.
Consideration of Settlement Made Pending Appeal.
Deciding Case from Record.
Discretion to Remand.
Findings of Fact.
In General.

Issues Not Raised on Appeal.
Jurisdiction.
Permissive Appeal.
Presentation of Additional Evidence.
Reversal Required.
Review of Unclear Findings.
Small Claims.
Supreme Court Review.

Agency Decisions.

Remand order by district court from appeal de novo of decision of agency after finding

reversible error due to admission of evidence without proper authentication and certification was proper under former law governing the role of the district court in appeal from the department of insurance on the ground of insufficient evidence, since both former law and § 67-5215(g), the present law dealing with appeals of agency decisions, provided that insufficient evidence warranted a remand to the lower tribunal to hear additional evidence to support the findings of the tribunal. *Knight v. Department of Ins.*, 119 Idaho 591, 808 P.2d 1336 (Ct. App. 1991).

Appeal from Magistrate Division.

A district court reviewing a decision of a magistrate may either conduct a trial de novo or conduct an appellate review on the existing record; where the district court elects to review the existing record as an appellate proceeding, it must apply the same standard of review that is applicable to the Court of Appeal's appellate review. *Pieper v. Pieper*, 125 Idaho 667, 873 P.2d 921 (Ct. App. 1994).

Supreme Court of Idaho interprets Idaho R. Civ. P. 83(u)(2) to allow the district court in an appellate review to hear additional evidence on other issues. *Roe Family Servs. v. Doe* (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

Attorney Fees.

Where a plaintiff wife brought an appeal to a district court from a magistrate's determination of property issues in a divorce action, the wife's failure to object to the memorandum of costs filed by the defendant husband in the district court did not constitute a waiver of all objections to the claimed attorney fees, because the district judge was sitting as an appellate court in this action and, therefore, the district judge was required to determine the appeal in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court; thus, I.A.R. 41 governed the procedure for applying for attorney fees on appeal. *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

Augmentation of Trial Record.

The district court, having undertaken the task of conducting an appellate review, is not as a result precluded from conducting a trial de novo, because when circumstances prevent a decisive, complete, or meaningful appellate review, it may be advisable for the district court to augment the trial record or create a new record in order to completely resolve the controversy. *Winn v. Winn*, 101 Idaho 270, 611 P.2d 1055 (1980).

Consideration of Settlement Made Pending Appeal.

On appeal from award of property by magistrate, the district judge rightly decided to consider the effect of settlement made pending appeal upon the parties' circumstances; however, the district court should have granted a trial de novo, either in that court or by remand to the magistrate, thereby allowing both parties the opportunity to present further evidence concerning the division of property, assumption or allocation of debts, and the amount of reasonable child support, in light of their changed circumstances. The course of action taken by the district court in taking the settlement into account without notice to either party was tantamount to holding a trial de novo in the absence of both parties and was not authorized under the rules. *Wells v. Wells*, 105 Idaho 575, 671 P.2d 488 (Ct. App. 1983).

Deciding Case from Record.

Where the district court chose to conduct an appellate review of a magistrate's decision just as the Supreme Court would conduct a review of a district court, and did not order a trial de novo, by so doing the district court should not have considered matters outside the appellate record presented to it, but should have reviewed the case solely on such record. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

Discretion to Remand.

The fact that the district court held a pre-trial conference did not limit its discretion to remand case back to the magistrate division for a new trial. *Blackadar v. Austin*, 121 Idaho 529, 826 P.2d 490 (Ct. App. 1992).

Findings of Fact.

In an action originally heard in a magistrate's court, with a first appeal to a district court, and a further appeal to the Court of Appeals, the Court of Appeals is required to accept the findings of fact made by the magistrate unless they are clearly erroneous. *Alison v. Bradley* (In re Estate of Bradley), 107 Idaho 860, 693 P.2d 1062 (Ct. App. 1984).

In General.

A district court, in making an appellate review of a magistrate's decision, should perform that task in the same manner as the Supreme Court performs its appellate review of the trial decision of a district court; in reviewing a magistrate's findings, therefore, the district courts should adhere to the well recognized rule that findings based on substantial and competent, though conflicting, evidence will not be set aside on appeal.

Hawkins v. Hawkins, 99 Idaho 785, 589 P.2d 532 (1978).

The district court may conduct an appellate review of a magistrate's decision just as the Supreme Court would conduct a review of a district court decision, or the district court may choose to wipe the slate clean by ordering a trial de novo and beginning the case anew. Winn v. Winn, 101 Idaho 270, 611 P.2d 1055 (1980).

Where a district court sits as an appellate court for purposes of reviewing a magistrate's judgment, the district court is required to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and conclusions of law; if those findings are so supported and the conclusions follow therefrom, and if correct legal principles have been applied, then a district court's decision affirming a magistrate's judgment will be upheld on further appeal. The judgment of the magistrate, as well as the decision of the district court affirming that judgment, are reviewable by the higher appellate court under a substantial evidence standard. Ustick v. Ustick, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

Where the issues before the appellate court are the same as those considered by the district court sitting in an appellate capacity, the appellate court will review the trial record with due regard for, but independently from, the district court's decision. Hentges v. Hentges, 115 Idaho 192, 765 P.2d 1094 (Ct. App. 1988).

Where a district court sits as an appellate court for the purpose of reviewing a magistrate's judgment, the district court is required to determine whether there is substantial evidence to support the magistrate's findings of fact. If those findings are so supported, and if the conclusions of law demonstrate proper application of legal principles to the facts found, then the district court will affirm the magistrate's judgment. The judgment also will be upheld on further appeal. Hentges v. Hentges, 115 Idaho 192, 765 P.2d 1094 (Ct. App. 1988).

Issues Not Raised on Appeal.

The in camera interviews of the judge with the children and the limited scope of evidence which did not include all of the evidence of the events and the circumstances from the date of father's motion for modification in 1984 through the date of the hearing in 1987, were not issues raised by father in his appeal from the magistrate to the district court and accordingly, the district court's reversal based on errors not properly before it on appeal cannot be sustained. Mills v. Mills, 120 Idaho 635, 818 P.2d 339 (Ct. App. 1991).

Jurisdiction.

District court lost the authority to decide issues of visitation and custody after the order issued remanding the case to the magistrate court because visitation was not a separate issue; however, given the fact that the visitation order was appropriate in terms of reuniting the father with the child and that order could be reconsidered by the magistrate court, the error if any, was harmless. Roe Family Servs. v. Doe (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

Permissive Appeal.

Pursuant to paragraph (u)(1) of this rule, when an appeal is taken from a magistrate court to a district court, the magistrate court retains the same powers, enumerated in I.A.R. 13(b), that a district court retains upon an appeal to the supreme court. Recommending a direct permissive appeal pursuant to I.A.R. 12.1 is not one of the powers enumerated in I.A.R. 13(b). Therefore, a magistrate court's recommendation of a direct permissive appeal in a custody case, after an appeal has been filed with the district court, has no force or effect. Dep't of Health & Welfare v. Doe (In re Doe), 147 Idaho 314, 208 P.3d 296 (2009).

Presentation of Additional Evidence.

On further appeal to the Supreme Court from the determination of the district court where additional evidence is presented, the new matters affecting the magistrate's determination will be scrutinized by the court according to the same standard of review as other appeals from the district court; however, where the district court's review of the magistrate's determination is not affected by the new matters presented to the district court, review of the district court will be as though the district court was an intermediate appellate court. Koester v. Koester, 99 Idaho 654, 586 P.2d 1370 (1978).

Where the district court chooses to handle an appeal as an appellate review and then elects to hear additional evidence on one or more issues, those issues affected by the additional evidence shall be treated as if involving a trial de novo; in other words, to the extent that the new evidence affects the decision of the magistrate, the district court shall act as a trial court, but where the additional evidence admitted by the district court does not affect the determination of the magistrate, the district court shall act as an appellate court. Koester v. Koester, 99 Idaho 654, 586 P.2d 1370 (1978).

Where district court chose to review as an appellate court a decision of magistrate denying waiver of juvenile court jurisdiction under former § 16-1806 (now § 20-508), and then

elected to hear additional evidence that California was terminating its contract to provide juvenile rehabilitation facilities to Idaho, it was appropriate for the district court to weigh de novo the factors considered by the magistrate along with the additional evidence, and it was in the district court's discretion to base its decision on any one or a combination of these factors under subsection (8) of former § 16-1806 (now § 20-508) as long as the district court accepted those findings of the magistrate which were unaffected by the additional evidence. *Dillard v. State*, 101 Idaho 917, 623 P.2d 1294 (1981).

Reversal Required.

Where the district court lacked jurisdiction to hear an appeal from a magistrate's order denying a motion for summary judgment, all subsequent orders entered by the district court based upon the law as established in that proceeding in which the district court acted without jurisdiction would be reversed. *State, Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979), overruled on other grounds, *Verska v. St. Alphonsus Reg'l Med. Ctr.*, — Idaho —, 265 P.3d 502 (2011).

Review of Unclear Findings.

Where the magistrate's findings of fact are confused or in conflict, or where findings on a particular issue are lacking, and resort to the record does not show clearly what findings are

correct, the district court ordinarily will not modify the judgment, but will either remand for new findings, or, alternatively, conduct a partial or full trial de novo. *Hawkins v. Hawkins*, 99 Idaho 785, 589 P.2d 532 (1978).

Small Claims.

The limitations on jurisdictional amount in magistrate courts do not apply in district court, a district court hearing a small claims appeal de novo is not a small claims court, and a district court damage award may exceed the limitation of what a small claims court could award. *Gilbert v. Moore*, 108 Idaho 165, 697 P.2d 1179 (1985).

Supreme Court Review.

Where issue before Supreme Court was the same issue that was before the district court, which heard the case in an appellate capacity on appeal from magistrate court and based its decision on the record before it, the Supreme Court could review the record of the magistrate court independently of the decision of the district court. *Robinson v. Joint Sch. Dist. No. 331*, 105 Idaho 487, 670 P.2d 894 (1983).

Cited in: *State v. Christensen*, 100 Idaho 631, 603 P.2d 586 (1979); *Nicholls v. Blaser*, 102 Idaho 559, 633 P.2d 1137 (1981); *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987); *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988); *Rendon v. Paskett*, 126 Idaho 944, 894 P.2d 775 (Ct. App. 1995).

DECISIONS UNDER PRIOR RULE OR STATUTE

Evaluation of Evidence.

Where the district court reviewed on the record the decision of the magistrate that a parent-child relationship should be terminated because the father abandoned the child, it was bound by standards of appellate review

to determine the factual sufficiency of the record to sustain the magistrate's finding and it was error for the district court to substitute its evaluation of the evidence for that of the magistrate. In *re Matthews*, 97 Idaho 99, 540 P.2d 284 (1975).

Rule 83(v). Appellate briefs.

Briefs shall be in the form and arrangement and filed and served within the time provided by rules for appeals to the Supreme Court unless otherwise ordered by the district court; provided that such briefs may be typewritten and copies may be carbon copies or photo copies. Only one (1) original signed brief need be filed with the court and copies shall be served on all other parties.

JUDICIAL DECISIONS

Untimely Filing.

In light of the judicial policy of encouraging resolution of legal disputes on the merits, the district court did not abuse its discretion by

its refusal to dismiss the appeal from the magistrate division even though the appellant's brief was not timely filed with the district court. *Duff v. Bonner Bldg. Supply*,

Inc., 103 Idaho 432, 649 P.2d 391 (Ct. App. 1982), *aff'd*, 105 Idaho 123, 666 P.2d 650 (1983).

Cited in: *Sivak v. State*, 115 Idaho 757, 769 P.2d 1129 (Ct. App. 1989).

Rule 83(w). Appellate argument.

Appellate argument may be heard by the district court after notice to the parties in the same manner as notice of hearing of a motion before a trial court under these rules.

JUDICIAL DECISIONS

Oral Argument.

Where a district court was acting in its appellate capacity, ruling on a magistrate's dismissal in the interests of justice erroneously denied the defendant an opportunity to present oral argument; defendant was not prejudiced since she was allowed to present her oral argument to the Court of Appeals on each of the issues; it would have served no

purpose to remand to the district court for oral argument when it had already been presented. *State v. Hayes*, 108 Idaho 556, 700 P.2d 959 (Ct. App. 1985).

Under Idaho R. Civ. P. 83(w) the district court is not required to hear oral argument. *Doe v. State, Dep't of Health & Welfare (In re Termination of Parental Rights of Doe)*, 137 Idaho 758, 53 P.3d 341 (2002).

Rule 83(x). Other appellate rules.

Any appellate procedure not specified or covered by these rules shall be in accordance with the appropriate rule of the I.R.C.P. or the I.A.R. to the extent the same is not contrary to this Rule 83. These rules shall be construed to provide a just, speedy and inexpensive determination of all appeals. (Amended April 11, 1979, effective May 1, 1979.)

JUDICIAL DECISIONS

Entry of Default.

Entry of default is not available in appellate proceedings; motion for entry of default after filing of appeal of magistrate's decision was improper and could not be basis for any relief. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987).

Cited in: *Griffin v. Griffin*, 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982); *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983); *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987); *Dieziger v. Pickering*, 122 Idaho 718, 838 P.2d 321 (Ct. App. 1992).

Rule 83(y). Listening to or copying recording tapes.

Any party to an action in the magistrates division may listen to or copy an electronic tape or belt recording of the trial or hearing proceedings under such rules and for such fee as adopted by the majority of the district judges of the judicial district. The fee charged under this rule shall be transmitted to the county treasurer of the county in which the trial or hearing occurred for deposit in the current expense fund of the county and credited back to the clerk's budget. (Adopted January 8, 1976, effective March 1, 1976.)

JUDICIAL DECISIONS

Cited in: *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983).

Rule 83(z). Judgment entered on appeal.

(1) **Trial de novo.** If an appeal is heard as a trial de novo, upon determination of the appeal the district judge shall enter a judgment as required by Rule 58(a).

(2) **Appellate review.** If an appeal is heard on the record, upon determination of the appeal the district judge shall enter an appellate judgment which shall include instruction to the magistrate. The clerk shall file stamp the appellate ruling and mail copies to the parties and the presiding magistrate. The original appellate ruling shall be filed in the court file which returned to the magistrate division as provided by Rule 83(n).

(A) **Remittitur from district court.** If no appeal to the Supreme Court is filed within forty-two (42) days after the clerk files the appellate ruling, the clerk shall issue and file a remittitur with the magistrate court from which the appeal was taken and mail copies to the parties and the presiding magistrate. The remittitur shall advise the magistrate judge that the opinion has become final and that the magistrate shall forthwith comply with the directive of the opinion.

(B) **Remittitur from Supreme Court or Court of Appeals.** When the Supreme Court or Court of Appeals files a remittitur with the district court in a case that was initially appealed from the magistrate division of the district court, the clerk of the district court shall mail a copy of such remittitur to the presiding magistrate. (Adopted April 19, 1995, effective July 1, 1995; amended January 30, 2001, effective July 1, 2001; amended April 22, 2004, effective July 1, 2004.)

JUDICIAL DECISIONS

Cited in: *Roe Family Servs. v. Doe* (In re Baby Boy Doe), 139 Idaho 930, 88 P.3d 749 (2004).

Rule 84. Judicial Review of Agency Actions by the District Court.

JUDICIAL DECISIONS

Cited in: *Roberts v. Board of Trustees*, 134 Idaho 890, 11 P.3d 1108 (2000); *County Residents Against Pollution from Septage Sludge v. Bonner County*, 138 Idaho 585, 67 P.3d 64 (2003); *Gibson v. Ada County Sheriff's Dep't*, 139 Idaho 5, 72 P.3d 845 (2003); *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003); *Mercy Med. Ctr. v. Ada County*, 146 Idaho 226, 192 P.3d 1050 (2008); *Euclid Ave. Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008); *Erickson v. Idaho Bd. of Registration*, 146 Idaho 852, 203 P.3d 1251 (2009); *City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 247 P.3d 1037 (2011); *In re City of Shelley*, — Idaho —, 255 P.3d 1175 (2011).

Rule 84(a). Judicial review of state agency and local government actions.

(1) **Scope of Rule 84.** The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or

local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review. Actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute. Rule 84 does not apply to the issuance of writs of mandate, prohibition, quo warranto, certiorari, review, or other common law or equitable writs, but petitions for judicial review under this rule may be filed with or in the alternative to petitions for these common law or equitable writs.

(2) **Definitions.** The term "action," "agency," "judicial review," "petitioner" and "respondent" have the following meaning in Rule 84:

(A) "Action" means any rule, order, ordinance or other decision or lack of decision of an agency made reviewable by statute.

(B) "Agency" means any non judicial board, commission, department, or officer for which statute provides for the district court's judicial review of the agency's action.

(C) "Judicial review" means the district court's review pursuant to statute of actions of agencies, whether the statutory term for review is appeal or judicial review or some other term, and the term judicial review includes other terms like appeal.

(D) "Petitioner" means the person seeking judicial review and includes other terms like appellant.

(E) "Respondent" means any person responding to the petitioner's request for judicial review of the agency's actions before the district court, including the agency itself. (Adopted March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

ANALYSIS

Appeal Barred.
Applicability.
Construction.

Appeal Barred.

Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. Thus, a party's failure to file a petition for judicial review with the district court within the time limits prescribed by statute and the Rules of Civil Procedure is jurisdictional and results in a dismissal of the appeal. *Cobbley v. City of Challis*, 139 Idaho 732, 139 P.3d 732 (2006).

Applicability.

When residents petitioned for judicial review of city's decision to annex a subdivision, the city failed to use the appropriate method

to challenge subject matter jurisdiction by filing a motion to dismiss pursuant to I.R.C.P. 12(b)(1), (6). I.R.C.P. 84(o) is the only provision for motions to a district court sitting in an appellate capacity. In *re City of Shelley*, — Idaho —, 255 P.3d 1175 (2011).

Construction.

Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. Thus, a party's failure to physically file a petition for judicial review with the district court within the time limits prescribed by statute and the Rules of Civil Procedure is jurisdictional and results in a dismissal of the appeal. *Cobbley v. City of Challis*, 139 Idaho 732, 139 P.3d 732 (2006).

Cited in: *Blaha v. Board of Ada County Comm'rs*, 134 Idaho 770, 9 P.3d 1236 (2000); *Taylor v. Canyon County Bd. of Comm'rs*, 147 Idaho 424, 210 P.3d 532 (2009).

Rule 84(b). Filing petition for judicial review.

(1) Unless a different time or procedure is prescribed by statute, a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review, but the time for filing a petition for judicial review is extended as provided in the next sentence. When the decision to be reviewed is issued by an agency with authority to reconsider its decision, the running of the time for petition for judicial review is suspended by a timely motion for reconsideration, and the full time for petition for judicial review commences to run and is computed from the date of any decision on reconsideration, the date of any decision denying reconsideration, or the date that reconsideration is deemed to be denied by statute by inaction on a petition for reconsideration. Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

(2) When a petition for judicial review has been filed the verbatim record or recording of hearings and oral presentations conducted by the agency shall be preserved for purposes of judicial review. (Adopted March 22, 2002, effective July 1, 2002.)

STATUTORY NOTES

Compiler's Notes. Parentheses in the original of paragraph 1.

Rule 84(c). Cross-petitions for judicial review.

Unless otherwise provided by statute, when a petition for judicial review is filed, any party or other person with a right to participate in the judicial review may cross-petition for judicial review within fourteen (14) days from the date the party or other person is served with a copy of the petition for judicial review or within the time prescribed for initially petitioning for judicial review, whichever is later. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(d). Petition for judicial review — Contents.

Unless a different procedure is provided by statute, a petition for judicial review from an agency to the district court filed pursuant to this rule shall contain the following information and statement:

- (1) The name of the agency for which judicial review is sought.
- (2) The title of the district court to which the petition is taken.
- (3) Information such as the date and the heading, case caption or other designation of the agency and the action for which judicial review is sought.

(4) A statement whether there was a hearing or oral presentation before the agency that was recorded or reported, together with an identification of the method of recording or reporting the hearing and the name and address of the person with possession of such recording or reporting when there was one.

(5) A statement of the issues for judicial review that the petitioner then intends to assert on judicial review; provided, the statement of issues may be filed separately within fourteen (14) days after the filing of the petition for judicial review and the list of issues in the petition for judicial review shall not prevent the petitioner from asserting other issues later discovered.

(6) A designation as to whether a transcript is requested.

(7) A certification of the attorney of the petitioner, or affidavit of the petitioner representing himself or herself:

(A) That service of the petition has been made upon the state agency or local government rendering the decision; and

(B) That the clerk of the agency has been paid the estimated fee for preparation of the transcript if one has been requested.

(C) That the clerk of the agency has been paid the estimated fee for the preparation of the record. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(e). Method and scope of review.

(1) **Method of review.** When judicial review is authorized by statute, and statute or law does not provide the procedure or standard, judicial review of agency action shall be based upon the record created before the agency. When the authorizing statute provides that the district court may take additional evidence itself upon judicial review, the district court may order the taking of additional evidence upon its own motion or motion of any party to the judicial review. When the statute provides that review is de novo, the appeal shall be tried in the district court on any and all issues, on a new record.

(2) **Scope of review.** The scope of judicial review on petition from an agency to the district court shall be as provided by statute. (Adopted March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

ANALYSIS

Extension of Filing Period.
Review of Record.
Substantial Evidence Review.
Trial De Novo

Extension of Filing Period.

Under this rule, a motion for reconsideration will extend the period for a petition for judicial review only if the agency possessed

authority to reconsider its initial decision. *Arthur v. Shoshone County*, 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000).

Review of Record.

Pursuant to a decision by the Idaho Board of Tax Appeals, reversed by the district court, because a trial de novo was conducted in district court pursuant to § 63-3812(c) and I.R.C.P. 84(e), the Idaho Supreme Court did not review the record independently of the

district court's appellate decision. *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 108 P.3d 349 (2005).

Tax Comm'n, 141 Idaho 316, 109 P.3d 170 (2005).

Substantial Evidence Review.

Proper standard of review in an appeal from a district court's trial de novo of a decision from the Idaho Tax Commission is substantial evidence and not on the record of the agency action. *Idaho Power Co. v. State*

Trial De Novo

In an appeal from the board of tax appeals, district court properly allowed counties to present new evidence of valuation, since it was not precluded in a trial de novo. *Canyon County Bd. of Equalization v. Amalgamated Sugar Co.*, 143 Idaho 58, 137 P.3d 445 (2006).

Rule 84(f). Payment of fee — Preparation of record.

(1) **Record to be prepared.** When statute provides what shall be contained in the official record of the agency upon judicial review, the agency shall prepare the record as provided by statute. Otherwise, the documents listed in paragraph (3) of this rule shall constitute the agency record for judicial review. In either case, the parties may stipulate or the district court may order that a partial record may be prepared for judicial review.

(2) **Use of original or copies.** The agency may prepare the originals contained in its official file or a certified copy of its official file, retaining the originals for its records. Upon determination of the petition for judicial review by the district court, and the expiration of the time for appeal to the Supreme Court, any original agency's record shall be returned to the agency together with the order and other disposition rendered by the district court on judicial review.

(3) **Record to be compiled when statute does not prescribe the record.** The agency's record shall contain the following when the record is not otherwise prescribed by statute:

(A) All original or amended complaints, petitions, applications, claims or other initial pleadings.

(B) All answers or responses to initial pleadings.

(C) All documents relating to an application or petition to intervene.

(D) All protests or other oppositions filed by a party or persons not parties.

(E) Certificate listing all exhibits identified at hearing.

(F) The findings of fact and conclusions of law, or, if none, any memorandum decision entered by the agency.

(G) The final decision, order or award.

(H) All petitions for rehearing or reconsideration and orders thereon.

(I) All petitions for review and cross-petitions for review.

(J) All requests for additional reporter's transcript or agency's record.

(K) Table of contents and index.

(4) **Fees for preparation of agency's record.** If the agency has a statute, rule, ordinance, or other provision setting forth a fee for preparation of the agency's record on petition for judicial review, the agency shall charge the fee for preparation of the agency's record. Otherwise, the agency shall charge the fee for copying of public records. Concurrently with filing the petition for judicial review, the petitioner shall pay the agency an estimated fee for preparation of the agency record. The district court may order a copy

of the record prepared at agency expense if governing statutes so provide or may order the transcript paid from district court funds upon a finding of indigency.

(5) **Lodging of record.** The clerk of the agency shall prepare the record in accordance with this rule and lodge it with the agency within 14 days of the filing of the petition for judicial review for the purpose of settlement of the record in accordance with Rule 84(j). The agency may apply to the district court for an extension of time in which to prepare the record which shall be granted only for good cause shown. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(g). Payment of fee — Preparation of transcript.

(1) **Preparation of Transcript Not Previously Transcribed.** Unless otherwise ordered by the district court, any transcript required by this rule to be prepared from previously untranscribed proceedings shall be prepared in the following manner:

(A) **Payment of Transcript Fee.** Unless otherwise ordered by the district court, the petitioner shall pay the estimated fee for preparation of the transcript as determined by the transcriber prior to filing of the petition for judicial review, and the petitioner shall pay the balance of the fee for the transcript upon its completion. If the agency has a statute, rule, ordinance or other provision setting forth a fee for the preparation of transcripts, the petitioner shall tender that fee for the preparation of the transcript; otherwise, the petitioner shall pay a sum per page for the original and two (2) copies of the transcript to be prepared by the transcriber equal to the dollar amount per page provided for the cost of a transcript prepared by a court reporter under Idaho Code § 1-1105. This sum shall be paid to the person preparing the transcript or such other person as designated by the agency. If the transcript is prepared by a transcriber or reporter privately retained by petitioner, the cost shall be paid by the petitioner as agreed, and for purposes of taxing costs, the cost shall be the same as provided in this rule. The district court may order a transcript prepared at agency expense if governing statutes so provide or may order the transcript paid from district court funds upon a finding of indigency.

(B) **Preparation of Transcript.** The transcriber shall give a receipt to the person paying the fees and shall thereafter prepare the transcript and lodge it with the agency within fourteen (14) days from the date of the filing of the petition. The transcriber may apply to the district court for an extension of time in which to prepare the transcript, which shall be granted only for good cause shown.

(C) **Certificate.** The transcript must be examined and certified by the transcriber by a certificate in substantially the following form:

CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he or she correctly and accurately transcribed and typed the above transcript from the recording of the

[describe hearing: e.g., hearing before hearing officer X, oral argument before Commission Y, etc.]

which was recorded on (date) in the above entitled action or proceeding.

Dated and certified this ____ day of _____.

Transcriber

(2) **Certification of Transcript Previously Transcribed.** Unless otherwise ordered by the district court, if a transcript was prepared for use of the agency in making its decision, a copy of that transcript may be used upon judicial review to the district court subject to the following conditions:

(A) **Payment of Transcript Fee.** Unless otherwise ordered by the district court, the petitioner shall pay the estimated fee for preparation of the transcript prior to filing of the petition for judicial review, and the petitioner shall pay the balance of the fee for the copy of the transcript upon its completion. If the agency has a statute, rule, ordinance or other provision setting forth a fee for the copying a previously prepared transcript, the petitioner shall tender that fee for the copying of the transcript; otherwise, the petitioner shall pay a sum of \$1.00 per page for a copy of the transcript, to be prepared by the agency or transcriber. This sum shall be paid to the person preparing the copy or such other person as designated by the agency. The district court may order a copy of the transcript prepared at agency expense if governing statutes so provide or may order the transcript paid from district court funds upon a finding of indigency.

(B) **Preparation of Copy of Transcript.** Upon the payment of the estimated copying fees, the transcriber shall give a receipt to the party paying such fees and shall thereafter prepare the transcript and lodge it with the agency within fourteen (14) days from the date of the filing of the petition. The transcriber may apply to the district court for an extension of time in which to prepare the copy of the transcript, which shall be granted only for good cause shown.

(C) **Certificate.** The transcript must be examined and certified by the person furnishing the copy by a certificate in substantially the following form:

CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he or she correctly and accurately copied the transcript previously furnished the (agency), which transcript was transcribed and typed from the recording (or the reporter's notes) of the _____

[describe hearing: e.g., hearing before hearing officer X, oral argument before Commission Y, etc.]

which was recorded on (date) in the above entitled action or proceeding.

Dated and certified this ____ day of _____.

Reporter (or other
person)

(Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(h). Joint use of transcripts.

Multiple parties may jointly use a transcript on judicial review. Any party desiring a separate copy may obtain one by paying the transcriber the fee prescribed by statute, rule, ordinance or other provision of the agency, or a fee of \$1.00 per page if there is no statute, rule, ordinance or provision of the agency prescribing the fee for providing a separate copy of the transcript. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(i). Form of transcript.

All transcripts of testimony and proceedings prepared for judicial review by the district court under Rule 84(g)(1) shall be in such form and arrangement as required for appeals to the Supreme Court under statutes and rules of the Supreme Court. All transcripts of testimony and proceedings copied for judicial review by the district court under Rule 84(g)(2) shall contain new cover sheets in such form and arrangements as required for appeals to the Supreme Court under statutes and rules of the Supreme Court. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(j). Settlement of transcript and record.

Upon receipt of the transcript prepared under Rule 84(g)(1) or copied under Rule 84(g)(2), and upon completion of the record the agency shall mail or deliver a notice of lodging of transcript and record to all attorneys of record or parties appearing in person and to the district court. The notice shall inform the parties before the agency that they pick up a copy of the transcript and record at the agency and that the parties have fourteen (14) days from the date of the mailing of the notice in which to file with the agency any objections, and the notice shall further advise the petitioner to pay the balance of the fees for the preparation of the transcript, if any, and the record, if any, before the copy of the transcript and record will be delivered to the petitioner. Where there are more than two parties to the judicial review, they shall determine by agreement the manner and time of use of the transcript and record by each party, or failing such agreement, such determination shall be made by the agency upon application by any party. Any party may object to the transcript and record with fourteen (14) days from the date of mailing of the notice of the parties that the transcript and record has been lodged with the agency. Upon failure of the parties to

file an objection within that time period, the transcript and record shall be deemed settled. Any objection made to a transcript and record shall be determined by the agency within fourteen (14) days of receipt thereof. The agency's decision on the objection and all evidence, exhibits, and written presentations on the objection shall be included in the record on petition for review. (Adopted March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

Cited in: Preston v. Idaho State Tax
Comm'n, 131 Idaho 502, 960 P.2d 185 (1998).

Rule 84(k). Lodging of transcript and record.

Unless otherwise provided by statute or order of the district court, the agency shall transmit the settled transcript and record to the district court within forty-two (42) days of the service of the petition for judicial review. The agency shall notify all parties or their attorneys of the agency's filing. No recordings of the hearings before the agency need be forwarded unless ordered by the district court. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(l). Augmentation of record — Additional evidence presented to the district court — Remand to agency to take additional evidence.

Any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court within twenty-one (21) days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure for augmentation of the record in appeals to the Supreme Court. Where statute provides for the district court itself to take additional evidence, the party desiring to present additional evidence must move the court to do so within twenty-one (21) days of the filing of the transcript and record with the district court. Where statute provides for the district court to remand the matter for the agency to take further evidence before the district court renders its decisions on judicial review, the district court may remand the matter to the agency. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(m). Stay during consideration of petition for judicial review — Power of agency.

Stay of proceedings. Unless otherwise provided by statute, the filing of a petition for judicial review with the district court does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the petition. Unless prohibited by statute, the agency may grant, or the reviewing court may order, a stay upon appropriate terms. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(n). Effect of failure to comply with time limits.

The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review. (Adopted March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS**Dismissal Improper.**

Trial court erred in dismissing plaintiff's petition for review of an order suspending plaintiff's driver's license where the delay occasioned by plaintiff's attorney's lapses was very slight; plaintiff's brief was only six days

overdue when the Idaho Transportation Department filed its motion to dismiss. The Department identified no prejudice occasioned by the delay in plaintiff's briefing. *Aho v. Idaho Transp. Dep't*, 145 Idaho 192, 177 P.3d 406 (Ct. App. 2008).

Rule 84(o). Motions.

All motions shall be filed with the district court, except those expressly required to be filed before the agency, and shall be served upon the parties in the same manner as motions before the district court. All motions must be accompanied with a supporting memorandum or brief. The opposing party shall have fourteen (14) days from the service to file a response or reply brief. The motion shall be determined without oral argument unless ordered by the court. (Adopted March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS**Applicability.**

When residents petitioned for judicial review of a city's decision to annex a subdivision, the city failed to use the appropriate method to challenge subject matter jurisdiction

by filing a motion to dismiss pursuant to I.R.C.P. 12(b)(1), (6). I.R.C.P. 84(o) is the only provision for motions to a district court sitting in an appellate capacity. In re *City of Shelley*, — Idaho —, 255 P.3d 1175 (2011).

Rule 84(p). Briefs and memoranda.

Briefs and memoranda shall be in the form and arrangement and filed and served within the time provided by rules for appeals to the Supreme Court unless otherwise ordered by the district court; provided that such briefs may be typewritten and copies may be carbon copies or photo copies. Only one (1) original signed brief need be filed with the court and copies shall be served on all parties. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(q). Oral argument.

Oral argument may be heard by the district court after notice to the parties in the same manner as notice of hearing of a motion before a trial court under these rules. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(r). Other procedural rules.

Any procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent the same is not contrary to this Rule 84. These rules shall be construed to provide a just, speedy and inexpensive determination of all petitions for review. If an appeal is de novo or the court orders an evidentiary hearing, the Idaho Rules of Civil Procedure, as applicable, shall apply to the de novo or evidentiary hearing. (Adopted March 22, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

Cited in: In re City of Shelley, — Idaho —, 255 P.3d 1175 (2011).

Rule 84(s). Listening to, watching or copying recording tapes.

Any party to a proceeding before an agency that is subject to judicial review by the district court may listen to, watch or copy any recording of the proceedings before the agency under such rules and for such fees as prescribed by statute, rule, ordinance or other provision setting forth such a fee. If no fees are prescribed, the district court may set a reasonable fee if the parties and the agency are unable to agree on a fee. (Adopted March 22, 2002, effective July 1, 2002.)

Rule 84(t). Finality of Judgments or Decisions and Remittiturs.

(1) **Judgment or Decision on Petition for Judicial Review.** The judgment or decision on petition for judicial review shall be entered in the manner prescribed by law. The clerk shall file stamp the district court's ruling and judgment and mail copies to the parties and to the agency.

(2) **Finality of Judgment or Decision Where District Court Does Not Take Additional Evidence.**

(a) If a notice of appeal is not filed, then the judgment or decision of the district court shall become final forty-two (42) days after the date evidenced by the filing stamp of the clerk of the court on the judgment or decision.

(b) If, after the judgment or decision, a party timely files a petition for rehearing then the judgment or decision shall become final forty-two (42) days after the date evidenced by the filing stamp of the clerk of the court on the order denying the rehearing or on any modified judgment or decision issued by the district court with or without a rehearing, if a notice of appeal is not filed.

(c) If a timely notice of appeal is filed, then the judgment or decision of the district becomes final upon the issuance of a remittitur by the Clerk of the Supreme Court or Court of Appeals.

(3) Finality of Judgment or Decision Where the District Court Does Take Additional Evidence.

(a) If a notice of appeal is not filed, then the judgment or decision shall become final within forty-two (42) days after the date evidenced by the filing stamp of the clerk of the court on the judgment or decision.

(b) If, after the judgment or decision, a party timely files a motion which, if granted, could affect the findings of fact or conclusions of law or the judgment or decision (except a motion under Rule 60 of the Idaho Rules of Civil Procedure or a motion regarding costs or attorney fees), then the judgment becomes final forty-two (42) days after the date evidenced by the filing stamp of the clerk of the court on the order deciding that motion, if a notice of appeal is not filed.

(c) If a timely notice of appeal is filed from the judgment or decision of the district court, or from an order deciding a motion that could affect such judgment or decision, then the judgment or decision becomes final upon the issuance of a remittitur by the Clerk of the Supreme Court or Court of Appeals on an opinion that does not remand the case for further proceedings in the district court.

(4) **Remittiturs.** When the judgment or decision of the district court has become final in accordance with this rule, the clerk of the court shall issue a remittitur, mail copies to all parties to the petition for judicial review, and mail a certified copy to the agency. The remittitur shall advise the agency that the judgment or decision has become final and that the agency shall forthwith comply with the directive of the judgment or decision. (Adopted March 22, 2002, effective July 1, 2002; amended April 22, 2004, effective July 1, 2004.)

Rule 85. Small Lawsuit Resolution Act Procedures.

Rule 85(a). Application of rule.

This rule applies only to civil actions in which a party has initiated the provisions of the Small Lawsuit Resolution Act, I.C. § 7-1501 et. seq. This rule is in addition to the procedures contained in the text of the statute. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(b). Computation of amount of claim.

In computing the amount of the claim for purposes of the Small Lawsuit Resolution Act, the dollar limitation is applied separately to each party, regardless of how that party's claim is designated, and excludes requests for costs and attorney's fees. The complaint must contain a statement that the amount of the claim does not exceed the statutory limitation of the Act. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(c). Notice of initiation of Act.

Any party may initiate the provisions of the Small Lawsuit Resolution Act by filing notice with the court as required by I.C. § 7-1503(2). This notice

must be entitled, "Notice of Initiation of Proceedings Under the Small Lawsuit Resolution Act". The notice will not be filed unless it is accompanied by the filing of a completed case information sheet on a form adopted by the Supreme Court and furnished by the clerk. Unless the opposing party files a written objection within seven (7) days of the filing of this notice, the opposing party will be deemed to have agreed to the initiation of the Act. (Adopted October 31, 2002, effective January 1, 2003; amended April 26, 2007, effective July 1, 2007.)

Rule 85(d). Selection of senior or retired judge by the parties.

If the parties select a retired or senior judge to serve as an evaluator from the list of private civil litigation evaluators who have qualified under subsection (g) of this rule, the parties shall compensate the retired or senior judge as they would any other private evaluator and such service shall not be considered judicial service subject to compensation by public funds. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(e). Appointment of senior judges as evaluators.

If the Supreme Court or an Administrative District Judge authorizes an appointment of a senior judge to serve as an evaluator, such appointment shall be considered judicial service for which the judge shall receive no compensation from the parties. A senior judge shall be compensated for such service in accordance with I.C. § 1-2005 or 1-2221 or, if a Plan B senior judge, shall receive credit for such service in accordance with the Supreme Court's Plan B rules for judicial retirement. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(f). List of evaluators.

Unless the parties have agreed in advance to the selection of a particular evaluator, upon notice of initiation of the provisions of the Small Lawsuit Resolution Act, the clerk of the court shall provide each party to the case a list containing the names of five (5) randomly selected evaluators, who reside or are willing to perform evaluations in the county where the lawsuit has been filed. The clerk of the court shall include the rate of hourly compensation, if any, for each evaluator and identify a website where the parties may obtain additional information about each evaluator's qualifications. If there are more than two parties to the litigation, the clerk will provide the names of ten (10) randomly selected evaluators to the parties. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(g). Registration of private civil litigation evaluators.

(1) **Application For Registration as a Private Civil Litigation Evaluator.** The Administrative Director of the Courts will compile a roster of private civil litigation evaluators. Persons interested in being placed on this list must submit an application to the Administrative Director of the Courts on a form prescribed by the Supreme Court. Applicants shall furnish,

in addition to information relating to the applicant, proof that the applicant possesses the qualifications for registration on the Supreme Court's list of private civil case evaluators as set forth in this rule. An applicant shall also be required to identify his or her area(s) of legal expertise and experience.

(2) **Qualifications of Private Civil Litigation Evaluators.** In order for a person to be placed on the Supreme Court's roster of private civil litigation evaluators, a person must certify by application that he or she is an active member of the Idaho State Bar in good standing and has held such membership for a minimum period of seven (7) years; or is a justice or judge who has retired from the Idaho judiciary or who has been designated a senior judge by the Idaho Supreme Court pursuant to § 1-2005 or § 1-2221, Idaho Code.

In addition, an applicant must be familiar with the Small Lawsuit Resolution Act (Section § 7-1501 et seq., Idaho Code) and the rules, practice and procedures of the Idaho Supreme Court governing proceedings in the district courts of the State of Idaho; and have the background experience and training to fairly, impartially and competently evaluate a civil case pursuant to the provisions of the Small Lawsuit Resolution Act.

(3) **Roster of Civil Litigation Evaluators.** The roster maintained by the Administrative Director of the Courts shall indicate, in addition to other information, the county or counties in which evaluators will accept appointments. The Administrative Director shall publish a copy of the roster, including information relating to the evaluator, on the Idaho Supreme Court's website.

(4) **Oath of Evaluator.** In each case, prior to undertaking an evaluation, a private civil litigation evaluator must sign a written oath that he or she will faithfully and impartially discharge the obligations and duties of an evaluator in a timely manner as prescribed by law, and to represent that he or she does not have a conflict of interest regarding the parties or the subject matter of the dispute that would prevent him or her from rendering a fair and impartial opinion in the dispute. The oath of the evaluator shall be filed with the clerk of the court and shall be substantially in the following form:

I, _____, hereby accept appointment as evaluator in the above-captioned case. I certify that I meet the qualifications of an evaluator, and shall timely and impartially discharge my obligations and duties as an evaluator. I have been informed of the identities of the parties to the case and the subject matter of the dispute and I have no conflict of interest or any bias that would prevent me from rendering a fair and impartial opinion in the dispute.

Signature

SUBSCRIBED AND SWORN to before me this ____ day of _____, 20 ____.

Signature

(Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(h). Compensation of evaluator.

Unless other arrangements are made by the parties or ordered by the court, the parties shall pay equal portions of the private civil litigation evaluator's fee as well as an equal portion of any actual costs incurred by the evaluator. If any party fails to pay its share of the evaluator's fee and costs, the court may enter an order for payment upon motion of the evaluator. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(i). Authority of evaluator.

A case brought under the Small Lawsuit Resolution Act remains under the jurisdiction of the court. An evaluator has only the authority expressly set forth in the Act. All other issues shall be determined by the court. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(j). Impartiality.

An evaluator has a duty to be impartial, and has a continuing duty to advise all parties of any circumstances bearing on possible bias, prejudice or partiality. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(k). Sanctions.

The evaluator shall be subject to sanctions, including removal from the roster of evaluators, if the evaluator fails to discharge the duties and responsibilities imposed by this rule or the Small Lawsuit Resolution Act. (Adopted October 31, 2002, effective January 1, 2003.)

Rule 85(l). Notice of request for trial de novo.

Within 21 days after the notice of issuance of the evaluator's decision has been filed with the clerk of the court, any party may file with the clerk a request for a trial de novo in the district court on all issues of law and fact. This request must be entitled, "Request for Trial de Novo under the Small Lawsuit Resolution Act." The request will not be filed unless it is accompanied by the filing of a completed information sheet on a form adopted by the Supreme Court and furnished by the clerk. (Adopted October 31, 2002, effective January 1, 2003; amended April 26, 2007, effective July 1, 2007.)

Rule 85(m). Statistical information.

In order to facilitate the gathering of statistical information pursuant to I.C. § 7-1512, each party shall file a completed case information sheet on a form adopted by the Supreme Court and furnished by the clerk whenever a judgment is entered in a case where the Small Lawsuit Resolution Act was initiated. This filing shall be in addition to the cover sheet required when the case is initiated and the request for trial de novo made. (Adopted April 26, 2007, effective July 1, 2007.)

Rule 86. Effective date.

These rules as amended shall take effect on January 1, 1975 and thereafter all laws and rules of civil procedure in conflict therewith shall be of no further force or effect. They govern all proceedings in actions then pending, except to the extent that in the opinion of the court, expressed by its order, their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the procedure existing at the time the action was brought applies.

STATUTORY NOTES

Compiler's Notes. By Supreme Court Order of April 19, 1995 this Rule (adopted effective January 1, 1975; amended December 19, 1975, effective January 1, 1976) was rescinded effective July 1, 1995. However, the Supreme Court Order of October 27, 1995 cancelled the rescission of Rule 86 in para-

graph 17 on page 8 of the order of the Court dated April 19, 1995 and reinstated said Rule, nunc pro tunc to April 19, 1995. The Order of October 17, 1995 provided that this order of reinstatement should be effective on the effective date of the order (October 27, 1995) nunc pro tunc to April 19, 1995.

Rule 87. Title.

These rules may be known and cited as the Idaho Rules of Civil Procedure, or abbreviated I.R.C.P. (Amended effective July 21, 1975; amended December 19, 1975, retroactive to January 1, 1975; amended April 22, 1976; amended April 11, 1979, effective July 1, 1979; amended April 2, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended April 13, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 30, 1988, effective July 1, 1988; amended March 27, 1989, effective July 1, 1989; amended March 23, 1990, effective July 1, 1990; amended March 30, 1990, effective July 1, 1990; amended April 5, 1990, effective July 1, 1990; amended April 2, 1991, effective July 1, 1991; amended April 13, 1992, effective January 1, 1993; amended April 21, 1993, effective July 1, 1993; amended May 11, 1994, effective July 1, 1994; amended April 19, 1995, effective July 1, 1995; amended April 3, 1996, effective July 1, 1996; amended February 26, 1997, effective July 1, 1997; amended March 31, 1998, effective July 1, 1998; amended March 9, 1999, effective July 1, 1999; amended November 15, 2002, effective January 1, 2003.)

Administrative Order No. 1: In administering the filing fee schedule of the district court the clerk of the court shall follow the following general rules of construction in charging the required filing fees:

1. The clerk of the court shall charge all statutory fees set forth in section 31-3201A, Idaho Code, as amended and summarized in the schedule under the state and county fee columns, regardless of whether the filing party has previously appeared in the action.

2. Upon the first appearance by any party in an action, including the filing of any docu-

ment or pleading for which a statutory fee is required, the clerk shall additionally charge and collect the sum of \$18.00 pursuant to section 1-2003, Idaho Code, for the Judges' Retirement Fund and \$10.00 pursuant to section 73-213, Idaho Code, for the Code Commission Fund, \$10.00 for the County Facility Fund pursuant to section 31-3201(3), Idaho Code, and \$5.00 for the ISTARS Technology Fund pursuant to section 31-3201A(a), Idaho code, all of which shall be disbursed and remitted as provided in such statutes. Provided, however, the clerk of the court shall not

charge or collect from any party more than one statutory fee for the Judges' Retirement Fund, one statutory fee for the Code Commission Fund, one statutory fee for the County Facility Fund and one for the ISTARS Technology Fund, in any action to which the person is a party, regardless of the amount or number of other statutory fees collected by the clerk for the filing of pleadings or documents pursuant to other statutes.

Examples of filings in an action:

1. A files actions against B in the district court. The fee is \$77.00, (\$17.00 State, \$17.00 County District Court Fund, \$18.00 Retirement Fund, \$10.00 Code Commission Fund, \$10.00 County Facility Fund and \$5.00 ISTARS Technology Fund).

2. A files Amended Complaint, no fee required.

3. B files Answer (no prior appearance). Fee is \$47.00 (\$10.00 State, \$4.00 County District Court Fund, \$18.00 Retirement Fund, \$10.00 Code Commission Fund and \$5.00 ISTARS Technology Fund).

4. C moves to intervene. Fee is \$50.00 (\$7.00 County District Court Fund — section 31-3201A(f), \$18.00 Retirement Fund, \$10.00 Code Commission Fund, \$10.00 County District Court Fund and \$5.00 ISTARS Technology Fund) (intervention fee). Motion granted, so C files Complaint in Intervention. Fee is \$34.00 (\$17.00 State, \$17.00 County District Court Fund). (Retirement Fund, ISTARS Technology Fund and Code Commission Fund already paid — prior appearance).

5. A files Cross Claim against C. Filing fee \$8.00. (County District Court Fund \$8.00 — section 31-3201A(h)). Retirement Fund, County Facility Fund, ISTARS Technology Fund and Code Commission Fund already paid — prior appearance.

6. B files Counterclaim against A. Filing fee \$8.00 (Prior appearance, Retirement Fund, County Facility Fund, ISTARS Technology Fund and Code Commission Fund already paid — \$8.00 for Counterclaim to the District Court Fund).

7. B files Third-Party Complaint against X. Filing fee \$8.00 (County District Court Fund \$8.00 — section 31-3201A(g)). (Retirement Fund, County Facility Fund, ISTARS Technology Fund and Code Commission Fund already paid — prior appearance).

8. X files Motion for Change of Venue. Filing fee \$52.00 (State \$10.00, County District Court Fund \$9.00 — section 31-3201A(c) first appearance fee — \$18.00 Retirement Fund, \$10.00 Code Commission Fund and \$5.00 ISTARS Technology Fund).

9. Change of venue granted. Filing fee to new county from X, \$9.00 total. (Change of

Venue fee to new county \$9.00 — section 31-3201A(i)). (Retirement Fund, County Facility Fund, ISTARS Technology Fund and Code Commission Fund already paid — prior appearance).

10. X files Answer to Third-Party Complaint. No filing fee. (\$14.00 first appearance fee already paid to original county under No. 8 above; and statutory \$9.00 fee for change of venue granted, section 31-3201A(i), already paid to county of new venue under No. 9 above).

Administrative Order No. 2: Petitions for adoption and petitions for termination of the parent-child relationship each carry a \$57.00 filing fee under the fee schedule under preceding fee table in Appendix "A". However, in the event that an adoption petition and a termination of the parent-child relationship petition are consolidated into one petition as permitted by section 16-1506, Idaho Code, only one \$57.00 filing fee shall be charged. More than one child may be involved in such a petition and still only one fee shall be charged. However, in any termination of the parent-child relationship whether or not consolidated with an adoption petition, if more than one child is joined in the petition and the children joined do not have the same common parents, then they shall be considered separate proceedings to the extent that there are separate parents involved, and a separate \$57.00 filing fee shall be charged for each proceeding involving different sets of parents. As an example, where a petition for termination of the parent-child relationship is filed (whether or not joined with an adoption petition) involving two children, both of whom have the same mother, but separate fathers, the proceedings shall be considered two separate proceedings, and two separate \$57.00 filing fees shall be charged.

Administrative Order No. 3: The initial appearance fee of \$77.00 (\$39.00 filing fee under section 31-3201A(a), which includes \$5.00 ISTARS Technology Fund, \$18.00 Judges Retirement Fund under section 1-2003, \$10.00 Code Commission Fund under section 73-213, \$10.00 County Facility Fund under section 31-3201(3)) shall be assessed and collected upon the first appearance by any party in an action. For this purpose such first appearance shall mean the filing of any pleading, motion, affidavit or document with the court by a party to an action, whether or not such party is represented by an attorney. The mere physical appearance and participation in a court proceeding by a party to an action, whether or not represented by or accompanied by an attorney, shall not constitute a first appearance for purposes of determin-

ing whether a filing fee shall be charged, unless otherwise ordered by the court. For example, a party physically appearing before the court, whether or not represented by or accompanied by an attorney, in response to an order to show cause shall not be required to pay a first appearance filing fee, if no affidavits, motions, pleadings or documents are filed on behalf of such party, or if no oral affirmative relief is sought.

The court shall have discretion whether any personal appearance of a party to an action shall constitute a "first appearance" which requires him to pay the required filing fees in order to be heard by the court in the action.

Administrative Order No. 4: Filing fees and costs of service in divorce actions — Waiver. — No divorce action shall be filed in any district court without payment of the statutory filing fee, unless the clerk is first ordered by a judge of the district to waive such filing fee.

Any person who claims an exemption from payment of the filing fee in a divorce action by reason of indigency shall make a written, verified petition to the district court for a waiver of such fee and sheriff's costs. Such petition shall set forth the facts on which the claim of indigency is made, and a showing that the petitioner seeks in good faith a judicial dissolution of the marriage. A judge shall examine such application and if satisfied as to its merits may enter an order on the basis of such application, or may require the petitioner at a hearing or otherwise to submit to the court proof, oral or documentary, of such

indigency and good faith. The court shall rule on all such applications and enter its order either denying the petition or granting it. Any order granting such petition shall require the clerk of the court to file a divorce action without payment of the fee, and also require service of any summons and copy of pleadings without costs to the indigent.

Any waiver of the filing fee or costs of service as provided by this rule on behalf of an indigent spouse shall not be construed as relieving the other spouse of any obligation to pay for such fee or costs, within the spirit and intent of section 32-704, Idaho Code.

Administrative Order No. 5: No Filing Fee on Acknowledged Service. — If there is filed in an action a document signed by a party to the action acknowledging service of process, such document shall be considered as a return of service and not an appearance in the action, and no filing fee for an appearance shall be charged. Likewise, if such document acknowledging service of process by a party to an action additionally waives the time permitted for appearance or defense, or refuses to plead further, or consents to the immediate hearing of a default proceeding against him without further notice, such document shall also be considered a return of service of process and no filing fee shall be required as an appearance in the action. Provided, however, if any of the documents described above are executed by an attorney for and on behalf of the party served, the filing of such document shall constitute an "appearance," and a filing fee for an appearance shall be charged.

Compiler's Notes. The words in parentheses so appeared in the rule as promulgated.

APPENDIX "A"

FILING FEE SCHEDULE - DISTRICT COURT AND MAGISTRATE DIVISION DISTRICT COURT FILING FEES

COMMENCING A CIVIL ACTION

A civil action is commenced by filing a complaint, petition, application, or other document that begins a new civil lawsuit. A civil action is commenced if the clerk opens a new case file rather than filing the document in an existing case file. Whether a filing fee is charged does not depend upon the title or name of the document filed, but upon whether it commences a new case.

In a civil lawsuit, a party usually seeks to obtain an order or judgment from the court against another party. However, there are some times when a clerk will have to file a document, such as registering a trust, when it will not commence a lawsuit. In such instances, no filing fee will be charged.

Only one filing fee is charged even if the complaint, petition, or application includes two or more separate claims for relief. If the claims would have differing filing fees if they were filed as separate actions, then the appropriate fee is whichever is higher; for example, if one action was filed to have a marriage annulled or, if that were denied, to obtain a divorce, the appropriate filing fee would be the fee for filing a divorce action because it is higher than the filing fee for an annulment. Likewise, if one action was filed to compromise a minor's claim and to appoint a conservator, the appropriate filing fee would be for the appointment of a conservator.

The fee for opening any civil case not found on this schedule is \$96.00, and the correct filing fee code is "A".

APPEARING IN A CIVIL ACTION (CATEGORY I)

An appearance is the first document filed by a party (other than the plaintiff or petitioner) in an existing civil action, regardless of whether it is filed *pro se* or through counsel and regardless of the title of the document (e.g., "notice of appearance," "answer," "motion," or other title).

If a party acting *pro se* has already filed an appearance in an action and then an attorney later files a "notice of appearance" to appear on behalf of that party, the attorney's "notice of appearance" does not constitute an appearance for the purpose of assessing a filing fee because the party has already appeared in the action *pro se*.

Fee Category	Idaho Code Fund	Judges Retire. Fund	County Facility Fund	State	State/ Guard- ship Project Fund	County Dist. Ct. Fund	ISTARS Tech. Fund	Senior Mag. Judges Fund	Total
A. All initial civil case filings of any type not listed in categories B-H, including:									
1. Adoptions									
2. Adoption and Termination of parental rights									
3. Termination of parental rights									
4. Personal injury									
5. Petition for formal probate									
6. Application for informal probate									
7. Name change									
8. Permission to marry									
9. Child Support (unless filed by DHW)									
10. Habeas by prisoners									
11. Paternity action									
12. Unlawful detainer									
13. Defacto custodian									
14. Relief from firearm disability	10.00	26.00	10.00	17.00		17.00	10.00	6.00	96.00
B. 1. Divorce									
State portion includes additional \$20 displaced homemaker fund and additional \$20 domestic violence fund district court fund includes \$5.00 taken from the State General Fund fee, which shall be separately identified and deposited in the District Court Fund, for establishing a uniform system of qualifying counselors in domestic violence cases. I.C. § 31-3201A(q)									
a. With minor children									
b. Without minor children	10.00	26.00	10.00	52.00		23.00	10.00	6.00	137.00
2. Motion to reopen or modify divorce									
a. With minor children									
b. Without minor children	10.00	26.00	10.00	15.00		17.00		6.00	84.00
3. Amended complaint to convert an action that was not one for divorce (e.g. separate maintenance) into an action for divorce (\$1.00 for court clerk fees I.C. § 39-266 & \$20 for the displaced homemaker account I.C. § 39-5009 & \$20 domestic violence project, I.C. § 39-5213)				41.00					41.00
C. Small claims		26.00	10.00			7.00		6.00	49.00
D. Summary administration of small estates			10.00	17.00		17.00	10.00	6.00	60.00
E. Petition for release from common law lien						35.00			35.00
F. Petition for entry of judgment on worker's comp award	10.00	26.00	10.00			9.00		6.00	61.00

G. 1. Guardianships a. Initial Petition motion or appearance by any person on behalf of a minor. b. Initial Petition motion or appearance by any person on behalf of an incapacitated person.	10.00	26.00	10.00	17.00	50.00	17.00	10.00	6.00	146.00
2. Conservatorship a. Initial Petition motion or appearance by any person on behalf of a minor. b. Initial Petition motion or appearance by any person on behalf of an incapacitated person.	10.00	26.00	10.00	17.00	50.00	17.00	10.00	6.00	146.00
3. Joint petition for guardianship/conservatorship or joint petition for receipt and acceptance of foreign guardianship a. where same party is guardian and conservator of a minor person b. where same party is guardian and conservator of incapacitated person	10.00	26.00	10.00	17.00	50.00	17.00	10.00	6.00	146.00
c. where different parties are petitioners for guardian and conservator of a minor d. where different parties are petitioners for guardian and conservator of incapacitated person (considered two filings)	20.00	52.00	20.00	17.00	50.00	17.00	10.00	6.00	192.00
4. Status reports guardianship					25.00				25.00
5. Intermediate or final account of conservator					41.00	9.00			50.00
6. Petition for distribution of estate in conservatorship				13.00	41.00	6.00		6.00	66.00
7. Inventories by conservator					41.00				41.00

H. Case filings with no fee 1. Cases brought under Ch. 3, Title 66, I.C. for commitment of mentally ill persons 2. Child Protective cases 3. Demand for bond before personal representative is appointed in probate 4. Petition for sterilization 5. Judicial consent for abortion petitions 6. Registration of trusts and renunciations 7. Petition to compromise minor's claim 8. Petition for civil protection order or to enforce foreign CPO pursuant to Ch. 63, Title 39, I.C. pleadings 9. Proceedings to suspend a license for non-payment of child support 10. Post-conviction act proceedings 11. Stipulation for entry of judgment 12. Filing of a custody decree from another state 13. BAC license suspension 14. Child support proceedings filed by DHW 15. Fugitive warrants 16. Court initiated contempt									No fee
I. The fees set out in Category I apply to the first document filed by a party <u>other than</u> the plaintiff or petitioner no matter what the document is entitled									
1. Initial Appearance by persons other than the plaintiff or petitioner a. Motion for Permissive Intervention – Defacto custodian	10.00 10.00	26.00 26.00		10.00 10.00		4.00 4.00	10.00 10.00	6.00 6.00	66.00 66.00
2. Small Claims									No fee
3. Stipulation for entry of judgment									No fee
4. Any objection or motion filed in a guardianship or conservatorship by the minor or alleged incapacitated person									No fee
5. Appearing after judgment when the party has not previously appeared	10.00	26.00	10.00			9.00	10.00	6.00	71.00
J. Additional filings in probate and trusts: the following fees shall be collected from any person filing the following documents, whether or not the person has appeared previously:									
1. Probate a. petition for distribution of estate				13.00		6.00		6.00	25.00
b. demand for notice						9.00			9.00
c. demand for bond after appointment of personal representative						9.00			9.00
d. intermediate or final accounting of personal rep						9.00			9.00

e. petition for approval of compromise				10.00		4.00			14.00
f. filing of copy of appointment of foreign personal representative				10.00		17.00			27.00
2. Trusts and Renunciations									
a. intermediate or final accounting of trustee						9.00			9.00
b. petition for final distribution of estate				13.00		6.00		6.00	25.00
K. Special Filings									
1. Order granting change of venue (pay to new county).						9.00			9.00
2. Petition to reopen a case after no activity for one year	10.00	26.00	10.00			9.00		6.00	61.00
3. Third party complaint – This fee is <i>in addition</i> to any fee filed as a plaintiff initiating the case or as a defendant appearing in the case						8.00		6.00	14.00
4. Cross claim (defendant v. defendant or plaintiff v. plaintiff) This fee is in addition to any fee filed as a plaintiff to initiate the case or as a defendant appearing in the case						8.00		6.00	14.00
a. For divorce when the complaint did not allege a claim for divorce. The \$41 fee is in addition to the fee for a general cross-claim, (\$1 for court clerk fee, I.C. § 39-266 & \$20 for displaced homemaker account, I.C. § 39-5009 & \$20 domestic violence project, I.C. § 39-5213)				41.00		8.00		6.00	55.00
5. Counterclaim for divorce when the complaint did not allege a claim for divorce *((\$1.00 for court clerk fees I.C. § 39-266 & \$20 for the displaced homemaker account I.C. § 39-5009 & \$20 domestic violence project, I.C. § 39-5213)				41.00					41.00
6. Renewing a judgment						9.00			9.00
7. Filing a foreign judgment						7.00			7.00
L. Appeals									
1. Small claims Dept to magistrate	10.00	26.00	10.00			9.00		6.00	61.00
2. Magistrate Division to District court	10.00	26.00	10.00			9.00		6.00	61.00
3. Appeal or petition for judicial review or cross appeal or cross-petition from commission, board, or body to district court	10.00	26.00	10.00	17.00		17.00	10.00	6.00	96.00
a. Petition for judicial review of IDWR adjudication of water rights	10.00	26.00	10.00	17.00		17.00	10.00	6.00	96.00

<div>4. Civil appeal or cross-appeal to Supreme Court (with exception of a. and b. below). The clerk of the district court shall collect the entire fee and remit the \$86.00 fee to the Supreme Court with a certified copy of the notice of appeal. Rule 23(b), I.A.R.) a. Post-Conviction b. Habeas Corpus</div>								
86.00 Sup. Ct.					9.00		6.00	101.00 No fee No fee

Index to Rules of Civil Procedure

A

ABBREVIATION OF RULES, CivPro 87.

ACCOUNTS AND ACCOUNTING.
Masters.

Statement of accounts, CivPro 53(d)(3).

ACTIONS.

Commencement of actions, CivPro 3(a).

Consolidation, CivPro 42(a).

Form of action, CivPro 2.

Transfer, CivPro 8(a)(2).

ADDITURS.

In lieu of new trial, CivPro 59.1.

ADMISSIONS.

Requests for admission, CivPro 36(a).

Effect of admission, CivPro 36(b).

Failure to admit.

Expenses, CivPro 37(c).

Non-filing of requests for admission and responses, CivPro 36(c).

Retention of discovery documents, CivPro 36(c).

Use of admissions, CivPro 36(d).

ADOPTION.

Decree of adoption, CivPro 76.

Family law case information sheet.

Required as condition for filing complaint, CivPro 3(a)(1).

AFFIDAVITS.

Child support.

Affidavit accompanying copy of decree, CivPro 6(c)(5).

Motions.

Filed with motion, CivPro 7(b)(3).

New trial.

Time for serving affidavits on motion for new trial, CivPro 59(c).

New trial.

Motion.

Time for serving affidavits on motion for new trial, CivPro 59(c).

Show cause orders.

Applications, CivPro 6(c)(2).

AFFIDAVITS —Cont'd

Summary judgment.

Bad faith affidavits, CivPro 56(g).

Form of affidavits, CivPro 56(e).

Service, CivPro 56(c).

When affidavits unavailable, CivPro 56(f).

AFFIRMATION IN LIEU OF OATH,

CivPro 43(d).

AFFIRMATIVE DEFENSES, CivPro

8(c).

AGE.

Service of process.

Who may serve, CivPro 4(c)(1).

AGENCY ACTIONS.

Appeals, CivPro 84.

ALTERNATIVE DISPUTE

RESOLUTION SCREENING.

Domestic relations cases involving children.

ADR reports, contents, disclosure, CivPro 16(m)(3).

ADR screeners, qualifications, CivPro 16(m)(2).

Authority of court, CivPro 16(m)(1).

AMENDMENTS, CivPro 1(b).

Findings of court, CivPro 52(b).

Judgments.

New trial, CivPro 59(a).

Motion to amend judgment, CivPro 59(e).

Stay on motion, CivPro 62(b).

Pleadings, CivPro 15(a).

Amendments to conform to the evidence, CivPro 15(b).

Relation back of amendments, CivPro 15(c).

Process or proof of service, CivPro 4(h).

ANOTHER ACTION PENDING BETWEEN SAME PARTIES.

Failure to join indispensable party.

Defenses required to be presented by motion, CivPro 12(b), (g).

APPEALS.

Argument, CivPro 83(w).

Bonds, surety.

Stays, CivPro 83(i).

APPEALS —Cont'd

Briefs, CivPro 83(v).

Cross appeals, CivPro 83(g).

Depositions pending appeal, CivPro 27(b).

Fees.

State agency and local government actions.

Preparation of agency's record, CivPro 84(f).

Preparation of transcript, CivPro 84(g).

Filing of appeal, CivPro 83(e).

Filing of transcript and record, CivPro 83(p), (z).

Forms.

Transcript.

Certificate of transcription, CivPro 83(k).

Injunction.

Powers of court pending appeal, CivPro 62(c).

Magistrates.

Appeals from magistrate's judgment or order, CivPro 83(a).

Filing of appeal, CivPro 83(e).

Judicial review, CivPro 83(b).

Scope of review, CivPro 83(u).

Stay during appeal, CivPro 83(i).

Trial de novo, instructions to magistrate, CivPro 83(z).

Mandamus.

Powers of court pending appeal, CivPro 62(c).

Method of appeal.

Determination, CivPro 83(j).

Motions, CivPro 83(t).

Notice, CivPro 83(f).

Other appellate rules, CivPro 83(x).

Record.

Agency's record, CivPro 83(n), 84(f), (j).

Augmentation of record, CivPro 83(q), 84(l).

Clerk's record, CivPro 83(n), (z).

Filing, CivPro 83(p).

Recording tapes.

Copying, CivPro 83(y).

Listening to, CivPro 83(j), (y).

Scope of appellate review, CivPro 83(u).

Small claims.

See SMALL CLAIMS.

State agency and local government actions.

Appellate rules, applicability of, CivPro 84(r).

APPEALS —Cont'd

State agency and local government actions —Cont'd

Augmentation of record, CivPro 84(l).

Brief and memoranda, CivPro 84(p).

Definitions, CivPro 84(a).

Evidence.

Additional evidence presented to district court, CivPro 84(l).

Fees.

Preparation of agency's record, CivPro 84(f).

Preparation of transcript, CivPro 84(g).

Forms.

Certificate of transcription, CivPro 84(g).

Joint use of transcripts, CivPro 84(h).

Lodging of transcript and record, CivPro 84(k).

Manner and scope of review, CivPro 84(e).

Motions, CivPro 84(o).

Oral argument, CivPro 84(q).

Petition for judicial review.

Contents of petition, CivPro 84(d).

Cross-petition for judicial review, CivPro 84(c).

Effect of failure to comply with time limits, CivPro 84(n).

Filing petition for judicial review, CivPro 84(b).

Finality of judgment or decisions and remittiturs, CivPro 84(t).

Motions, CivPro 84(o).

Stay of proceedings, CivPro 84(m).

Preparation of transcript, CivPro 84(g).

Form of transcript, CivPro 84(i).

Recordation of proceedings.

Listening to, watching or copying recording tapes, CivPro 84(s).

Record on appeal.

Augmentation of record, CivPro 84(l).

Preparation of record, CivPro 84(f).

Settlement transcript and record, CivPro 84(j).

Remand to agency to take additional evidence, CivPro 84(l).

Scope of rules, CivPro 84(a).

Settlement transcript and record, CivPro 84(j).

Stay, CivPro 62(d), 83(i).

Time.

Failure to comply with time limits. Effect, CivPro 83(s).

APPEALS —Cont'd

Time —Cont'd

Filing of appeal, CivPro 83(e).

Record.

Filing, CivPro 83(p).

Transcript.

Filing, CivPro 83(p).

Objections to transcript, CivPro 83(o).

Preparation, CivPro 83(k).

Transcript, CivPro 83(j), (l).

Certificate of transcription.

Form, CivPro 83(k).

Filing, CivPro 83(p).

Joint use of transcript, CivPro 83(r).

Objections to transcript, CivPro 83(o).

Preparation, CivPro 83(k).

Settlement of transcript, CivPro 83(o).

Trial de novo, CivPro 83(j).

District court judgment, CivPro 83(z).

APPEARANCES.

Contempt.

Nonsummary proceedings.

Initial appearance of respondent, CivPro 75(f).

Filing and service of pleadings and other papers, CivPro 5(a).

General appearance, CivPro 4(i)(1).

Personal jurisdiction.

Contesting personal jurisdiction, CivPro 4(i)(2).

Voluntary submission to personal jurisdiction of court, CivPro 4(i)(1).

Special appearance or motion.

Contesting personal jurisdiction, CivPro 4(i)(2).

Voluntary appearance.

Voluntary submission to personal jurisdiction of court, CivPro 4(i)(1).

Withdrawal of attorney.

Filing and service of additional written notice of appearance after withdrawal, CivPro 11(b)(3).

APPLICABILITY OF RULES.

Effective date, CivPro 86.

Scope, CivPro 1(a).

ASSIGNMENT OF ERROR.

Giving or failing to give instructions.

Objection required, CivPro 51(b).

Lack of finding by court.

Required to raise, CivPro 52(b).

ASSOCIATIONS.

Class actions.

Actions relating to unincorporated associations, CivPro 23(g).

Derivative actions by shareholders, CivPro 23(f).

Depositions.

Oral examination.

Deposition of organization, CivPro 30(b)(6).

ATTORNEYS AT LAW.

Appearances.

Withdrawal of attorney.

Filing and service of additional written notice of appearance after withdrawal, CivPro 11(b)(3).

Bonds, surety.

Counsel not acceptable as surety, CivPro 66(b).

Change of attorneys, CivPro 11(b)(1).

Child custody and visitation disputes.

Mediation.

Contact between mediator and attorneys, CivPro 16(j)(9).

Death of attorney.

Withdrawal upon, CivPro 11(b)(4).

Disbarment.

Withdrawal upon, CivPro 11(b)(4).

Fees.

See ATTORNEYS' FEES.

Magistrates.

Attorney magistrates, CivPro 82(b).

Assignment of additional cases to attorney magistrates, CivPro 82(c)(2).

Enlargement of dollar amount of cases assignable, CivPro 82(c)(5).

Jurisdiction, CivPro 82(c)(2).

Special assignment to attorney magistrates, CivPro 82(c)(4).

Mediation.

Child custody and visitation disputes.

Contact between mediator and attorneys, CivPro 16(j)(9).

ATTORNEYS AT LAW —Cont'd

Service of process.

Service upon attorney, CivPro 5(b).
Legislature.

Service on attorney-legislator
suspended during sessions,
CivPro 5(g).

Withdrawal of attorney.

Filing and service of additional
written notice after
withdrawal, CivPro 11(b)(3).

Order of withdrawal, CivPro
11(b)(3).

Substitution of attorney.

Notice, CivPro 11(b)(1).

**Withdrawal of attorney, CivPro
11(b)(2).**

Death, extended illness, absence or
disbarment of attorney, CivPro
11(b)(4).

Leave to withdraw, CivPro 11(b)(3).

Notice to client, CivPro 11(b)(3).

ATTORNEYS' FEES, CivPro 54(e)(1).

Amount, CivPro 54(e)(3).

Applicability of rule.

Claims to which rule applies, CivPro
54(e)(8).

Award, CivPro 54(e)(1).

Determination not binding on
attorney and client, CivPro
54(e)(7).

Findings of court, CivPro 54(e)(2).

Contempt.

Nonsummary proceedings, CivPro
75(m).

Costs, CivPro 54(e)(5).

Default judgments, CivPro 54(e)(4).

**Effective date of rule, CivPro
54(e)(9).**

Findings of court, CivPro 54(e)(2).

Mistrial declared.

Sanctions for misconduct of party or
attorney, CivPro 47(u).

Objections, CivPro 54(e)(6).

Court to include reasoning and
factors in order, CivPro 54(e)(7).

Pleading, CivPro 54(e)(4).

**Settlement of attorney fees by
order of court, CivPro 54(e)(7).**

Small claims.

Appeals, CivPro 81(q).

B

BONDS, SURETY.

Appeals.

Stays, CivPro 83(i).

Costs.

Nonresident cost bond.

Prohibited, CivPro 54(d)(4).

**Counsel not acceptable as surety,
CivPro 66(b).**

Divorce and related proceedings.

Prohibitive or mandatory orders.

Bond discretionary, CivPro 65(g).

**Justification of sureties on bond,
CivPro 66(a).**

Small claims.

Appeals, CivPro 81(l).

Stays.

Appeals, CivPro 83(i).

BRIEFS.

Appellate briefs, CivPro 83(v).

Filing, CivPro 7(b)(3).

Motions.

Submission of brief in support.

Time limits for filing with court,
CivPro 7(b)(3).

**State agency and local government
actions.**

Judicial review by district court,
CivPro 84(p).

**Time limits for filing and serving,
CivPro 7(b)(3).**

C

CERTIFICATE OF FINAL

JUDGMENT, CivPro 54(b).

CHANGE OF VENUE, CivPro 40(e).

**CHILD CUSTODY AND
VISITATION.**

**Alternative dispute resolution
screening.**

Domestic relations cases involving
children, CivPro 16(m).

**De facto custodian intervention,
CivPro 24(d).**

Family law case information sheet.

Required as condition for filing
complaint, CivPro 3(a)(1).

**Informal custody trials, CivPro
16(p).**

CHILD CUSTODY AND VISITATION —Cont'd

Mediation of disputes, CivPro 16(j).
 Authority of court, CivPro 16(j)(5).
 Matters subject to mediation, CivPro 16(j)(2).
 “Mediation” defined, CivPro 16(j)(1).
Mediator.
 Application and registration, CivPro 16(j)(6).
 Communications with court, CivPro 16(j)(8).
 Contact with attorneys, CivPro 16(j).
 Continuing education, CivPro 16(j)(6).
 Duties, CivPro 16(j)(7).
 Qualifications, CivPro 16(j)(6).
 Selection, CivPro 16(j)(3).
 Training requirements, CivPro 16(j)(6).
 Parenting coordinators, CivPro 16(l).
 Requirement to attend orientation, CivPro 16(j)(4).
 Termination of mediation, CivPro 16(j)(10).

Modification.

 Proceedings to modify orders, CivPro 60(c).

Parenting coordinators, CivPro 16(l).

Supervised access to children, CivPro 16(o).

CHILD PROTECTION ACT.

Family law case information sheet.
 Required as condition for filing complaint, petition or application, CivPro 3(a)(1).

CHILD SUPPORT.

Affidavit accompanying copy of decree, CivPro 6(c)(5).

Alternative dispute resolution screening.

 Domestic relations cases involving children, CivPro 16(m).

Blood tests.

 Paternity actions, CivPro 6(c)(7).

Genetic tests.

 Paternity actions, CivPro 6(c)(7).

Guidelines, CivPro 6(c)(6).

Informal custody trials, CivPro 16(p).

Modification.

 Proceedings to modify child custody and child support orders, CivPro 60(c).

CITATION OF RULES.

 Title, CivPro 87.

CIVIL PROTECTION ORDERS.

Closed proceedings, CivPro 77(b).

CIVIL RIGHTS.

Pleadings.

 Violation of civil or constitutional rights, CivPro 9(b).

CLASS ACTIONS.

Actions conducted partially as class actions, CivPro 23(c).

Compromise, CivPro 23(e).

Derivative actions by shareholders, CivPro 23(f).

Dismissal, CivPro 23(e).

Joinder of parties.

 Persons to be joined if feasible.

 Exception as to class actions, CivPro 19(a)(4).

Judgments, CivPro 23(c).

Notice, CivPro 23(c).

Orders, CivPro 23(d).

 Determination by order whether class action to be maintained, CivPro 23(c).

Prerequisites, CivPro 23(a).

Unincorporated associations.

 Actions relating to, CivPro 23(g).

When maintainable, CivPro 23(b).

CLERKS OF COURT.

Appellate judgments, CivPro 83(z).

Books and records, CivPro 79(f).

Default judgment by clerk, CivPro 55(b)(1).

Office.

 When open, CivPro 77(c).

Orders, CivPro 77(c).

Records, CivPro 79(f).

CLOSED TRIAL, CivPro 77(b).

COMMENCEMENT OF ACTIONS, CivPro 3(a).

COMPLAINTS, CivPro 7(a).

Filing.

 Commencement of action, CivPro 3(a)(1).

 Waiver of fee, CivPro 10(a)(6).

COMPROMISE AND SETTLEMENT.

Attorneys' fees.

 Settlement of attorney fees by order of court, CivPro 54(e)(7).

Class actions, CivPro 23(e).

COMPROMISE AND SETTLEMENT
—Cont'd

Costs.

Settlement of costs by order of court,
CivPro 54(d)(7).

CONDITIONS PRECEDENT.

Pleading, CivPro 9(c).

**CONFERENCE TELEPHONE
CALLS.**

Depositions by, CivPro 30(b)(7).

CONFLICTS OF INTEREST.

Depositions.

Taking of depositions.

Persons before whom depositions
may be taken.

Disqualification for interest,
CivPro 28(d).

Judges.

Disqualification for cause, CivPro
40(d)(2).

Supervised access to children.

Providers of supervised access,
CivPro 16(o).

CONSERVATORS.

Powers and duties, CivPro 72(a).

CONSOLIDATION OF ACTIONS,
CivPro 42(a).

**CONSTRUCTION AND
INTERPRETATION.**

Liberal construction of rules,
CivPro 1(a).

Pleadings, CivPro 8(f).

CONTEMPT, CivPro 75.

Definitions, CivPro 75(a).

Nonsummary proceedings.

Appearances.

Initial appearance of respondent,
CivPro 75(f).

Applicability of other rules, CivPro
75(n).

Attorneys' fees, CivPro 75(m).

Burden of proof, CivPro 75(j).

Commencement, CivPro 75(c).

Defenses, CivPro 75(h).

Findings of fact, CivPro 75(k).

Plea, CivPro 75(g).

Sanctions, imposition of, CivPro 75(l).

Service of process, CivPro 75(d).

Trial, CivPro 75(i).

Warrant of attachment and bail,
CivPro 75(e).

Subpoenas.

Nonobedience of subpoena, CivPro
45(h).

CONTEMPT —Cont'd

Summary proceedings, CivPro 75(b).

CORPORATIONS.

Class actions.

Derivative actions by shareholders,
CivPro 23(f).

Depositions.

Oral examination.

Deposition of organization, CivPro
30(b)(6).

Service of process.

Personal service.

Service upon domestic or foreign
corporations, CivPro 4(d)(4).

COSTS, CivPro 54(d)(1).

Attorneys' fees.

See ATTORNEYS' FEES.

Bonds, surety.

Nonresident cost bond.

Prohibited, CivPro 54(d)(4).

Dismissal of actions.

Previously dismissed action, CivPro
41(d).

Items allowed, CivPro 54(d)(1).

Jurisdictional amounts, CivPro
82(d).

Memorandum of costs, CivPro
54(d)(5).

Objections, CivPro 54(d)(6).

Mistrial declared.

Sanctions for deliberate misconduct
of party or attorney, CivPro
47(u).

Objections to costs, CivPro 54(d)(6).

Postponement.

Costs on, CivPro 54(d)(3).

Prevailing party, CivPro 54(d)(1).

Multiple parties, CivPro 54(d)(2).

Small claims.

Appeals, CivPro 81(p).

**COUNTERCLAIMS AND
CROSS-CLAIMS.**

Compulsory counterclaims, CivPro
13(a).

Counterclaim against the state,
CivPro 13(d).

**Counterclaim exceeding opposing
claim**, CivPro 13(c).

**Counterclaim maturing or
acquired after pleading**, CivPro
13(e).

Cross-claim against coparty, CivPro
13(g).

Dismissal, CivPro 41(c).

COUNTERCLAIMS AND

CROSS-CLAIMS —Cont'd

General rules of pleading, CivPro 8(a)(1).

Judgments.

Default judgments.

Counterclaimants and cross-claimants covered by rule, CivPro 55(d).

Separate trials.

Separate judgments, CivPro 13(i).

Jurisdiction.

Counterclaims or cross-claims exceeding jurisdiction, CivPro 82(e).

Omitted counterclaims, CivPro 13(f).

Permissive counterclaims, CivPro 13(b).

Pleadings allowed, CivPro 7(a).

Separate trials.

Separate judgments, CivPro 13(i).

Small claims.

Counterclaims prohibited, CivPro 81(b).

State of Idaho.

Counterclaim against the state, CivPro 13(d).

D

DAMAGES.

Excessive or inadequate damages.

New trial.

Grounds, CivPro 59(a).

Pleadings.

Special damage, CivPro 9(g).

DEATH.

Parties.

Effect of death of coparty, CivPro 25(a)(2).

Public officers, CivPro 25(d).

Substitution of parties, CivPro 25(a)(1).

DECLARATORY JUDGMENTS,

CivPro 57.

DE FACTO CUSTODIAN

INTERVENTION, CivPro 24(d).

DEFAULT, CivPro 55(a)(1).

Actions at issue.

Not default, CivPro 55(a)(3).

Appearances.

Party, appearance made by.

Entry of default against, requirements, CivPro 55(a)(1).

DEFAULT —Cont'd

Appearances —Cont'd

Withdrawal of attorney.

Filing and service of additional written notice after withdrawal.

Failure to file cause for default, CivPro 11(b)(3).

Attorneys at law.

Withdrawal of attorney.

Filing and service of additional written notice after withdrawal.

Failure to file cause for default, CivPro 11(b)(3).

Entry, CivPro 55(a)(1).

Exceptions.

Actions at issue, CivPro 55(a)(3).

Judgments.

Default judgments.

See JUDGMENTS.

Proof.

Time limitation, CivPro 55(a)(2).

Withdrawal of attorney.

Filing and service of additional written notice after withdrawal.

Failure to file and serve cause for default, CivPro 11(b)(3).

DEFENSES, CivPro 8(b).

Affirmative defenses, CivPro 8(c).

Contempt, CivPro 75(h).

Failure to deny.

Effect, CivPro 8(b).

Form of denials, CivPro 8(b).

How defenses and objections presented, CivPro 12(a), (b).

Motions.

Presented by pleading or motion, CivPro 12(a), (b).

Preservation of certain defenses, CivPro 12(g).

Two or more statements of defense.

Permissible, CivPro 8(e)(2).

Waiver of certain defenses, CivPro 12(g).

DEMURRERS.

Abolished, CivPro 7(c).

DEPOSITIONS.

Appeals.

Depositions pending appeal, CivPro 27(b).

Armed forces members.

Persons before whom depositions may be taken, CivPro 28(c).

DEPOSITIONS —Cont'd

Errors in depositions.

Effect, CivPro 32(d).

Examination, CivPro 27(a)(3).

Failure of party to attend at own deposition, CivPro 37(d).

Foreign countries.

Taking in foreign countries, CivPro 28(b).

Interstate depositions and discovery, CivPro 45(i).

Irregularities in depositions.

Effect, CivPro 32(d).

Military affairs.

Armed forces members.

Persons before whom depositions may be taken, CivPro 28(c).

Notice, CivPro 27(a)(2).

Oral examination, CivPro 30(b)(1), (2).

Filing of deposition, CivPro 30(f)(3).

Special notice, CivPro 30(b)(3).

Written questions, CivPro 31(a).

Filing of deposition, CivPro 31(c).

Objections to admissibility, CivPro 32(b).

Oral examination.

Audio-visual deposition, CivPro 30(b)(4).

Certification and filing by officer, CivPro 30(f)(1).

Notice of filing, CivPro 30(f)(3).

Conduct of counsel, CivPro 30(d).

Conference telephone calls, CivPro 30(b)(7).

Copies, CivPro 30(f)(2).

Cross-examination, CivPro 30(c).

Examination and cross-examination, CivPro 30(c).

Exhibits, CivPro 30(f)(1), (5).

Expenses, CivPro 30(g)(2).

Failure to attend, CivPro 30(g)(1).

Motion to terminate or limit examination, CivPro 30(d).

Notice, CivPro 30(b)(1), (2).

Filing of deposition, CivPro 30(f)(3).

Special notice, CivPro 30(b)(3).

Oaths, CivPro 30(c).

Objections, CivPro 30(c).

Conduct during depositions, CivPro 30(d).

Organizations, CivPro 30(b)(6).

Production of documents and things, CivPro 30(b)(5).

DEPOSITIONS —Cont'd

Oral examination —Cont'd

Publication of depositions, CivPro 30(f)(4).

Record of examination, CivPro 30(c).

Signing by witness, CivPro 30(e).

Submission to witness, CivPro 30(e).

Subpoenas, CivPro 30(b)(1).

Deposition of organization, CivPro 30(b)(6).

Telephone calls.

Conference calls, CivPro 30(b)(7).

Termination or limitation.

Motion, CivPro 30(d).

When depositions may be taken, CivPro 30(a).

Orders, CivPro 27(a)(3).

Written questions.

Orders for the protection of parties and deponents, CivPro 31(d).

Perpetuation of testimony, CivPro 27(a)(1).

Action to perpetuate testimony.

Power of court to entertain not limited, CivPro 27(c).

Petition, CivPro 27(a)(1).

Place of examination, CivPro 45(f)(1).

Attendance where required, CivPro 45(f)(2).

Service.

Notice, CivPro 27(a)(2).

Stipulations regarding discovery procedure, CivPro 29.

Subpoenas, CivPro 45(b), 45(f)(1).

Attendance where required, CivPro 45(f)(2).

Interstate depositions and discovery, CivPro 45(i)(3), (4).

Taking of depositions.

Persons before whom depositions may be taken.

Armed forces members, CivPro 28(c).

Disqualification for interest, CivPro 28(d).

Foreign countries, CivPro 28(b).

Within United States, CivPro 28(a).

Use of depositions, CivPro 27(a)(4), 31(a), 32(a).

Depositions to be used in other states, CivPro 28(e).

Written questions, CivPro 31(a).

Filing of deposition, CivPro 31(b).

Notice, CivPro 31(c).

DEPOSITIONS —Cont'd

Written questions —Cont'd

- Notice, CivPro 31(a).
- Filing of deposition, CivPro 31(c).
- Officer to take responses and prepare record, CivPro 31(b).
- Orders for the protection of parties and deponents, CivPro 31(d).
- Serving questions, CivPro 31(a).

DEPOSITS IN COURT, CivPro 67.

DIRECTED VERDICT.

Motion, CivPro 50(a).

- Stay on motion for judgment in accordance with motion for directed verdict, CivPro 62(b).

DISCOVERY.

Depositions.

- See DEPOSITIONS.

Entry upon land.

- Failure of party to respond to request for inspection, CivPro 37(d).
- Persons not parties, CivPro 34(c).
- Procedure, CivPro 34(b).
- Scope, CivPro 34(a).

Experts, CivPro 26(b)(4).

- Apportionment of fees of expert, CivPro 26(b)(4)(C).
- Experts not expected as witnesses, CivPro 26(b)(4)(B).

Insurance agreements, CivPro 26(b)(2).

Interrogatories.

- See INTERROGATORIES.

Interstate depositions and discovery, CivPro 45(i).

Methods, CivPro 26(a).

Motion for order compelling discovery, CivPro 37(a).

Orders.

- Failure to comply with order.
 - Sanctions, CivPro 37(e).
- Order compelling discovery.
 - Motion for, CivPro 37(a).
 - Sanctions for failure to comply, CivPro 37(b).
- Physical and mental examination of persons.
 - Order for examination, CivPro 35(a).
- Protective orders, CivPro 26(c).
- Violation.
 - Sanctions, CivPro 37(a).

DISCOVERY —Cont'd

Physical and mental examination of persons.

- Order for examination, CivPro 35(a).
- Report of examining physician, CivPro 35(b).

Privileged information.

- Production of information claimed privileged, CivPro 26(b)(5)(B).
- Withholding of privileged information, CivPro 26(b)(5)(A).

Production of documents, electronically stored information, and things.

- Failure to respond to request for inspection, CivPro 37(d).
- Notice to court of service, CivPro 34(d).

- Persons not parties, CivPro 34(c).

- Procedure, CivPro 34(b).

- Retention of discovery documents, CivPro 34(b).

- Scope, CivPro 34(a).

- Subpoenas, CivPro 45(b).

Protective orders, CivPro 26(c).

Requests for admission, CivPro 36(a).

- Effect of admission, CivPro 36(b).
- Failure to admit.
 - Expenses, CivPro 37(c).

Retention of discovery documents.

- Admission requests and responses thereto, CivPro 36(c).
- Interrogatories and answers thereto, CivPro 33(a).

- Request for production, response thereto, and documents produced, CivPro 34(b).

Scope, CivPro 26(b)(1).

Sequence and timing of discovery, CivPro 26(d).

Signing of discovery requests, responses and objections, CivPro 26(f).

State of Idaho.

- Expenses.
 - Award against state, CivPro 37(f).

Stipulations regarding discovery procedure, CivPro 29.

Supplementation of responses, CivPro 26(e).

Trial preparation.

- Materials, CivPro 26(b)(3).

DISMISSAL OF ACTIONS.

Appearance.

- Withdrawal of attorney.
- Filing and service of additional written notice after withdrawal.
- Failure to file and serve cause for dismissal, CivPro 11(b)(3).

Class actions, CivPro 23(e).

Costs.

- Previously dismissed actions, CivPro 41(d).

Counterclaims and cross-claims, CivPro 41(c).

Inactive cases, CivPro 40(c).

Involuntary dismissal, CivPro 41(b).

Notice.

- Voluntary dismissal, CivPro 41(a)(1).

Order of court, CivPro 41(a)(2).

Receivers.

- Dismissal of action wherein receiver has been appointed, CivPro 73.

Small claims.

- Inactive small claims, CivPro 81(f).

Third-party claims, CivPro 41(c).

Voluntary dismissal, CivPro 41(a)(1).

- Notice, CivPro 41(a)(1).
- Stipulation, CivPro 41(a)(1).

Withdrawal of attorney.

- Filing and service of additional written notice after withdrawal.
- Failure to file and serve cause for dismissal, CivPro 11(b)(3).

DISTRICT COURTS.

Appeals.

- See APPEALS.

Clerks of court.

- Appellate judgments, CivPro 83(z).
- Summons.

Issuance, CivPro 4(a).

Signing of summons, CivPro 4(b).

Motion day, CivPro 78.

Rules of district courts, CivPro 1(c).

Stays.

- Powers of court not limited, CivPro 62(f).

DIVORCE.

Alternative dispute resolution screening.

- Domestic relations cases involving children, CivPro 16(m).

Closed proceedings, CivPro 77(b).

Family law case information sheet.

- Required as condition for filing complaint, CivPro 3(a)(1).

DIVORCE —Cont'd

Prohibitive or mandatory orders in divorce and related proceedings, CivPro 65(g).

DOMESTIC VIOLENCE.

Protection orders.

- Entry of order into Idaho law enforcement telecommunications system.
- Information required as condition of commencing proceeding, CivPro 3(a)(2).

E

EFFECTIVE DATE OF RULES, CivPro 86.

ELECTRONICALLY STORED INFORMATION (ESI).

Interrogatories, CivPro 33(c).

Production of documents, electronically stored information, and things.

- Failure to respond to request for inspection, CivPro 37(d).
- Notice to court of service, CivPro 34(d).

Persons not parties, CivPro 34(c).

Procedure, CivPro 34(b).

Scope, CivPro 34(a).

Subpoenas, CivPro 45(b).

ELECTRONIC SERVICE, CivPro 5(b).

EMPLOYERS AND EMPLOYEES.

Injunctions.

- Exemption of certain actions from rules as to injunctions or restraining orders, CivPro 65(f).

ENGLISH LANGUAGE.

Pleadings, CivPro 10(a)(3).

EVIDENCE.

Admissibility, CivPro 43(a).

Appeals.

- State agency and local government actions.
- Additional evidence presented to district court, CivPro 84(l).

Blood tests.

- Paternity actions, CivPro 6(c)(7).

Child custody.

- Informal custody trials, CivPro 16(p).

Form of evidence, CivPro 43(a).

EVIDENCE —Cont'd

Insufficiency of evidence.

New trial.

Grounds, CivPro 59(a).

Motions.

Evidence on, CivPro 43(e).

Newly discovered evidence.

New trial.

Grounds, CivPro 59(a).

Relief from judgment or order.

Grounds, CivPro 60(b).

Pleadings.

Amendments to conform to the evidence, CivPro 15(b).

Stenographic report or transcript,

CivPro 80.

Witnesses.

See WITNESSES.

EXAMINATIONS.

Mentally ill.

Order for examination of persons, CivPro 35(a).

Report of examining physician, CivPro 35(b).

EXCEPTIONS.

Abolished, CivPro 7(c).

Unnecessary, CivPro 46.

EXECUTIONS, CivPro 69.

Small claims, CivPro 81(j).

EXHIBITS.

Depositions.

Oral examination, CivPro 30(f)(1), (5).

Jury.

Taking to jury room, CivPro 47(p).

List of exhibits.

Order for filing, CivPro 16(e).

Pleadings, CivPro 10(c).

Pre-trial procedure.

Exhibits and witnesses, CivPro 16(h).

Reclaiming exhibits, CivPro 79(e).

EXPERTS.

Discovery, CivPro 26(b)(4).

Apportionment of fees of expert, CivPro 26(b)(4)(C).

Experts not expected as witnesses, CivPro 26(b)(4)(B).

Informal custody trials, CivPro 16(p).

F

FACSIMILE TRANSMISSIONS.

Filing with court, CivPro 5(e)(2).

FACSIMILE TRANSMISSIONS

—Cont'd

Service of process, CivPro 5(b).

FAILURE TO STATE CLAIM.

Defenses required to be presented by motion, CivPro 12(b), (g).

FAMILY LAW CASE

INFORMATION SHEET.

Family law cases.

Required as condition for filing complaint, CivPro 3(a)(1).

FEES.

Appeals.

State agency and local government actions.

Preparation of agency's record, CivPro 84(f).

Transcript.

Joint use, CivPro 83(r).

Preparation, CivPro 83(k).

Attorneys' fees.

See ATTORNEYS' FEES.

Costs.

Items allowed, CivPro 54(d)(1).

Filing fees.

Waiver, CivPro 10(a)(6).

Filing fee schedule, CivPro Appx A.

Witnesses, CivPro 45(e)(1).

Costs.

Items allowed, CivPro 54(d)(1).

FILING OF PAPERS, CivPro 5(d).

Appeals, CivPro 83(e).

Clerks of court, CivPro 83(z).

Transcript and record, CivPro 83(p).

Facsimile filing, CivPro 5(e).

Fees.

Filing fee schedule, CivPro Appx A.

Waiver, CivPro 10(a)(6).

Master's report, CivPro 53(e)(1).

Paternity actions.

Blood test results, CivPro 6(c)(7).

Pleadings and other papers, CivPro 5(a).

Privacy protection for filings,

CivPro 3(c).

Schedule of fees, CivPro Appx A.

Waiver of fee, CivPro 10(a)(6).

Small claims, CivPro 81(a).

What constitutes filing with court,

CivPro 5(e).

Withdrawal of files, CivPro 11(a)(3).

FINDINGS BY COURT.

Amendment, CivPro 52(b).

INDEX

FINDINGS BY COURT —Cont'd

Attorney fees.

Award, CivPro 54(e)(2).

Effect, CivPro 52(a).

Lack of findings.

Assignment of error, requirement,
CivPro 52(b).

FOREIGN COUNTRIES.

Depositions.

Taking in foreign countries, CivPro
28(b).

FOREIGN LAW.

Judicial notice, CivPro 44(d).

FORM OF ACTION, CivPro 2.

FORMS.

Affidavit accompanying copy of child support decree, CivPro

6(c)(5).

Appeals.

Transcript.

Certificate of transcription, CivPro
83(k).

Child support.

Affidavit accompanying copy of
decree, CivPro 6(c)(5).

Guidelines, CivPro 6(c)(6).

Eviction proceedings.

Summons, CivPro 4(b).

Judgments.

Judgment upon multiple claims or
involving multiple parties,
CivPro 54(b).

Subpoenas.

Witnesses, CivPro 45(c).

Summons, CivPro 4(b).

FRAUD.

Pleading fraud or mistake, CivPro

9(b).

Relief from judgment or order.

Grounds, CivPro 60(b).

FRAUDULENT CONVEYANCES.

Joinder of remedies, CivPro 18(b).

G

GOVERNMENT AGENCY ACTIONS.

Appeals, CivPro 84.

GUARDIAN AD LITEM.

Appointment for infant or incompetent person, CivPro

17(c).

GUARDIAN AD LITEM —Cont'd

Informal custody trials, CivPro

16(p).

GUARDIANS.

Family law case information sheet.

Required as condition for filing
complaint, CivPro 3(a)(1).

Powers and duties, CivPro 72(a).

Service of process.

Personal service.

Service upon infants and
incompetents, CivPro 4(d)(3).

GUIDELINES.

Child support, CivPro 6(c)(6).

H

HARMLESS ERROR, CivPro 61.

HEARINGS, CivPro 77(b).

Consolidation of actions, CivPro

42(a).

Exclusion of persons, CivPro 77(b).

Preliminary hearings.

Motions for judgment, CivPro 12(d).

Setting hearings by court, CivPro

6(e)(2).

Show cause hearings.

Generally, CivPro 6(c)(2).

Support hearings.

Affidavit to accompany copy of
decree, CivPro 6(c)(5).

Telephone or video conference.

Hearings by, CivPro 7(b)(4).

I

IMPROPER VENUE.

Defenses required to be presented by motion, CivPro 12(b), (g).

IN CAMERA PROCEEDINGS,

CivPro 77(b).

INJUNCTIONS.

Appeals.

Powers of court pending appeal,
CivPro 62(c).

Divorce and related proceedings.

Prohibitive or mandatory orders,
CivPro 65(g).

Employer and employee actions.

Exempt from rules, CivPro 65(f).

Preliminary injunction, CivPro

65(a).

Grounds, CivPro 65(e).

INJUNCTIONS —Cont'd

Preliminary injunction —Cont'd

Notice, CivPro 65(a).

Scope, CivPro 65(d).

Security, CivPro 65(c).

Divorce and related proceedings.

Bond discretionary in prohibitive or mandatory orders, CivPro 65(g).

Temporary restraining order,

CivPro 65(b).

Duration, CivPro 65(b).

Hearing, CivPro 65(b).

Notice, CivPro 65(b).

Scope, CivPro 65(d).

Security, CivPro 65(c).

INSTRUCTIONS TO JURY.

See JURY.

INSUFFICIENCY OF PROCESS OR SERVICE OF PROCESS.

Defenses required to be presented by motion, CivPro 12(b), (g).

INSURANCE.

Declaratory judgments.

Joinder of parties with claims against insured, CivPro 57(b).

Discovery.

Insurance agreements, CivPro 26(b)(2).

INTERPLEADER, CivPro 22.

INTERPRETERS, CivPro 43(b)(2).

INTERROGATORIES.

Availability, CivPro 33(a).

Failure of party to serve answers to interrogatories, CivPro 37(d).

Option to produce records, CivPro 33(c).

Order compelling discovery.

Motion for, CivPro 37(a).

Procedures for use, CivPro 33(a).

Retention of original interrogatories and answers thereto, CivPro 33(a).

Scope, CivPro 33(b).

Use at trial or on motions, CivPro 34(b).

INTERSTATE DEPOSITIONS AND DISCOVERY, CivPro 45(i).

Application of other rules, CivPro 45(i)(5).

Application to pending actions, CivPro 45(i)(8).

INTERSTATE DEPOSITIONS AND DISCOVERY —Cont'd

Construction and interpretation.

Uniformity, CivPro 45(i)(7).

Definitions, CivPro 45(i)(2).

Statement of purpose, CivPro 45(i)(1).

Subpoenas.

Issuance, CivPro 45(i)(3).

Protective orders, CivPro 45(i)(6).

Quashing or modifying subpoena, action for, CivPro 45(i)(6).

Service, CivPro 45(i)(4).

Uniformity of application and construction, CivPro 45(i)(7).

INTERVENTION.

De facto custodian intervention, CivPro 24(d).

Intervention of right, CivPro 24(a).

Permissive intervention, CivPro 24(b).

Procedure, CivPro 24(c).

J

JOINDER.

Claims, CivPro 18(a).

Parties, CivPro 13(h).

Declaratory judgments.

Insurance coverage.

Joinder of parties with claims against insured, CivPro 57(b).

Failure to join indispensable party.

Defenses required to be presented by motion, CivPro 12(b), (g).

Misjoinder, CivPro 21.

Motor vehicle owners, CivPro 19(b).

Nonjoinder, CivPro 21.

Pleading reasons for nonjoinder, CivPro 19(a)(3).

Permissive joinder, CivPro 20(a).

Persons to be joined if feasible, CivPro 19(a)(1).

Class actions.

Exception as to, CivPro 19(a)(4).

Determination by court whether joinder not feasible, CivPro 19(a)(2).

Pleading reasons for nonjoinder, CivPro 19(a)(3).

Remedies, CivPro 18(b).

JUDGES.

Books and records, CivPro 79(f).

JUDGES —Cont'd

Disability, CivPro 63.

Disqualification of judges.

Alternate judges, CivPro 40(d)(1).

Assignment of new judge, CivPro 40(d)(5).

Disqualification for cause, CivPro 40(d)(2).

Motion, CivPro 40(d)(2).

Disqualification without cause, CivPro 40(d)(1).

Effect, CivPro 40(d)(5).

Misuse of disqualification without cause, CivPro 40(d)(1).

New judges, CivPro 40(d)(1).

New trial, disqualification on, CivPro 40(d)(1).

Voluntary disqualification, CivPro 40(d)(4).

Records, CivPro 79(f).

JUDGMENT NOTWITHSTANDING THE VERDICT.

Motion for, CivPro 50(b).

JUDGMENTS.

Amendment.

New trial, CivPro 59(a).

Motion to amend judgment, CivPro 59(e).

Stay on motion, CivPro 62(b).

Appellate judgments.

Clerks of court, CivPro 83(z).

Certificate of final judgment, CivPro 54(b).

Class actions, CivPro 23(c).

Counterclaims and cross-claims.

Default judgments.

Counterclaimants and cross-claimants covered by rule, CivPro 55(d).

Separate trials.

Separate judgments, CivPro 13(i).

Declaratory judgments, CivPro 57.

Default judgments.

Attorneys' fees, CivPro 54(e)(4).

Clerk.

Default judgment by, CivPro 55(b)(1).

Court.

Default judgment by, CivPro 55(b)(1).

Persons exempt, CivPro 55(b)(2).

Parties covered by rule, CivPro 55(d).

Setting aside, CivPro 55(c).

Small claims, CivPro 81(a).

JUDGMENTS —Cont'd

Default judgments —Cont'd

State of Idaho.

Default judgment against, CivPro 55(e).

Defined, CivPro 54(a).

Demand for judgment, CivPro 54(c).

Entry of judgment, CivPro 58(a).

Executions.

Generally, CivPro 69.

Forms.

Judgment upon multiple claims or involving multiple parties, CivPro 54(b).

Judgment notwithstanding verdict.

Motion for, CivPro 50(b).

Conditional rulings on granted motions, CivPro 50(c).

Denial of motion, CivPro 50(d).

Judgment on the pleadings.

Motion for, CivPro 12(a), (c).

Mandamus.

Writ of mandate, CivPro 74(d).

Multiple claims or multiple parties, CivPro 54(b).

Notice, CivPro 77(d).

Offer of judgment, CivPro 68.

Paper.

Size and quality, CivPro 10(a)(1).

Pleading a judgment, CivPro 9(e).

Relief from judgment or order, CivPro 60(a), (b).

Stay on motion for, CivPro 62(b).

Satisfaction of judgment, CivPro 58(b).

Seizure of person or property for purpose of securing satisfaction of judgment, CivPro 64.

Small claims, CivPro 81(h).

Execution, CivPro 81(j).

Vacation, reconsideration or correcting clerical errors, CivPro 81(i).

Specific acts.

Judgment for, CivPro 70.

State of Idaho.

Default judgments against, CivPro 55(e).

Summary judgment.

Affidavits.

Bad faith affidavits, CivPro 56(g).

Form, CivPro 56(e).

Service, CivPro 56(c).

When affidavits unavailable, CivPro 56(f).

JUDGMENTS —Cont'd

Summary judgment —Cont'd

- Defense required, CivPro 56(e).
- For claimant, CivPro 56(a).
- For defending party, CivPro 56(b).
- Motion, CivPro 56(c).
 - Case not fully adjudicated on motion for summary judgment, CivPro 56(d).
- Proceedings on, CivPro 56(c).

Title.

- Vesting title, CivPro 70.

Type, CivPro 10(a)(1).

Writs of prohibition, CivPro 74(d).

JUDICIAL NOTICE.

Facts and foreign law, CivPro 44(d).

JURISDICTION.

Costs.

- Jurisdictional amounts, CivPro 82(d).

Counterclaims or cross-claims exceeding jurisdiction, CivPro 82(e).

Lack of jurisdiction.

- Defenses required to be presented by motions, CivPro 12(b), (g).

Magistrates, CivPro 82(c)(1).

- Attorney magistrates, CivPro 82(c)(2).

Personal jurisdiction.

- Special appearance.
 - Contesting personal jurisdiction, CivPro 4(i)(2).
- Voluntary appearance.
 - Submission to personal jurisdiction, CivPro 4(i)(1).

Unaffected by rules, CivPro 82(a).

JURY.

Additional jurors, CivPro 47(l).

Admonition by court, CivPro 47(n).

Challenges, CivPro 47(i).

- Challenges for cause, CivPro 47(h), (i).
- Peremptory challenges.
 - Exercise, CivPro 47(k).
 - Number, CivPro 47(j).

Documents.

- Taking to jury room, CivPro 47(p).

Exhibits.

- Taking to jury room, CivPro 47(p).

Instructions, CivPro 51(a)(1).

- Copies furnished to parties for examination and objection, CivPro 51(b).
- Final instructions, CivPro 51(b).

JURY —Cont'd

Instructions —Cont'd

- Further instructions, CivPro 51(b).
- Idaho jury instructions (IDJI).
 - Use, CivPro 51(a)(2).
- Objections, CivPro 51(a)(1).
 - Required for assignment of error, rulings on, CivPro 51(b).
- Requests, CivPro 51(a)(1).
- Written copy.
 - Taking to jury room, CivPro 51(b).

Juror notebooks, CivPro 47(o).

Juror questioning of witnesses, CivPro 47(q).

Juror questionnaire confidentiality, CivPro 47(d).

Misconduct.

- New trial.
 - Grounds, CivPro 59(a).

Notes by jurors, CivPro 47(o).

Number of jurors.

- Juries of less than twelve, CivPro 48(a).

Oaths, CivPro 47(m).

- Panel, CivPro 47(f).

Panel.

- Oath to panel, CivPro 47(f).
- Opening statements to entire jury panel, CivPro 47(i).
- Selection, CivPro 47(b).

Polling jury, CivPro 48(b).

Roll call of jurors, CivPro 47(e).

Selection.

- Initial jury, CivPro 47(g).
- Jury panel, CivPro 47(b).
- Master jury list, CivPro 47(a).
- Master jury wheel, CivPro 47(a).

Separation of jury, CivPro 47(n).

Trial by jury, CivPro 39(a).

- Advisory jury, CivPro 39(c).
- Demand, CivPro 38(b).
 - Failure to demand, CivPro 38(d).
- Specification of issues, CivPro 38(c).
- Discretion of court, CivPro 39(b).
- Right preserved, CivPro 38(a).
- Trial by consent, CivPro 39(c).
- Waiver of right, CivPro 38(d).

Verdict.

- Directed verdict.
 - Motion for, CivPro 50(a).
 - Stay on motion for judgment in accordance with motion for directed verdict, CivPro 62(b).
- General verdict accompanied by answer to interrogatories, CivPro 49(b).

JURY —Cont'd

Verdict —Cont'd

Judgment notwithstanding verdict.

Motion for, CivPro 50(b).

Conditional rulings on granted motions, CivPro 50(c).

Denial of motion, CivPro 50(d).

Majority verdict, CivPro 48(a).

Rendering verdict, CivPro 48(b).

Special verdicts, CivPro 49(a).

Interrogatories, CivPro 49(a).

View of premises, property or things, CivPro 43(f).

Voir dire examination of jurors, CivPro 47(i).

L

LACK OF JURISDICTION.

Defenses required to be presented by motions, CivPro 12(b), (g).

LEGISLATURE.

Service of process.

Service on attorney-legislator suspended during sessions, CivPro 5(g).

LIBEL AND SLANDER.

Pleadings, CivPro 9(i).

LIMITATION OF ACTIONS.

Pleading statute of limitations, CivPro 9(h).

LOCAL GOVERNMENT AGENCY ACTIONS.

Appeals, CivPro 84.

M

MAGISTRATES.

Appeals from magistrate's

judgment or order, CivPro 83(a).

Filing of appeal, CivPro 83(e).

Judicial review, CivPro 83(b).

Scope of appellate review, CivPro 83(u).

Stay during appeal, CivPro 83(i).

Trial de novo, instructions to magistrate, CivPro 83(z).

Assignment to magistrates.

Attorney magistrates.

Assignment of additional cases, CivPro 82(c)(2).

Enlargement of dollar amount of cases assignable, CivPro 82(c)(5).

MAGISTRATES —Cont'd

Assignment to magistrates —Cont'd

Attorney magistrates —Cont'd

Special assignment to, CivPro 82(c)(4).

Objection, CivPro 82(c)(3).

Attorney magistrates, CivPro 82(b).

Assignment of additional cases to attorney magistrates, CivPro 82(c)(2).

Enlargement of dollar amount of cases assignable, CivPro 82(c)(5).

Jurisdiction, CivPro 82(c)(2).

Special assignment to attorney magistrate, CivPro 82(c)(4).

Disqualification for cause, CivPro 40(d)(2).

Jurisdiction, CivPro 82(c)(1).

Attorney magistrates, CivPro 82(c)(2).

Objection to assignment to magistrate, CivPro 82(c)(3).

Record of proceedings of magistrate's division, CivPro 83(d).

Small claims.

Disqualification of magistrate in small claim proceedings, CivPro 81(e).

Transfer to magistrate's division.

When permitted, CivPro 81(c).

MAIL.

Service of process.

Additional time after service by mail, CivPro 6(e)(1).

MANDAMUS.

Appeals.

Powers of court pending appeal, CivPro 62(c).

Writ of mandate, CivPro 74(a).

Application for writ, CivPro 74(a), (b).

Judgment, CivPro 74(d).

Opposing writ, CivPro 74(c).

Trial of complaint or petition, CivPro 74(d).

MASTERS.

Accounts and accounting.

Statement of accounts, CivPro 53(d)(3).

Appointment, CivPro 53(a)(1).

Compensation, CivPro 53(a)(1).

Disqualification, CivPro 53(a)(2).

Motion, CivPro 53(a)(3).

MASTERS —Cont'd

Disqualification —Cont'd

Notice, CivPro 53(a)(3).

Meetings of parties, CivPro 53(d)(1).

Powers, CivPro 53(c).

Proceedings, CivPro 53(d)(1).

Reference to master, CivPro 53(b).

Reports, CivPro 53(e)(1).

Draft report of master, CivPro 53(e)(5).

Findings, CivPro 53(e)(1).

Jury actions, CivPro 53(e)(3).

Nonjury actions, CivPro 53(e)(2).

Stipulation as to findings of master, CivPro 53(e)(4).

Witnesses, CivPro 53(d)(2).

MEDIATION.

Child custody and visitation disputes, CivPro 16(j).

Civil lawsuits, CivPro 16(k).

Authority of court, CivPro 16(k)(3).

Confidentiality, CivPro 16(k)(11).

Definition of mediation, CivPro 16(k)(1).

Matters subject to mediation, CivPro 16(k)(2).

Mediation sessions.

Attendance, CivPro 16(k)(10).

Scheduling, CivPro 16(k)(6).

Mediators.

Compensation, CivPro 16(k)(8).

Impartiality, CivPro 16(k)(9).

Qualifications, CivPro 16(k)(13).

Selection, CivPro 16(k)(5).

Referral, CivPro 16(k)(4).

Reports, CivPro 16(k)(7).

Sanctions, CivPro 16(k)(12).

MEMORANDUM OF COSTS, CivPro 54(d)(5).

Attorneys' fees.

Inclusion in memorandum, CivPro 54(e)(5).

Objections, CivPro 54(d)(6).

MENTAL EXAMINATIONS.

Order for examination, CivPro 35(a).

Report of examining physician, CivPro 35(b).

MENTALLY ILL.

Order for examination of persons, CivPro 35(a).

Report of examining physician, CivPro 35(b).

Parties.

Effect of party becoming incompetent, CivPro 25(b).

MENTALLY ILL —Cont'd

Parties —Cont'd

Infants or incompetent persons, CivPro 17(c).

Service of process.

Personal service.

Service upon infants and incompetents, CivPro 4(d)(3).

MILITARY AFFAIRS.

Depositions.

Taking of depositions.

Members of armed forces, CivPro 28(c).

MINORS.

Parties.

Infants or incompetent persons, CivPro 17(c).

Paternity actions.

Blood test results, CivPro 6(c)(7).

Service of process.

Personal service.

Service upon infants and incompetents, CivPro 4(d)(3).

MISTAKE OR ERROR.

Harmless error, CivPro 61.

Relief from judgment or order, CivPro 60(b).

Clerical mistakes, CivPro 60(a).

Small claims.

Judgments.

Correction of clerical errors, CivPro 81(i).

MISTRIAL, CivPro 47(u).

MOTION DAY, CivPro 78.

MOTIONS.

Affidavit in support.

Filed with motion, CivPro 7(b)(3).

Appeals, CivPro 83(t).

State agency and local government actions.

Motions, CivPro 84(o).

Applications to court for orders to be by motion, CivPro 7(b)(1).

Brief in support of motion.

Time for filing and serving, CivPro 7(b)(3).

Captions, CivPro 7(b)(2).

Change of venue, CivPro 40(e).

Child custody or support.

Proceedings to modify child custody and child support orders, CivPro 60(c).

MOTIONS —Cont'd

Contesting personal jurisdiction.

Special appearance or motion, CivPro 4(i)(2).

Defenses and objections.

Presented by pleading or motion, CivPro 12(a), (b).

Depositions.

Oral examination.

Motion to terminate or limit examination, CivPro 30(d).

Directed verdict, CivPro 50(a).

Stay on motion for judgment in accordance with motion for directed verdict, CivPro 62(b).

Discovery.

Order compelling discovery.

Motion for, CivPro 37(a).

Dismissal of actions.

Involuntary dismissal, CivPro 41(b).

Evidence on motions, CivPro 43(e).

Fee waiver, CivPro 10(a)(6).

Findings of court.

Amendment, CivPro 52(b).

Form of motions, CivPro 7(a).

Interrogatories.

Use, CivPro 33(b).

Intervention.

De facto custodian intervention, CivPro 24(d).

Judges.

Disqualification of judges.

Disqualification for cause, CivPro 40(d)(2).

Disqualification without cause, CivPro 40(d)(1).

Judgment notwithstanding verdict,

CivPro 50(b).

Conditional rulings on granted motions, CivPro 50(c).

Denial of motion, CivPro 50(d).

Judgment on the pleadings.

Motion for, CivPro 12(a), (c).

Masters.

Disqualification, CivPro 53(a)(3).

Mistrial, CivPro 47(u).

Modification of child custody and child support orders, CivPro 60(c).

More definite statement.

Motion for, CivPro 12(e).

Motion day, CivPro 78.

New trial.

Affidavits.

Time for serving affidavits on motion for new trial, CivPro 59(c).

MOTIONS —Cont'd

New trial —Cont'd

Amendment of judgment, CivPro 59(e).

Stay on motion, CivPro 62(b).

Time for motion, CivPro 59(b).

Oral argument.

Desire indicated upon face of motion, CivPro 7(b)(3).

Orders.

Reconsideration of interlocutory orders, CivPro 11(a)(2).

Paper.

Size and quality, CivPro 10(a)(1).

Preliminary hearings.

Motions for judgment, CivPro 12(d).

Reconsideration motions, CivPro 11(a)(2)(B).

Signing of motions, CivPro 7(b)(2), 11(a)(1).

Striking.

Motion to strike, CivPro 12(f).

Time limits.

Filing and serving.

Motions, affidavits and briefs in support, CivPro 7(b)(3).

Type, CivPro 10(a)(1).

Written motions required, CivPro 7(b)(1).

MOTIONS FOR

RECONSIDERATION, CivPro 11(a)(2)(B).

MOTOR VEHICLES.

Joinder of parties.

Motor vehicle owners, CivPro 19(b).

MUNICIPAL CORPORATIONS.

Service of process.

Personal service.

Service upon governmental subdivisions, CivPro 4(d)(5).

N

NEW TRIAL.

Additurs.

In lieu of new trial, CivPro 59.1.

Affidavits.

Motion.

Time for serving affidavits on motion for new trial, CivPro 59(c).

Amendment of judgment, CivPro 59(a).

Motion, CivPro 59(e).

Stay on motion, CivPro 62(b).

NEW TRIAL —Cont'd

Grounds, CivPro 59(a).

Initiative of court, CivPro 59(d).

Motion.

Affidavits.

Time for serving affidavits on motion for new trial, CivPro 59(c).

Amendment of judgment, CivPro 59(e).

Stay on motion, CivPro 62(b).

Time for, CivPro 59(b).

Remittiturs.

In lieu of new trial, CivPro 59.1.

Small lawsuit resolution act procedures.

Trial de novo after evaluator's decision, CivPro 85(l).

NONRESIDENTS.

Costs.

Bonds, surety.

Nonresident cost bond prohibited, CivPro 54(d)(4).

NOTICE.

Appeals, CivPro 83(f).

Attorneys at law.

Substitution of attorneys, CivPro 11(b)(1).

Withdrawal of attorney.

Notice to client, CivPro 11(b)(3).

Blood test results.

Paternity actions, CivPro 6(c)(7).

Class actions, CivPro 23(c).

Depositions, CivPro 27(a)(2).

Oral examination, CivPro 30(b)(1), (2).

Filing of deposition, CivPro 30(f)(3).

Special notice, CivPro 30(b)(3).

Written questions, CivPro 31(a).

Filing of deposition, CivPro 31(c).

Discovery.

Production of documents and things.

Notice to court of service, CivPro 34(d).

Dismissal of actions.

Voluntary dismissal, CivPro 41(a)(1).

Divorce and related proceedings.

Prohibitive or mandatory orders.

Notice discretionary, CivPro 65(g).

Injunctions.

Preliminary injunction, CivPro 65(a).

Temporary restraining order, CivPro 65(b).

NOTICE —Cont'd

Judgments, CivPro 77(d).

Masters.

Disqualification, CivPro 53(a)(3).

Orders, CivPro 77(d).

Paper.

Size and quality, CivPro 10(a)(1).

Small claims.

Appeals, CivPro 81(l).

Small lawsuit resolution act procedures.

Initiation of provisions, CivPro 85(c).

Type, CivPro 10(a)(1).

O

OATHS.

Affirmation in lieu of oath, CivPro 43(d).

Civil litigation evaluators, CivPro 16(n).

Depositions.

Oral examination, CivPro 30(c).

Jury, CivPro 47(m).

Panel, CivPro 47(f).

OBJECTIONS.

Jury instructions.

Required to assign error, rulings on, CivPro 51(b).

Witnesses.

Juror questioning of witnesses, CivPro 47(q).

OFFER OF JUDGMENT, CivPro 68.

ORDERS.

Applications for orders.

Successive applications, CivPro 11(a)(2).

Attorneys' fees.

Settlement of attorney fees by order of court, CivPro 54(e)(7).

Child custody and visitation.

Proceedings to modify orders, CivPro 60(c).

Child support.

Proceedings to modify child custody and child support orders, CivPro 60(c).

Class actions, CivPro 23(d).

Determination by order whether class action to be maintained, CivPro 23(c).

Clerks of court, CivPro 77(c).

Costs.

Settlement of costs by order of court, CivPro 54(d)(7).

ORDERS —Cont'd

Depositions, CivPro 27(a)(3).

Written questions.

Orders for the protection of parties and deponents, CivPro 31(d).

Discovery.

Failure to comply with orders.

Sanctions, CivPro 37(e).

Order compelling discovery.

Motion, CivPro 37(a).

Sanctions for failure to comply, CivPro 37(b).

Physical and mental examination of persons.

Order for examination, CivPro 35(a).

Protective orders, CivPro 26(c).

Violation of orders.

Sanctions, CivPro 37(a).

Dismissal of actions.

Dismissal by order of court, CivPro 41(a)(2).

Exceptions.

Unnecessary, CivPro 46.

New trial.

Initiative of court, CivPro 59(d).

Notice, CivPro 77(d).

Paper.

Size and quality, CivPro 10(a)(1).

Persons not parties.

Enforcement of orders in behalf of and against, CivPro 71.

Pre-trial order, CivPro 16(f).

Objections to pre-trial order, CivPro 16(g).

Pre-trial procedure.

Sanctions for noncompliance, CivPro 16(i).

Reconsideration.

Interlocutory orders.

Motion, CivPro 11(a)(2).

Relief from judgment or order,

CivPro 60(a), (b).

Stay on motion for, CivPro 62(b).

Separate trials.

Order for, CivPro 20(b).

Show cause orders, CivPro 6(c)(2).

Type, CivPro 10(a)(1).

PARTIES.

Appellate judgments.

Copies mailed to, CivPro 83(z).

Capacity to sue or be sued, CivPro 17(b).

Class actions.

See CLASS ACTIONS.

Death.

Effect of death of coparty, CivPro 25(a)(2).

Public officers, CivPro 25(d).

Substitution of parties, CivPro 25(a)(1).

Designation of parties to civil actions, CivPro 3(b).

Infants or incompetent persons, CivPro 17(c).

Effect of party becoming incompetent, CivPro 25(b).

Interpleader, CivPro 22.

Intervention.

De facto custodian intervention, CivPro 24(d).

Intervention of right, CivPro 24(a).

Permissive intervention, CivPro 24(b).

Procedure, CivPro 24(c).

Joinder, CivPro 13(h).

Declaratory judgments.

Insurance coverage.

Joinder of parties with claims against insured, CivPro 57(b).

Failure to join indispensable party.

Defenses required to be presented by motion, CivPro 12(b), (g).

Misjoinder, CivPro 21.

Motor vehicle owners, CivPro 19(b).

Nonjoinder, CivPro 21.

Pleading reasons for nonjoinder, CivPro 19(a)(3).

Permissive joinder, CivPro 20(a).

Persons to be joined if feasible, CivPro 19(a)(1).

Class actions.

Exception as to, CivPro 19(a)(4).

Determination by court whether joinder not feasible, CivPro 19(a)(2).

Pleading reasons for nonjoinder, CivPro 19(a)(3).

Judgments.

Copies mailed to, CivPro 83(z).

Multiple parties.

Judgment involving, CivPro 54(b).

P

PAPER.

Pleadings, motions, judgments, orders and notices.

Size and quality of paper, CivPro 10(a)(1).

PARTIES —Cont'd

Mentally ill.

- Effect of party becoming incompetent, CivPro 25(b).
- Incompetent persons, CivPro 17(c).

Minors, CivPro 17(c).

Pleadings.

- Names of parties, CivPro 10(a)(1).
- Unknown party, CivPro 10(a)(4).
- Designation, CivPro 10(a)(5).

Public officers.

- Death or separation from office, CivPro 25(d).

Real party in interest, CivPro 17(a).

Substitution of parties.

- Death, CivPro 25(a)(1).
- Substitution at any stage, CivPro 25(e).
- Transfer of interest, CivPro 25(c).

Third-party practice, CivPro 14(a), (b).

- Dismissal of third-party claims, CivPro 41(c).

Transfer of interest, CivPro 25(c).

Unknown owners or heirs, CivPro 17(d).

Unknown parties.

- Pleadings, CivPro 10(a)(4).

PARTNERSHIPS.

Depositions.

- Oral examination.
- Deposition of organization, CivPro 30(b)(6).

PATERNITY.

Family law case information sheet.

- Required as condition for filing complaint, CivPro 3(a)(1).

PERSONAL IDENTIFYING INFORMATION.

Privacy protection for filings, CivPro 3(c).

PETITIONS.

Appeals.

- State agency and local government actions.
- Contents of petition, CivPro 84(d).
- Cross-petition for judicial review, CivPro 84(c).
- Effect of failure to comply with time limits, CivPro 84(n).
- Filing petition for judicial review, CivPro 84(b).
- Motions, CivPro 84(o).
- Stay of proceedings, CivPro 84(m).

PETITIONS —Cont'd

Depositions, CivPro 27(a)(1).

PHYSICAL EXAMINATIONS.

Order for examination, CivPro 35(a).
Report of examining physician, CivPro 35(b).

PLEADINGS, CivPro 7(a).

Abbreviations, CivPro 10(a)(3).

Adoption by reference, CivPro 10(c).

Amendments, CivPro 15(a).

- Amendments to conform to the evidence, CivPro 15(b).

- Relation back of amendments, CivPro 15(c).

Attorneys' fees, CivPro 54(e)(4).

Capacity, CivPro 9(a).

Captions, CivPro 10(a)(1).

Claims for relief, CivPro 8(a)(1).

Conciseness and directness, CivPro 8(e)(1).

Conditions precedent, CivPro 9(c).

Consistency, CivPro 8(e)(1).

Construction, CivPro 8(f).

Defenses and objections.

- Presented by pleading or motion, CivPro 12(a), (b).

English language, CivPro 10(a)(3).

Exhibits, CivPro 10(c).

Failure to deny.

- Effect, CivPro 8(d).

Filing, CivPro 5(a).

Form of pleadings, CivPro 10(a)(1).

Fraud, mistake or condition of mind, CivPro 9(b).

Judgment, CivPro 9(e).

- Motion for, CivPro 12(a), (c).

Libel or slander, CivPro 9(i).

Limitation of actions, CivPro 9(h).

Lost papers, CivPro 10(a)(2).

More definite statement.

- Motion for, CivPro 12(e).

Motions for judgment.

- Preliminary hearings, CivPro 12(d).

Names of parties, CivPro 10(a)(1).

Numbers.

- Words or numerals, CivPro 10(a)(3).

Official document or act, CivPro 9(d).

Paper.

- Size and quality, CivPro 10(a)(1).

Paragraphs, CivPro 10(b).

Parties.

- Names of parties, CivPro 10(a)(1).
- Unknown parties, CivPro 10(a)(4).
- Designation, CivPro 10(a)(5).

PLEADINGS —Cont'd

Real property.

Description, CivPro 9(j).

Rules of pleading.

General rules, CivPro 8(a)(1).

Separate statements, CivPro 10(b).

Service, CivPro 5(a).

Signing of pleadings, CivPro 11(a)(1).

Special damage, CivPro 9(g).

Special matters, CivPro 9(a) to (j).

Striking matter from pleadings.

Motion to strike, CivPro 12(f).

Supplemental pleadings, CivPro 15(d).

Time and place, CivPro 9(f).

Two or more statements of claim or defense.

Permissible, CivPro 8(e)(2).

Type, CivPro 10(a)(1).

Verification, CivPro 11(c).

PLEAS.

Abolished, CivPro 7(c).

Contempt.

Nonsummary proceedings, CivPro 75(g).

PRE-TRIAL PROCEDURE.

Conferences.

Objectives, CivPro 16(a).

Scheduling and planning, CivPro 16(b).

Subjects to be discussed at conferences, CivPro 16(c).

Exhibits, CivPro 16(h).

Final pre-trial procedure, CivPro 16(d).

Formulating issues, CivPro 16(d).

Mediation.

Civil lawsuits, CivPro 16(k).

Objectives.

Pre-trial conferences, CivPro 16(a).

Orders.

Pre-trial order, CivPro 16(f).

Objections, CivPro 16(g).

Sanctions for disobedience, CivPro 16(i).

Sanctions, CivPro 16(i).

Scheduling and planning.

Conferences, CivPro 16(b).

Stipulations, CivPro 16(e).

Subjects to be discussed at conference, CivPro 16(c).

Witnesses, CivPro 16(h).

PRIVATE CIVIL LITIGATION EVALUATORS.

Registration, CivPro 16(n).

PRIVATE CIVIL LITIGATION

EVALUATORS —Cont'd

Small lawsuit resolution act procedures, CivPro 85(g).

PRIVATE HEARINGS, CivPro 77(b).

PROBATE.

Guardians and conservators.

Powers and duties under uniform probate code, CivPro 72(a).

PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS.

Depositions.

Oral examination, CivPro 30(b)(5).

Failure to respond to request for inspection, CivPro 37(d).

Notice of filing and notice of compliance, CivPro 34(d).

Persons not parties, CivPro 34(c).

Procedure, CivPro 34(b).

Retention of discovery documents, CivPro 34(b).

Scope, CivPro 34(a).

Subpoenas, CivPro 45(b).

PROHIBITION.

Writs of prohibition.

See WRITS OF PROHIBITION.

PROTECTION ORDERS.

Domestic violence.

Entry of order into Idaho law enforcement telecommunications system.

Information required as condition of commencing proceeding, CivPro 3(a)(2).

PUBLICATION.

Depositions.

Oral examination, CivPro 30(f)(4).

Service of process, CivPro 4(e)(1).

Completion of service, CivPro 4(e)(2).

Proof of service, CivPro 4(g).

PUBLIC OFFICERS AND EMPLOYEES.

Parties.

Death or separation from office, CivPro 25(d).

R

REAL PARTY IN INTEREST, CivPro 17(a).

REAL PROPERTY.

Pleadings.

Description of real property, CivPro 9(j).

RECEIVERS, CivPro 73.

**RECLAIMING EXHIBITS,
DOCUMENTS OR PROPERTY**,
CivPro 79(e).

RECORDS.

Appeals.

See APPEALS.

Blood test results.

Paternity actions, CivPro 6(c)(7).

Clerks of court, CivPro 79(f).

Judges, CivPro 79(f).

Magistrates.

Proceedings of magistrate's division,
CivPro 83(d).

Small claims.

Nature of trial, CivPro 81(g).

Supervised access to children.

Providers of supervised access,
CivPro 16(o).

Withdrawal of records, CivPro
11(a)(3).

REMITTITURS.

In lieu of new trial, CivPro 59.1.

**Magistrate court from which
appeal taken**, CivPro 83(z).

**State or local government agency
action**, CivPro 84(t).

REPEAL OF RULES, CivPro 1(b).

REPORTS.

ADR reports.

Domestic relations cases involving
children, CivPro 16(m).

Discovery.

Physical and mental examination of
persons.

Report of examining physician,
CivPro 35(b).

Evidence.

Stenographic report or transcript,
CivPro 80.

Masters, CivPro 53(e)(1).

Draft report of master, CivPro
53(e)(5).

Findings, CivPro 53(e)(1).

Jury actions, CivPro 53(e)(3).

Nonjury actions, CivPro 53(e)(2).

Stipulation as to findings of
master, CivPro 53(e)(4).

S

SATISFACTION OF JUDGMENT,
CivPro 58(b).

**Seizure of person or property for
purpose of securing
satisfaction of judgment**, CivPro
64.

SCOPE OF RULES, CivPro 1(a).

**SEIZURE OF PERSON OR
PROPERTY**, CivPro 64.

SEPARATE TRIALS, CivPro 20(b),
42(b).

Consolidation, CivPro 42(a).

Counterclaims and cross-claims.
Separate judgments, CivPro 13(i).

SERVICE OF PROCESS.

Attorneys at law.

Service upon attorney, CivPro 5(b).
Legislature.

Service on attorney-legislator
suspended during sessions,
CivPro 5(g).

Withdrawal of attorney.

Filing and service of additional
written notice after
withdrawal, CivPro 11(b)(3).

Order granting leave to withdraw,
CivPro 11(b)(3).

Blood test results.

Paternity actions, CivPro 6(c)(7).

By whom served, CivPro 4(c)(1).

Completion of service, CivPro
4(e)(2).

Contempt.

Nonsummary proceedings, CivPro
75(d).

Corporations.

Personal service.

Service upon domestic or foreign
corporations, CivPro 4(d)(4).

Depositions.

Notice, CivPro 27(a)(2).

Discovery.

Production of documents,
electronically stored information,
and things, and entry upon land.
Request, CivPro 34(b).

**Disqualification of judge without
cause.**

Motion, CivPro 40(d)(1).

Electronic service, CivPro 5(b).

Exhibiting process, CivPro 4(c)(2).

SERVICE OF PROCESS —Cont'd

Facsimile service, CivPro 5(b).

How service made, CivPro 5(b).

Insufficiency of service.

Defenses required to be presented by motion, CivPro 12(b), (g).

Judgment notwithstanding the verdict.

Time for serving motions, CivPro 50(b).

Mail.

Additional time after service by mail, CivPro 6(e)(1).

Mentally ill.

Personal service.

Service upon infants and incompetents, CivPro 4(d)(3).

Minors.

Personal service.

Service upon infants and incompetents, CivPro 4(d)(3).

Municipal corporations.

Personal service.

Service upon state, agencies or governmental subdivisions, CivPro 4(d)(5).

Numerous defendants, CivPro 5(c).

Personal service, CivPro 4(d)(1).

Completion of service, CivPro 4(e)(2).
Corporations.

Service upon domestic or foreign corporations, CivPro 4(d)(4).

Individuals.

Service upon, CivPro 4(d)(2).

Infants and incompetents.

Service upon, CivPro 4(d)(3).

Outside state, CivPro 4(e)(1).

Receipt of service, CivPro 4(d)(6).

State, agencies or governmental subdivisions.

Service upon, CivPro 4(d)(5).

Pleadings and other papers, CivPro 5(a).

Proof of service, CivPro 4(g), 5(f).

Amendment, CivPro 4(h).

Publication, CivPro 4(e)(1).

Completion of service, CivPro 4(e)(2).

Proof of service, CivPro 4(g).

Return of process, CivPro 4(g).

Show cause orders, CivPro 6(c)(2).

State departments and agencies.

Personal service.

Service upon state, agencies or governmental subdivisions, CivPro 4(d)(5).

SERVICE OF PROCESS —Cont'd
State of Idaho.

Personal service.

Service upon state, agencies or governmental subdivisions, CivPro 4(d)(5).

Subpoenas, CivPro 4(c)(1), 45(e)(2).

Interstate depositions and discovery, CivPro 45(i)(4).

Territorial limits of effective service, CivPro 4(f).

Telegraphic copy, CivPro 4(c)(3).

Territorial limits of effective service, CivPro 4(f).

Time limit for service of summons and complaint, CivPro 4(a).

Withdrawal of attorney.

Filing and service of additional written notice after withdrawal, CivPro 11(b)(3).

Order granting leave to withdraw, CivPro 11(b)(3).

SESSIONS OF COURT.

Continuous session, CivPro 77(a).

SHOW CAUSE ORDERS, CivPro 6(c)(2).

Applications for, CivPro 6(c)(2).

Hearings.

Generally, CivPro 6(c)(2).

Service, CivPro 6(c)(2).

SIGNATURES.

Discovery.

Requests, responses and objections, CivPro 26(f).

Motions, CivPro 7(b)(2), 11(a)(1).

Pleadings, CivPro 11(a)(1).

SMALL CLAIMS.

Appeals, CivPro 81(n).

Attorney fees, CivPro 81(q).

Bond, CivPro 81(l).

Costs, CivPro 81(p).

Notice, CivPro 81(l).

Procedure on appeal, CivPro 81(o).

Stay of execution, CivPro 81(n).

Who may appeal, CivPro 81(k).

Appearances, CivPro 81(d).

Attorneys' fees.

Appeals, CivPro 81(q).

Bonds, surety.

Appeals, CivPro 81(l).

Costs.

Appeals, CivPro 81(p).

Counterclaims prohibited, CivPro 81(b).

SMALL CLAIMS —Cont'd

Default judgments, CivPro 81(a).

Dismissal of inactive small claims,
CivPro 81(f).

Executions, CivPro 81(j).

Filing, CivPro 81(a).

Judgments, CivPro 81(h).

Execution, CivPro 81(j).

Vacation, reconsideration or
correction of clerical errors,
CivPro 81(i).

Magistrates.

Disqualification in small claim
proceedings, CivPro 81(e).

Transfer to magistrate's division.

When permitted, CivPro 81(c).

Nature of trial, CivPro 81(g).

Notice.

Appeals, CivPro 81(l).

**Small lawsuit resolution act
procedures**, CivPro 85.

Subpoenas.

Witnesses, CivPro 81(d).

Telephonic testimony, CivPro 81(g).

Transfer to magistrate's division.

When permitted, CivPro 81(c).

Witnesses in small claims

proceedings, CivPro 81(d).

**SMALL LAWSUIT RESOLUTION
ACT PROCEDURES.**

Amount of claim, computation,
CivPro 85(b).

Application of rule, CivPro 85(a).

Evaluator.

Authority, CivPro 85(i).

Compensation, CivPro 85(h).

Impartiality, CivPro 85(j).

List of evaluators, CivPro 85(f).

Private civil litigation evaluators,
CivPro 85(g).

Sanctions against, CivPro 85(k).

Selection by court, CivPro 85(e).

Selection by parties, CivPro 85(d).

Notice of initiation of provisions,
CivPro 85(c).

Statistical data gathering, CivPro
85(m).

**Trial de novo after evaluator's
decision**, CivPro 85(l).

SOCIAL SECURITY NUMBERS.

Privacy protection for filings,
CivPro 3(c).

SPECIAL APPEARANCE.

Contesting personal jurisdiction,
CivPro 4(i)(2).

**STATE DEPARTMENTS AND
AGENCIES.**

Appeal of state agency action,
CivPro 84.

Service of process.

Personal service.

Service upon state or agencies,
CivPro 4(d)(5).

STATE OF IDAHO.

Counterclaim against the state,
CivPro 13(d).

Discovery.

Expenses.

Award against state, CivPro 37(f).

Judgments.

Default judgments against, CivPro
55(e).

Service of process.

Personal service.

Service upon state, agencies or
governmental subdivisions,
CivPro 4(d)(5).

Stay in favor of state.

No security required, CivPro 62(e).

STAYS.

Appeals, CivPro 83(i).

Stay upon appeal, CivPro 62(d).

Bonds, surety.

Appeals, CivPro 83(i).

District courts.

Powers of court not limited, CivPro
62(f).

Multiple claims.

Stay of judgment upon, CivPro 62(g).

New trial.

Stay on motion for, CivPro 62(b).

Proceedings to enforce judgment.

Stay upon entry of judgment, CivPro
62(a).

Relief from judgment or order.

Stay on motion for, CivPro 62(b).

State of Idaho.

Stay in favor of state.

No security required, CivPro 62(e).

Supreme court.

Powers of court not limited, CivPro
62(f).

Waiver of filing of security, CivPro
62(e).

**STENOGRAPHIC REPORT OR
TRANSCRIPT.**

Evidence, CivPro 80.

STIPULATIONS.

Discovery procedure, CivPro 29.

Physical and mental examination of persons, CivPro 35(a).

Dismissal of actions.

Voluntary dismissal, CivPro 41(a)(1).

Effect.

Not binding on court, CivPro 6(e)(3).

Masters.

Reports.

Findings, CivPro 53(e)(4).

Pre-trial stipulations, CivPro 16(e).

STOCK AND STOCKHOLDERS.

Class actions.

Derivative actions by shareholders, CivPro 23(f).

SUBPOENAS.

Attendance at hearing or trial,

CivPro 45(g).

Contempt.

Nonobedience of subpoena, CivPro 45(h).

Depositions, CivPro 45(f)(1).

Interstate depositions and discovery, CivPro 45(i)(3), (4).

Oral examination, CivPro 30(b)(1).

Deposition of organization, CivPro 30(b)(6).

Form, CivPro 45(c).

Issuance, CivPro 45(a).

Interstate depositions and discovery, CivPro 45(i)(3).

Production of documents, electronically stored information, or things, or inspection of premises, CivPro 45(b).

Protection against subpoena,

CivPro 45(d).

Interstate depositions and discovery, CivPro 45(i)(6).

Service, CivPro 4(c)(1), 45(e)(2).

Interstate depositions and discovery, CivPro 45(i)(4).

Territorial limits of effective service, CivPro 4(f).

Small claim proceedings, CivPro

81(d).

Witnesses.

Masters.

Procuring attendance of witnesses before masters, CivPro 53(d)(2).

Small claims, CivPro 81(d).

SUBSTITUTION OF ATTORNEYS.

Notice, CivPro 11(b)(1).

SUMMARY JUDGMENT.

See JUDGMENTS.

SUMMONS.

Contents, CivPro 4(b).

Eviction proceedings.

Form, CivPro 4(b).

Issuance, CivPro 4(a).

Service.

See SERVICE OF PROCESS.

Time limit for service, CivPro 4(a).

SUPERVISED ACCESS TO CHILDREN, CivPro 16(o).

SUPREME COURT.

Amendment or repeal of rules, CivPro 1(b).

Stays.

Powers of court not limited, CivPro 62(f).

T

TELEGRAPHS.

Service of telegraphic copy, CivPro 4(c)(3).

TELEPHONES.

Depositions by conference calls, CivPro 30(b)(7).

Hearings by telephone conference, CivPro 7(b)(4).

TERMINATION OF PARENTAL RIGHTS.

Family law case information sheet.

Required as condition for filing complaint, CivPro 3(a)(1).

TERMS OF COURT.

Abolished, CivPro 77(a).

THIRD-PARTY PRACTICE.

Dismissal of third-party claims, CivPro 41(c).

When defendant may bring in third party, CivPro 14(a), (b).

TIME.

Appeals.

Failure to comply with time limit.

Effect, CivPro 83(s).

Filing of appeal, CivPro 83(e).

Record.

Filing, CivPro 83(p).

Transcript.

Filing, CivPro 83(p).

TIME —Cont'd
Appeals —Cont'd
 Transcript —Cont'd
 Objections to transcript, CivPro 83(o).
 Preparation, CivPro 83(k).
Blood test results.
 Paternity actions, CivPro 6(c)(7).
Computation of time, CivPro 6(a).
Default proof, CivPro 55(a)(2).
Disqualification of judge without cause.
 Filing motion, CivPro 40(d)(1).
Enlargement of time, CivPro 6(b).
Findings by court.
 Motion to amend, CivPro 52(b).
Judgment notwithstanding the verdict.
 Service of motion, CivPro 50(b).
Judgment on the pleadings.
 Motion for, CivPro 12(a).
Jury.
 Trial by jury.
 Demand, CivPro 38(b).
Mail.
 Service by mail.
 Additional time after, CivPro 6(e)(1).
Motions, affidavits and briefs.
 Filing and serving, CivPro 7(b)(3).
New trial.
 Initiative of court.
 Order, CivPro 59(d).
 Motion, CivPro 59(b).
 Affidavits.
 Time for serving affidavits on motion for new trial, CivPro 59(c).
 Amendment of judgment, CivPro 59(e).
Pleadings.
 Averments of time and place, CivPro 9(f).
Service of summons and complaint, CivPro 4(a).
Third-party complaints, CivPro 14(a).
TITLE.
Judgments.
 Vesting title, CivPro 70.
TITLE OF RULES, CivPro 87.
TRANSFER OF ACTIONS, CivPro 8(a)(2).

TRIAL, CivPro 77(b).
Child custody and support.
 Informal custody trials, CivPro 16(p).
Consolidation, CivPro 42(a).
Contempt.
 Nonsummary proceedings, CivPro 75(i).
Divorce proceedings.
 Exclusion of persons, CivPro 77(b).
Exclusion of persons from courtroom, CivPro 77(b).
Findings by court.
 Amendment, CivPro 52(b).
 Effect, CivPro 52(a).
Interrogatories.
 Use at trial, CivPro 33(b).
Jury.
 See JURY.
Mistrial, CivPro 47(u).
New trial.
 See NEW TRIAL.
Paternity actions.
 Blood test results, CivPro 6(c)(7).
Request for trial setting, CivPro 40(b).
Separate trials.
 See SEPARATE TRIALS.
Setting of action for trial.
 Request for trial setting, CivPro 40(b).
Trial by court, CivPro 39(b).
 Advisory jury, CivPro 39(c).
View of premises, property or things, CivPro 43(f).
TYPE.
Pleadings, motions, judgments, orders and notices, CivPro 10(a)(1).

U

UNKNOWN PARTIES.
Pleadings, CivPro 10(a)(4).

V

VENUE.
Change of venue, CivPro 40(e).
Improper venue.
 Defenses required to be presented by motion, CivPro 12(b), (g).
Unaffected by rules, CivPro 82(a).

VERDICT.

Directed verdict.

- Motion for, CivPro 50(a).
- Stay on motion for judgment in accordance with motion for directed verdict, CivPro 62(b).

Judgment notwithstanding verdict.

- Motion for, CivPro 50(b).
- Conditional rulings on granted motions, CivPro 50(c).
- Denial of motion, CivPro 50(d).

Jury.

- Directed verdict.
 - Motion for, CivPro 50(a).
 - Stay on motion for judgment in accordance with motion for directed verdict, CivPro 62(b).
- General verdict accompanied by answer to interrogatories, CivPro 49(b).
- Judgment notwithstanding verdict.
 - Motion for, CivPro 50(b).
 - Denial of motion, CivPro 50(d).
- Majority verdict, CivPro 48(a).
- Motion for.
 - Conditional rulings on granted motions, CivPro 50(c).
- Rendering verdict, CivPro 48(b).
- Special verdicts, CivPro 49(a).
- Interrogatories, CivPro 49(a).

VERIFICATION.

- Pleadings, CivPro 11(c).

VIDEO CONFERENCE.

- Hearings by, CivPro 7(b)(4).

VIEW OF PREMISES, PROPERTY OR THINGS.

- View by court or jury, CivPro 43(f).

VISITATION.

- See CHILD CUSTODY AND VISITATION.

VOLUNTARY APPEARANCE.

- Submission to personal jurisdiction of court, CivPro 4(i)(1).

W

WITNESSES.

- Cross-examination, CivPro 43(b)(1).
 - Show cause hearings, CivPro 6(c)(2).
- Depositions.
 - See DEPOSITIONS.
- Examination, CivPro 43(b)(1).
 - Reexamination and recalling, CivPro 43(b)(5).

WITNESSES —Cont'd

- Exclusion from courtroom, CivPro 77(b).

Expenses.

- Subpoenas, CivPro 45(e)(1).

Fees.

- Costs, CivPro 54(d)(1).
- Items allowed, CivPro 54(d)(1).
- Subpoenas, CivPro 45(e)(1).

- Inspection of writings, CivPro 43(b)(12).

- Juror questioning of witnesses, CivPro 47(q).

List of witnesses.

- Order for filing, CivPro 16(e).

Masters.

- Procuring of attendance before masters, CivPro 53(d)(2).

Paternity actions.

- Blood test reports, CivPro 6(c)(7).

Pre-trial procedure.

- Exhibits and witnesses, CivPro 16(h).

- Reexamination and recalling, CivPro 43(b)(5).

- Small claim proceedings, CivPro 81(d).

- Telephonic testimony, CivPro 81(g).

Subpoenas.

- Form, CivPro 45(c).
- Masters.
 - Procuring attendance of witnesses before masters, CivPro 53(d)(2).
- Small claim proceedings, CivPro 81(d).

Travel expenses.

- Costs, CivPro 54(d)(1).

Writing shown to witness.

- Inspection by opposite party, CivPro 43(b)(12).

WRITINGS.

Witnesses.

- Inspection of writings shown to witness, CivPro 43(b)(12).

WRITS.

Applications for writs.

- Successive applications, CivPro 11(a)(2).

Mandamus.

- Writ of mandate.
 - See MANDAMUS.

Prohibition.

- See WRITS OF PROHIBITION.

INDEX

WRITS OF PROHIBITION, CivPro
74(a).
Application for writ, CivPro 74(a),
(b).
Judgment, CivPro 74(d).

WRITS OF PROHIBITION —Cont'd
Opposing writ, CivPro 74(c).
Trial of complaint or petition,
CivPro 74(d).

IDAHO RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS.

Rule

- 101. Title and scope.
- 102. Purpose and construction.
- 103. Rulings on evidence.
- 104. Preliminary questions.
- 105. Limited admissibility.
- 106. Remainder of or related writings or recorded statements.

ARTICLE II. JUDICIAL NOTICE.

- 201. Judicial notice of adjudicative facts.

ARTICLE III. PRESUMPTIONS.

- 301. Presumptions in general in civil actions and proceedings.
- 302. Applicability of Federal law in civil cases.
- 303. Presumptions in criminal cases.

ARTICLE IV. RELEVANCY AND ITS LIMITS.

- 401. Definition of relevant evidence.
- 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
- 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
- 404. Character evidence not admissible to prove conduct; exceptions; other crimes.
- 405. Methods of proving character.
- 406. Habit; routine practice.
- 407. Subsequent remedial measures.
- 408. Compromise and offers to compromise.
- 409. Payment of medical and similar expenses.
- 410. Inadmissibility of pleas, plea discussions, and related statements.
- 411. Liability insurance.
- 412. Sex crime cases; relevance of victim's past behavior.
- 413. Proceedings of medical malpractice screening panels.
- 414. Inadmissibility of expressions of condolence or sympathy.

ARTICLE V. PRIVILEGES.

- 501. Privileges recognized only as provided.
- 502. Lawyer-client privilege.
- 503. Physician and psychotherapist-patient privilege.
- 504. Husband-wife privilege.
- 505. Religious privilege.
- 506. Political vote.
- 507. Conduct of mediations.

Rule

- 508. Secrets of State and other official information; governmental privileges.
- 509. Identity of informer.
- 510. Waiver of privilege by voluntary disclosure.
- 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege.
- 512. Comment upon or inference from claim of privilege; instruction.
- 513. Lawyer may exercise claim of privilege.
- 514. Parent-child; guardian or legal custodian-ward privilege.
- 515. Accountant-client privilege.
- 516. School counselor-student privilege.
- 517. Licensed counselor-client privilege.
- 518. Licensed social worker-client privilege.
- 519. Hospital, in-hospital medical staff committee and medical society privilege.
- 520. Medical malpractice screening panel privilege.

ARTICLE VI. WITNESSES.

- 601. General rule of competency.
- 602. Lack of personal knowledge.
- 603. Oath or affirmation.
- 604. Interpreters.
- 605. Competency of judge as witness.
- 606. Competency of juror as witness.
- 607. Who may impeach.
- 608. Evidence of character and conduct of witness.
- 609. Impeachment by evidence of conviction of crime.
- 610. Religious beliefs or opinions.
- 611. Mode and order of interrogation and presentation.
- 612. Writing or object used to refresh memory.
- 613. Prior statements of witnesses.
- 614. Calling and interrogation of witnesses by court.
- 615. Exclusion of witnesses.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.

- 701. Opinion testimony by lay witness.
- 702. Testimony by experts.
- 703. Basis of opinion testimony by experts.
- 704. Opinion on ultimate issue.
- 705. Disclosure of facts or data underlying expert opinion.
- 706. Court appointed experts.

ARTICLE VIII. HEARSAY.

- 801. Definitions.
- 802. Hearsay rule.

Rule

803. Hearsay exceptions; availability of declarant immaterial.
 804. Hearsay exceptions; declarant unavailable.
 805. Hearsay within hearsay.
 806. Attacking and supporting credibility of declarant.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION.

901. Requirement of authentication or identification.
 902. Self-authentication.
 903. Subscribing witness' testimony unnecessary.
 904. Authentication of medical or dental tests and test results for diagnostic or treatment purposes.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.

1001. Definitions.

Rule

1002. Requirement of original.
 1003. Admissibility of duplicates.
 1004. Admissibility of other evidence of contents.
 1005. Public records.
 1006. Summaries.
 1007. Testimony or written admission of party.
 1008. Functions of court and jury.

ARTICLE XI. MISCELLANEOUS RULES.

1101. Adoption and amendments.
 1102. Effect on evidentiary statutes and rules.
 1103. Application.

ARTICLE I. GENERAL PROVISIONS.

Rule 101. Title and scope.

(a) **Title.** These rules shall be known and cited as the Idaho Rules of Evidence, or abbreviated I.R.E.

(b) **Scope.** These rules govern all actions, cases and proceedings in the courts of the State of Idaho and all actions, cases and proceedings to which rules of evidence are applicable, except as hereinafter provided.

(c) **Rules of privilege.** The rules with respect to privileges apply at all stages of all actions, cases and proceedings.

(d) **Rules inapplicable in part.** These rules apply in the following proceedings subject to the enumerated exceptions:

(1) **Preliminary hearings.** Preliminary hearings except as modified by Rule 5.1(b) of the Idaho Criminal Rules.

(2) **Juvenile Corrections Act.** Proceedings under the Juvenile Corrections Act except as modified by the Idaho Juvenile Rules.

(3) **Masters proceedings.** Masters proceedings unless the appointing court directs otherwise in the order of appointment pursuant to Rule 53 of the Idaho Rules of Civil Procedure.

(4) **Uniform Post-Conviction Act.** Proceedings under the Uniform Post-Conviction Procedure Act except as modified by Idaho Code § 19-4907.

(5) **Driver's license suspension.** Proceedings for suspension of driver's license for failure to take an evidentiary test for alcohol concentration except as modified by Rule 9.2(b) of the Idaho Misdemeanor Criminal Rules.

- (6) **Paternity Act.** Proceedings under the Paternity Act except as modified by Rule 6(c)(7) of the Idaho Rules of Civil Procedure.
- (7) **Restitution hearings.** Restitution hearings except as modified by I.C. § 19-5304(6).
- (e) **Rules inapplicable.** These rules, other than those with respect to privileges, do not apply in the following situations:
- (1) **Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).
- (2) **Special Inquiry Judge.** Special Inquiry Judge proceedings.
- (3) **Miscellaneous proceedings.** Proceedings for extradition or rendition; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.
- (4) **Contempt proceedings.** Contempt proceedings in which the court may act summarily.
- (5) **Small claims.** Proceedings in the small claims department of the district court.
- (6) All hearings conducted pursuant to the provisions of the Child Protective Act, I.C. 16-1601 et seq., except that the Rules of Evidence shall apply at adjudicatory hearings conducted pursuant to I.C. § 16-1619 and termination of parental rights proceedings pursuant to I.C. § 16-1624.
- (7) Informal hearings for emergency medical treatment pursuant to I.C. § 16-1627.
- (8) **Judicial Authorization for Abortion.** All hearings conducted pursuant to I.C. § 18-609A regarding a request for judicial authorization for performance of an abortion on a minor. (Adopted January 8, 1985, effective July 1, 1985; amended June 7, 1993, effective July 1, 1993; amended March 1, 2000, effective July 1, 2000; amended December 26, 2002, effective February 1, 2003; amended March 21, 2007, effective July 1, 2007; amended April 4, 2008, effective July 1, 2008; amended February 9, 2012, effective July 1, 2012.)

STATUTORY NOTES

Compiler’s Notes. The Youth Rehabilitation Act referred to in subdivision (d)(2) of this rule has been amended and redesignated as

the Juvenile Corrections Act, § 20-501 et seq., Idaho Code, effective October 1, 1995.

JUDICIAL DECISIONS

ANALYSIS	
Application.	ings for revoking probation. State v. Tracy, 119 Idaho 1027, 812 P.2d 741 (1991).
Child Protective Act Proceedings.	Child Protective Act Proceedings.
Prison Administrative and Disciplinary Proceedings.	This rule modifies I.J.R., Rule 10 by making the Rules of Evidence applicable in all Child Protective Act proceedings except temporary shelter care hearings; hence, subsection (b) of former § 16-1608 (now § 16-1619), providing
Application.	
Rules of Evidence do not apply to proceed-	

that hearings shall be conducted in an informal manner, is no longer governing. Idaho Dep't of Health & Welfare v. Syme, 110 Idaho 44, 714 P.2d 13 (1986).

Prison Administrative and Disciplinary Proceedings.

Prison administrative and disciplinary proceedings are subject neither to the Rules of Evidence nor the provisions of the Administrative Procedure Act; therefore, the process due in a prison classification hearing does not preclude hearsay evidence which the State Correctional Institution Classification Committee reasonably deems to be reliable. Wolfe v. State, 114 Idaho 659, 759 P.2d 950 (Ct. App. 1988).

Cited in: State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989); State v. Peters, 119 Idaho 382, 807 P.2d 61 (1991); State v. Farmer, 131 Idaho 803, 964 P.2d 670 (Ct. App. 1998); State v. Murillo, 135 Idaho 811, 25 P.3d 124 (Ct. App. 2001); State v. Nunez, 138 Idaho 636, 67 P.3d 831 (2003); State v. Goodlett, 139 Idaho 262, 77 P.3d 487 (Ct. App. 2003); State v. Martin, 142 Idaho 58, 122 P.3d 317 (Ct. App. 2005); State v. Rose, — Idaho —, — P.3d —, 2006 Ida. App. LEXIS 54 (May 30, 2006); Doe v. Doe, 146 Idaho 386, 195 P.3d 745 (2008); State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009).

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

Rule 103. Rulings on evidence.

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Errors affecting substantial rights.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Admission of Evidence.

—Error.

—Harmless.

—Not Error.

Cross-Examination.

—By Prosecutor

—Determination of Harm.

Evidence Not Prejudicial.

Exclusion of Evidence.

Expert Testimony.

New Trial.

Objection.

Out-of-Court Statements.

—Offer of Proof Not Made.

Plain Error.

Preservation for Appeal.

Prosecutor's Comments.

Purpose.

Standard of Review.

Substantial Rights.

Admission of Evidence.

Even if admission of expert testimony regarding post-traumatic stress disorder in a rape trial was an abuse of discretion it did not constitute fundamental error. *State v. Roles*, 122 Idaho 138, 832 P.2d 311 (Ct. App. 1992).

District court's initial confusion regarding the law of the case doctrine was not error, and a basis for reversal, where the appellant failed to identify any instance in the record where the district court refused to admit evidence that would have affected a substantial right of hers. *Read v. Harvey*, 147 Idaho 364, 209 P.3d 661 (2009).

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford*, 150 Idaho 355, 247 P.3d 582 (2010).

—Error.

—Harmless.

The erroneous admission of a duplicate

tape recording of a conversation between buyer and seller had no significant effect on the district court's determination of buyer's credibility. Thus, error in the admission of the duplicate tape was harmless. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

The outer boundary of the admissibility of conduct offered to prove a plan is whether that plan is a fact of consequence to the determination of the action. The facts of consequence in the action were the elements of first-degree kidnapping and there is no plan element in a first-degree kidnapping. The existence of facts that supported an inference that defendant has a plan to pick up young girls was irrelevant to any issue in dispute. Therefore, the court exceeded the bounds of its discretion when it chose to apply the legal standard of "common scheme or plan" to facts that were not relevant to any disputed issue. However, other evidence in the case was sufficient for a jury to conclude that defendant had committed first-degree kidnapping and therefore the error of admitting the two girls' testimony was harmless error. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992).

Where testimony of officer was notably repetitive of victim's testimony at trial, the information elicited from the officer regarding the attack was already before the jury and court was convinced that the jury would have reached the same decision absent that portion of the officer's testimony as such, any error was harmless error and not grounds for reversal. *State v. Woodbury*, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995).

In view of the considerable amount of independent evidence, essentially un rebutted by the defense, that identified defendant as the second man who fled from officer, and in view of the district court's directive to the jury to disregard officer's testimony that was designed to convey hearsay, court held that the misconduct of the prosecutor was harmless beyond a reasonable doubt. *State v. Agundis*, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995).

Where the court was convinced, beyond a reasonable doubt, that the result in the case would have been the same despite inappropriate testimony admitted in error, the error was judged not to warrant remand for a new trial as it was held to be harmless under this rule. *State v. Carsner*, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995).

In a criminal case where trial court overruled defendant's hearsay objection under I.R.E. 801(c), but the Court of Appeals noted

that the trial court should have sustained the objection until the proponent made an offer of proof that the statement was not hearsay, under this rule, the testimony was harmless error because other non-hearsay evidence amply proved fact related by the objectionable testimony. *State v. Gomez*, 126 Idaho 700, 889 P.2d 729 (Ct. App. 1995).

In defendant's robbery trial, the State's presentation of evidence of pre-arrest, pre-Miranda silence constituted harmless error. In light of strong circumstantial evidence, the jury would have found defendant guilty if the court had excluded the testimony regarding his silence when he was initially detained. *State v. Kerchusky*, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003).

Where injured parties brought suit against a cow owner, pasture owners, and the state when their vehicle struck a cow carcass on an interstate highway, the trial court did not abuse its discretion in allowing the pasture owners' expert to testify as to why the cows might have broken down a pasture gate and gone out onto the highway. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004).

In a criminal prosecution for forgery, the trial court erred by admitting a reclamation document advising the bank that the payee's social security check had been forged since there was no testimony presented by any witness familiar with the system used to create the document; however, the error was harmless because the reclamation document did not present the jury with any information that had not already been introduced through the testimony of other witnesses. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

—Not Error.

Note written by defendant's co-conspirator to the co-conspirator's girlfriend, showing that the co-conspirator was attempting to cover up the crime by dissuading his girlfriend from divulging information to police, was not hearsay; although the note was offered in error under I.R.E. 801(d)(2)(E), such error was harmless because the note was admissible on other grounds. *State v. Harris*, 141 Idaho 721, 117 P.3d 135 (Ct. App. 2005).

Cross-Examination.

—By Prosecutor.

Where defendant testified as part of the self-defense argument that he was not in a position to be able to fight because of health problems, and that was part of the reason why he thought he had to defend himself with a gun which led to the victim's death, the cross-examination by the prosecutor about defendant's history as boxer and being in-

volved in fist fights clearly was designed to provide a basis upon which the jury ultimately could reach a conclusion whether to believe defendant's version of his reason for killing and there was no error in the admission of the evidence and the trial court did not err in denying the motion for mistrial and motion for a new trial. *State v. Babbitt*, 120 Idaho 337, 815 P.2d 1077 (Ct. App. 1991).

—Determination of Harm.

In determining whether an error has affected substantial rights or is harmless, the inquiry is whether it appears from the record that the error contributed to the verdict, leaving the appellate court with a reasonable doubt that the jury would have reached the same result had the error not occurred. *State v. Woodbury*, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995).

Evidence Not Prejudicial.

Testimony by a social worker, upon cross-examination, that the defendant's wife told the social worker that she suspected her husband of having an affair with the babysitter was not prejudicial to the defendant who was on trial for lewd and lascivious conduct with his eight-year-old stepdaughter, where the wife had already testified without objection that she suspected defendant of having an affair and the basis of defendant's objection to the social worker's testimony was that it was cumulative and irrelevant. *State v. Cliff*, 116 Idaho 921, 782 P.2d 44 (Ct. App. 1989).

At a hearing on applicant's petition for habeas corpus, which he filed seeking release from commitment on the ground that he was no longer mentally ill, it was not harmful error to admit into evidence a risk assessment document that detailed applicant's history of dangerous behavior and assessed his potential for similar behavior in the future. *Henry v. State*, 127 Idaho 349, 900 P.2d 1360 (1995).

Exclusion of Evidence.

Where, in a medical malpractice action, defendant doctor was allowed to testify as to his referrals of plaintiff to other doctors, and where the medical charts of the doctor concerning his treatment of plaintiff were admitted in evidence and indicated that the doctor had suggested consultations with others, including a neurological consultation if the patient would agree, in light of this evidence the exclusion of evidence of defendant's habit of referring patients to other doctors was not inconsistent with substantial justice and did not affect the substantial rights of the doctor; accordingly, such an exclusion did not warrant a new trial. *Hake v. DeLane*, 117 Idaho 1058, 793 P.2d 1230 (1990).

The erroneous exclusion of evidence justifies setting aside a jury verdict only if substantial rights of the parties were affected by the error. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Where court excluded a witness on defendant's witness list and defendant had informed plaintiff that it reserved the right to call anyone on the witness list, error occurred; however, it was harmless because excluding the witness' testimony did not affect defendant's substantial rights as defendant presented other direct evidence and the excluded witness' testimony was cumulative and inadmissible in part. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

In a property sale dispute, the grant of a new trial on damages, based on erroneous exclusion of evidence, was proper where the error affected a substantial right of the buyer, within the meaning of I.R.C.P. 61 and I.R.E. 103(a), because he was precluded from presenting evidence of his remodeling costs as an element of his damages. *White v. Mock*, 140 Idaho 882, 104 P.3d 356 (2004).

During a discussion regarding the medical expert's expected testimony, defendant's counsel did not claim that the expert would testify that in his opinion the plaintiff's medical condition would shorten her life expectancy. There was nothing in the record indicating that the defendant's medical expert would testify, to a reasonable degree of medical probability, that in his opinion the plaintiff's life expectancy would be shortened by any of her medical conditions — the district court did not err in excluding the speculative evidence. *Slack v. Kelleher*, 140 Idaho 916, 104 P.3d 958 (2004).

Expert Testimony.

When reviewing an evidentiary ruling on expert testimony, court's inquiry is limited to whether the challenged ruling was an abuse of the trial court's discretion, and error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

New Trial.

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Objection.

There is no authority in this state that requires a motion to strike or an objection

before a trial court may exclude or not consider evidence offered by a party. Absent plain or fundamental error, some form of objection is ordinarily necessary, however, to preserve the right to challenge on appeal the admission or consideration of evidence. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992).

Denial of the inmate's petition for post-conviction relief was proper pursuant to § 19-4907 where he declined to present any evidence that his counsel ignored his request to file a direct appeal. The adoption of the inmate's position that his verified application and affidavits were automatically introduced into evidence at the evidentiary hearing would have deprived the parties of the opportunity to object to the admissibility of any such proof. *Loveland v. State*, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005).

Objections to evidence cannot be raised for the first time on appeal. There must be a timely objection to the evidence or a motion to strike, which is essentially a delayed objection. *Phillips v. Erhart*, — Idaho —, 254 P.3d 1 (2011).

Out-of-Court Statements.

—Offer of Proof Not Made.

The issue of suppression of out-of-court statements, which were relied upon by the officer in stopping defendant and arresting defendant for driving under the influence and possession of a concealed weapon, was not preserved for appeal where the state made no offer of proof showing the substance of those statements or that such evidence would have shown the stop was reasonable. *State v. Schoonover*, 125 Idaho 953, 877 P.2d 924 (Ct. App. 1994).

Plain Error.

The term "plain error," when applied to a criminal case, is intended to embody the concept of "fundamental error" — that is, error which so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

In a prosecution for aggravated driving under the influence, allegations, not specified as grounds for objection at trial, that the state failed to prove the blood sample was withdrawn in the proper manner and properly processed for testing, or that the hospital's automatic chemical analyzer operated on the basis of accepted scientific principles, did not establish failure of authentication and identification, under Rule 901, constituting plain error in admitting evidence of the test result.

State v. Koch, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

No error in either the admission or the exclusion of evidence is grounds for granting a new trial or for setting aside a verdict unless refusal to take such action appears to the court to be inconsistent with substantial justice. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

In cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings. If there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings. Placing the burden of demonstrating harm on the defendant will encourage the making of timely objections that could result in the error being prevented or the harm being alleviated. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

Preservation for Appeal.

Defendant did not preserve the right to raise on appeal whether the trial court violated I.R.E. 404(a) by admitting the testimony of the state's child abuse expert concerning the profile of an offender in an incestuous family to show that defendant fit this profile. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

The court refused to consider defendant's argument of the admissibility of the exhibit that was an enlargement of comparative fingerprints where defendant initially objected to the admission of the exhibit on the basis of best evidence, whereas, on appeal defendant argued that the district court erred in admitting the exhibit on the basis of lack of foundation. *State v. Norton*, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000).

On appeal of defendant's conviction for possession of a controlled substance with intent to deliver, he challenged the reliability of drug detection dog that alerted to presence of drugs in defendant's truck. Because defendant did not bring a foundational challenge to the admission of the evidence of the canine alert, he was not required to make a foundational objection to preserve his claim for review. *State v. Yeomans*, 144 Idaho 871, 172 P.3d 1146 (2007).

Prosecutor's Comments.

By contradicting a witness's testimony in front of the jury, the prosecutor, in effect, presented his own unsworn testimony in violation of this rule and in violation of I.R.E. 603. *State v. Gerardo*, 147 Idaho 22, 205 P.3d 671 (2009).

Purpose.

The purpose of this subsection (a)(2) is to preserve a record for appeal and to enable the court to rule on the evidence's admissibility. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

Standard of Review.

Appellate courts review trial court decisions admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

The basis of defendant's objection to the admission of preliminary hearing testimony, while not set forth specifically as required by subdivision (a)(1) of this rule, appeared to be under § 9-336, and the trial court's ruling therefore would not be disturbed unless clearly erroneous. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

The supreme court reviews challenges to a trial court's evidentiary rulings under an abuse of discretion standard. To determine whether a trial court has abused its discretion, the supreme court considers whether the trial court correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason. Error is disregarded as harmless unless the ruling affects a substantial right of the party. *Herman v. Herman*, 136 Idaho 781, 41 P.3d 209 (2002).

Substantial Rights.

Plain error affecting substantial rights, although not properly brought to the attention of the trial court, may serve as the basis for review on appeal. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Error may not be based upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *L & L Furn. Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991).

Court must disregard any error or defect in the proceeding "which does not affect the substantial rights of the parties." *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

A judgment may not be disturbed on appeal

due to error in an evidentiary ruling unless the error affected the substantial rights of a party. *Wood v. State*, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

In prosecution for robbery, admission of testimony of witnesses concerning hat and coat found in home of defendant's fiancée that purportedly resembled the clothing worn by the robber and which were identified by the witnesses as being similar to those worn by the robber did not affect a substantial right, where the coat and hat were not shown to the jury, and the district court sustained defendant's objection to introduction of the items into evidence, and following such ruling defendant's counsel did not renew motion to strike testimony of witnesses identifying the clothing, and in spite of such omission, the record showed that there was overwhelming evidence to support the jury's verdict of guilty. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

Even though the trial court should not have allowed cross-examination regarding the two citations received by plaintiff in motor vehicle accident, the admission of the testimony in the personal injury action did not require a new trial because it did not affect plaintiff's substantial rights. *Martin v. Hackworth*, 127 Idaho 68, 896 P.2d 976 (1995).

In malpractice action trial court did not abuse its discretion in excluding evidence regarding plaintiff's medical history of sexually-transmitted diseases (STDs) and the testimony of plaintiff's expert concerning the use of a fetal scalp monitor, to have refused to allow the defense to present evidence regarding plaintiff's history of STDs and also to have refused to strike expert's testimony regarding use of the monitor would have impaired the substantial rights of the defendant and thus the court prevented prejudice to both plaintiff by not allowing testimony regarding her history of STDs and to defendant by striking

plaintiff's expert's testimony that defendant could not rebut without referring to this medical history. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997).

Trial court should have permitted cross examination of defense's accident reconstruction expert concerning defendant's statement to an insurance adjuster; the error affected plaintiff's substantial rights and was grounds for granting a new trial. *Dabestani ex rel. Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998).

Cited in: *State*, Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985); *State v. Stevens*, 115 Idaho 457, 767 P.2d 832 (Ct. App. 1989); *State v. Fisher*, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989); *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989); *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991); *State v. Browning*, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992); *State v. Thompson*, 121 Idaho 638, 826 P.2d 1350 (Ct. App. 1992); *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992); *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994); *State v. Vierra*, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994); *State v. Stover*, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994); *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994); *McKay Constr. Co. v. Ada County*, 126 Idaho 923, 894 P.2d 156 (Ct. App. 1995); *State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995); *State v. Welker*, 129 Idaho 805, 932 P.2d 928 (Ct. App. 1997); *State v. Aspeytia*, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997); *State v. Young*, 136 Idaho 113, 29 P.3d 949 (2001); *Evans v. Bd. of Comm'rs*, 137 Idaho 428, 50 P.3d 443 (2002); *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 50 P.3d 975 (2002); *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003); *State v. Davis*, 139 Idaho 731, 85 P.3d 1130 (Ct. App. 2003); *State v. Watkins*, 148 Idaho 418, 224 P.3d 485 (2009); *State v. Estes*, 223 P.3d 287 (2009); *State v. Fordyce*, — Idaho —, 264 P.3d 975 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

Remarks of Counsel.

Timely and proper objections should be made to the remarks of counsel properly to preserve and present to the Supreme Court alleged errors in remarks, so that the trial court may have an opportunity to prevent or, if possible, eradicate the errors by admonition or instruction, and so that there may be an adverse ruling or action by the trial court for review by the Supreme Court. *Stewart v. City of Idaho Falls*, 61 Idaho 471, 103 P.2d 697 (1940).

The failure of a court to admonish the jury to disregard remarks of counsel was, in effect, an overruling of objection to the remarks, as well as the request for the admonition; such a ruling is deemed excepted to and therefore presents the question as to whether the jury was, by the remarks complained of, aroused and inflamed and by reason thereof, influenced in the verdict they returned. *Cogswell v. C.C. Anderson Stores Co.*, 68 Idaho 205, 192 P.2d 383 (1948).

RESEARCH REFERENCES

A.L.R. Construction of Rule 43(c) of the Federal Rules of Civil Procedure and similar state provisions, providing for entry into re-

cord of evidence excluded by trial court. 9 A.L.R.3d 508.

Rule 104. Preliminary questions.

(a) **Questions of admissibility generally.** Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy conditioned on fact.** Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of jury.** Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of a jury. Hearings on other preliminary matters in all cases shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if the accused so requests.

(d) **Testimony by accused.** The accused does not, by testifying upon a preliminary matter, subject the accused to cross-examination as to other issues in the case.

(e) **Weight and credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Blood-Alcohol Content Test.
Instructions.

Blood-Alcohol Content Test.

The state provided a sufficient foundation to establish that defendant's blood-alcohol content test was performed by a laboratory or method approved by the Idaho Department of Law Enforcement as required by I.C. § 18-8004(4). *State v. Uhly*, 121 Idaho 1020, 829 P.2d 1369 (Ct. App. 1992).

Where officer who administered a breath test did not "closely observe" defendant for the requisite fifteen-minute period, nor did the state present evidence showing that defendant had been observed by any officer for fifteen minutes preceding the tests, the results of the breath test produced by the Intoximeter 3000 machine were inadmissible. *State v. Utz*, 125 Idaho 127, 867 P.2d 1001 (Ct. App. 1993).

State laid a sufficient foundation for the

admission of the alcohol concentration tests to be introduced into evidence through witness testimony; the expert's testimony stated that the Intoxilyzer 5000 was approved by the Idaho State Police almost two decades ago and was still in use. *State v. Anderson*, 145 Idaho 99, 175 P.3d 788 (2008).

Instructions.

The court admitted the photographs of victim's bruises subject to a motion to strike if the state failed to later connect it up with victim's testimony. Later, victim testified that defendant had beaten and raped her and that the bruises depicted in the photographs were caused by him, and the state asked the court to instruct the jury to consider the bruises as being caused by defendant. Court's instruction on the admissibility of the photographs, that while the photographs had previously been admitted subject to limitations they were now admitted without limitations, was entirely neutral. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Cited in: *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988); *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989); *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992); *State v. Kay*, 129 Idaho 507, 927

P.2d 897 (Ct. App. 1996); *Reed v. Reed*, 137 Idaho 53, 44 P.3d 1108 (2002); *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 48 P.3d 651 (2002); *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003).

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Error Not Harmless.

Failure to Request Limiting Instruction.
Timing.

Error Not Harmless.

The erroneous admission of hearsay evidence was not harmless where the evidence was admitted for the truth of the content and its use was not limited to impeachment. *State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999).

Trial court should have granted defendant a limiting instruction for the comments by a police officer during a videotaped confession, wherein the officer stated he was an expert in deception, as the officers' comments that defendant was lying were admissible for the purpose of giving context to defendant answers, but inadmissible for the purpose of proving the truth of the matter asserted—in this case, defendant's truthfulness. *State v. Cordova*, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002).

Failure to Request Limiting Instruction.

Where the state put defendant on notice that it would seek to admit videotaped testi-

mony of victim's prior inconsistent statements as evidence, and not just for the purpose of impeachment, and where defendant failed to object to the testimony or to request a limiting instruction at that time, defendant's later requested limiting instruction was neither timely nor specific. *State v. Vaughn*, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993).

Timing.

When one party introduces evidence for a limited purpose by the terms of this rule, the opponent is entitled to an instruction restricting the use of such evidence to the purpose for which it was admitted. The instruction that was given at the conclusion of the trial apprised the jury of the sole purpose for which evidence of the incident could be considered and the court's decision regarding the timing of the instruction did not create grounds for either a mistrial or a new trial. *State v. Dopp*, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996).

Cited in: *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993); *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994); *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998); *Kirk v. Ford Motor Co.*, 141 Idaho 697, 116 P.3d 27 (2005).

Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Failure to Limit Request.
Preservation for Review.
Videotape.

Failure to Limit Request.

Where at trial, officer testified as to statements defendant made during a taped police interview, the trial court committed no error in refusing to admit the full transcript of the taped interview or the tapes themselves, since defendant did not limit his request to those portions of the transcript which explained, qualified or were relevant to that part of the conversation regarding which officer testified. *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989), cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989).

Preservation for Review.

The district court did not abuse its discretion by denying the admissibility of defendant's statements made during the police interrogation on hearsay grounds when trial counsel argued their admissibility as admissions of a party-opponent. Defendant's contention that admission of the statements was

justified under other Rules of Evidence was not properly preserved for appeal and did not rise to the level of fundamental error. *State v. Parmer*, 147 Idaho 210, 207 P.3d 186 (2009).

Videotape.

It was more appropriate to analyze the admissibility of the videotape under this rule because the essence of the prosecutor's reason for seeking admission of the tape was to demonstrate, by providing context, that the allegedly inconsistent statements introduced on cross-examination of victim were actually not inconsistent, rather than introduce prior consistent statements to mitigate inconsistent statements. *State v. Bingham*, 124 Idaho 698, 864 P.2d 144 (1993).

The state's failure to tailor the submission of videotape evidence request resulted in the admission of patently prejudicial and irrelevant evidence which accompanied the jury even into deliberations, thus the videotape's admission could not be justified under this rule. *State v. Bingham*, 124 Idaho 698, 864 P.2d 144 (1993).

Cited in: *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988).

RESEARCH REFERENCES

A.L.R. Construction and Application of Uniform Rule of Evidence 106, Applying Doc-

trine of Completeness to Writings and Recorded Statements. 27 A.L.R.6th 183.

ARTICLE II. JUDICIAL NOTICE.

Rule 201. Judicial notice of adjudicative facts.

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not. When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court shall identify the specific documents or items that were so noticed.

(d) **When mandatory.** When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A

court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (Adopted January 8, 1985, effective July 1, 1985; amended March 21, 2007, effective July 1, 2007.)

JUDICIAL DECISIONS

ANALYSIS

- Harmless Error.
- Judicial Notice Improper.
- Judicial Notice Proper.
- Jury Instructions.
- Juvenile Proceeding.
- Official Reports of the Government.
- Ordinances.
- Scientific Tests.

Harmless Error.

Summary judgment was properly awarded to a county in a developer's declaratory judgment action challenging the validity of various planning and zoning ordinances. Because standing was a jurisdictional issue, any error that the trial court committed in failing to take judicial notice of orders entered in a related case, in which the developer was determined to have standing, was harmless. *Martin & Martin Custom Homes, LLC v. Camas County*, 150 Idaho 508, 248 P.3d 1243 (2011).

Judicial Notice Improper.

The magistrate took improper judicial notice of the "fact" that it costs more to raise children who are ages 14 and 12 and that a child's needs are more expensive at those ages than for children who are only six and eight. *Brazier v. Brazier*, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986).

Bar misconduct records do not meet the requirements of this rule. *Newman v. State*, 149 Idaho 225, 233 P.3d 156 (2010).

Judicial Notice Proper.

Judicial notice of defendants' liquor and beer licenses was proper where the Idaho

Department of Law Enforcement was the agency which issued the license numbers to the defendants, the defendants' record in this case contained a copy of the defendants' licenses and the defendants presented no evidence to dispute that they were the holders of the two licenses. *State, Dep't of Law Enforcement v. Engberg*, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985).

It was permissible for magistrate to take judicial notice of court clerk's record regarding ex-husband's payment of child support in a suit to recover delinquent support payments. *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990).

This section provides that where the department of law enforcement adopted rules and regulations pertaining to the administration of alcohol concentration tests, the court is empowered to take judicial notice of these rules and regulations. *State v. Howell*, 122 Idaho 209, 832 P.2d 1144 (Ct. App. 1992).

District court erred in denying a petition for writ of habeas corpus where the inmate claimed the parole commission denied him parole in retaliation for his litigative activities while in prison. Evidence of the inmate's litigative activities was a matter of public record. *Drennon v. Craven*, 141 Idaho 34, 105 P.3d 694 (Ct. App. 2004).

In prosecution for unlawful purchase of a firearm, the requirement that defendant have been convicted of a felony shall include a person who has entered a plea of guilty and does not require sentencing for defendant to be considered a felon. When the district court, as the trier of fact, took judicial notice of defendant's previous conviction in the form of his guilty plea, the state had at that time

provided sufficient evidence to satisfy that element of the crime. *State v. Cook*, 143 Idaho 323, 144 P.3d 28 (Ct. App. 2006).

Jury Instructions.

The trial court was not only permitted, but required, to instruct the jury as to judicially-noticed mortality figures where it had taken judicial notice of such figures admitted into evidence and contained in the testimony and reports of a life care planner and economist. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Juvenile Proceeding.

Judicial notice of a local ordinance was properly taken in a juvenile proceeding relating to the alleged violation of a curfew. *Doe v. Doe*, 146 Idaho 386, 195 P.3d 745 (2008).

Official Reports of the Government.

The Court of Appeals may take judicial notice of adjudicative facts, those not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; this notice may be taken at any stage in the proceeding, at the trial or appellate level, and extends to official reports of the federal government, including those published by the Bureau of Labor Statistics. *Trautman v. Hill*, 116 Idaho 337, 775 P.2d 651 (Ct. App. 1989).

Ordinances.

Existence of an ordinance relevant to adjudication of a dispute is a question well-suited to the application of this rule, and if an ordinance's existence is not reasonably in dispute because it is generally known within the territorial jurisdiction of the trial court, or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, then it may be accepted as evidence by judicial notice. *Doe v. Doe*, 146 Idaho 386, 195 P.3d 745 (2008).

Scientific Tests.

In order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the reliability of the test to produce accurate results. This may be done by establishing the scientific acceptability of the testing process. General scientific acceptance is a proper condition for taking judicial notice. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

Cited in: *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988); *Knopp v. Nelson*, 116 Idaho 343, 775 P.2d 657 (Ct. App. 1989); *State v. Phillips*, 118 Idaho 27, 794 P.2d 297 (Ct. App. 1990); *State v. Nunez*, 138 Idaho 636, 67 P.3d 831 (2003).

ARTICLE III. PRESUMPTIONS.

Rule 301. Presumptions in general in civil actions and proceedings.

(a) **Effect.** In all civil actions and proceedings, unless otherwise provided by statute, by Idaho appellate decisions or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption.

(b) **Jury Instructions.** When any presumption operates, the court shall instruct the jury that the fact has been proved without using the term

“presumption”. (Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998.)

JUDICIAL DECISIONS

ANALYSIS

Effect of Presumption.

In General.

Negligence Instruction.

Survivorship in Joint Accounts.

Effect of Presumption.

A presumption under this rule relieves the party in whose favor the presumption operates from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986).

A Rule 301 presumption relieves the party in whose favor it operates from presenting further evidence of the presumed fact until the opposing party introduces substantial evidence of the nonexistence of the fact. *Krebs v. Krebs*, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988).

Where husband alleged that property was his separate property and not community property because wife quitclaimed her interest to him, but she alleged that she was induced to do so by husband's artifice, where wife introduced evidence demonstrating that a confidential relationship existed and that husband was instrumental in procuring the deed, the burden shifted to husband to come forward with evidence tending to disprove at least one of the four prima facie elements of undue influence. *Krebs v. Krebs*, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988).

The burden was on long-term healthcare facility to demonstrate its right to reimbursement; however, once the facility had submitted substantial evidence that it was efficiently operated and had incurred costs beyond its control, the presumption contained in former § 56-110(a)(6) disappeared, and the facility had made a prima facie case that the costs were reasonable. *Idaho County Nursing Home v. Idaho Dep't of Health & Welfare*, 120 Idaho 933, 821 P.2d 988 (1991).

Where husband, during marriage, executed a quitclaim deed to ranch property to his wife as her separate property in accordance with the requirements of § 55-601, husband's testimony as to lack of consideration was inadmissible and his evidence insufficient to rebut the presumption of § 32-906; therefore, finding that property was wife's separate property was upheld. *Bliss v. Bliss*, 127 Idaho 170, 898 P.2d 1081 (1995).

It was within the legislature's power to enact § 42-1411(4), which directs that the contents of the Director of the Idaho Department of Water Resources report shall constitute prima facie evidence of some water rights claims; this direction is recognized in this rule to create an evidentiary presumption, and unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the director's report are established. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

In General.

This rule provides two major benefits. First, it standardizes the definition of the word “presumption”; the rule simply means that when courts use the word presumption, and it is not otherwise defined by statute or the Rules of Evidence, then it shifts the burden of production. Second, the rule effectively eliminates the word presumption from jury instructions. *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986).

While affidavits may dispel the presumed correctness of the facts contained in a report, the facts contained therein still exist as facts. Facts contained in the affidavits create triable issues to the extent they conflict with facts alleged in the report. Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

Negligence Instruction.

Giving “dead man's” instruction that motorcyclist, killed when hit by another vehicle, was presumed to be exercising ordinary care, unless defendants introduce substantial evidence to the contrary, was reversible error; a properly instructed jury may well have allocated some negligence to motorcyclist. *Smith v. Angell*, 122 Idaho 25, 830 P.2d 1163 (1992).

Survivorship in Joint Accounts.

This rule has not changed the rule that a survivor of a joint account is required to show by clear and convincing evidence the deceased party to the account intended that the corpus of the account pass to the survivor by right of survivorship. *Ashe v. Hurt*, 114 Idaho 70, 753 P.2d 281 (Ct. App. 1988), *aff'd*, 117 Idaho 266, 787 P.2d 252 (1990).

Cited in: Roll v. City of Middleton, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989); Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990); Evans v. Hara's, Inc., 123 Idaho 473, 849 P.2d 934 (1993).

Rule 302. Applicability of Federal law in civil cases.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which Federal law supplies the rule of decision is determined in accordance with Federal law. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 303. Presumptions in criminal cases.

(a) **Scope.** Except as otherwise provided by statute, in criminal cases presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) **Submission to jury.** The court shall not direct the jury to find a presumed fact against the accused. The court may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt on the presumed fact beyond a reasonable doubt.

(c) **Instructing the jury.** Whenever the existence of a presumed fact against the accused is submitted to the jury, the court in instructing the jury shall not charge in terms of a presumption. The charge shall include an instruction to the effect that the jurors have a right to draw reasonable inferences from facts proved beyond a reasonable doubt and may convict the accused in reliance upon an inference of fact if they conclude that such inference is valid and if the inference convinces them of guilt beyond a reasonable doubt and not otherwise. (Adopted January 8, 1985, effective July 1, 1985.)

ARTICLE IV. RELEVANCY AND ITS LIMITS.

Rule 401. Definition of relevant evidence.

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion Standard.
Driving Under the Influence.
Error Harmless.
Error Not Harmless.
Escape or Flight.
Evidence Held Admissible.
Evidence Held Inadmissible.

Evidence of Character.
Evidence of Flight.
Evidence of Intent.
Expert Testimony.
Illustrative Evidence.
Impeachment Evidence.
In General.
Jury Verdict.
Lay Witness.

Other Bad Acts and Uncharged Crimes.
 Photographs.
 Plane Crash.
 Pornographic Images.
 Probative Value.
 Review.
 Scientific Tests.
 Value of Marijuana Plants.
 Video.

Abuse of Discretion Standard.

When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice, the appellate court uses an abuse of discretion standard. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

In prosecution for delivery of and trafficking in methamphetamine, evidence that defendant sent two money orders, both for substantial amounts, to the same person in a city within the same week that two packages were sent from fictitious people and addresses and delivered to defendant through an airline from the same city, made it more probable that defendant was engaged in trafficking methamphetamine and thus such evidence was relevant; the trial court's conclusion that the probative value of the evidence was not outweighed by its unfair prejudice was not an abuse of discretion and such evidence was properly admitted. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

Driving Under the Influence.

The trial court erred in excluding nonforensic evidence of defendant's blood alcohol concentration and its correlation to the level of alcohol present in his breath; this evidence was relevant and admissible for the purpose of impeaching the accuracy of the state's breath test results. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Error Harmless.

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unrepresented alibi testimony, such evidence would not have likely produced an acquittal and denial of defendant's motion for a new trial was proper. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

Where there was nothing in a challenged videotape to address the defendant's assertion that methamphetamine belonged to another person, even though the district court

may not have performed the required balancing test in ruling on the defendant's request for a short continuance to acquire the tape from the prosecution and offer it into evidence, there was no reversible error because his substantial rights were not affected and thus there was no prejudice. *State v. Saxton*, 133 Idaho 546, 989 P.2d 288 (Ct. App. 1999).

The hearsay nature of testimony regarding statements made by the victim, defendant's ex-wife, expressing her fear that defendant was going to harm her, was not subject to an exception based on a claim that the victim committed suicide. While there was some examination of that possibility during the investigation, it was not a part of the defense case. However, the weight of other evidence against the defendant rendered admission of the victim's statements harmless. *State v. Shackelford*, 150 Idaho 355, 247 P.3d 582 (2010).

Error Not Harmless.

Trial judge erred in excluding the evidence on lack of farmerlike performance under a sharecropping agreement, as the excluded evidence reasonably could have affected the amount of damages awarded to the owners by the jury; consequently, the error was not harmless. *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989).

In an action for possession of a controlled substance with intent to deliver, the admission of two bags of unidentified white powder that were not controlled substances, but were found in the possession of defendant along with a controlled substance (methamphetamine), was in error because they were not relevant to the question of defendant's possession of methamphetamine with intent to deliver. *State v. Seitter*, 127 Idaho 356, 900 P.2d 1367 (1995).

Escape or Flight.

Escape or flight is one of the exceptions to the general rule prohibiting evidence of prior bad acts or crimes. Evidence of escape or flight may be admissible because it may indicate a consciousness of guilt. However, the inference of guilt may be weakened when a defendant harbors motives for escape other than guilt of the charged offense. The existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. *State v. Rossignol*, 147 Idaho 818, 215 P.3d 538 (2009).

Evidence Held Admissible.

The district court did not abuse its discretion in admitting bank deposit slips and money order receipts showing that the defendant had handled several thousand dollars

during a period of approximately six weeks, where evidence of the financial transactions was relevant to prove the defendant's knowledge of the controlled substances in his possession, and there was nothing inherently inflammatory about the evidence of financial transactions. *State v. Palmer*, 110 Idaho 142, 715 P.2d 355 (Ct. App. 1985).

In a personal injury action, the trial court did not abuse its discretion in deeming the evidence of the defendant's driving, three or four hours before the accident, too remote to corroborate the plaintiff's testimony that he detected the odor of alcohol coming from the defendant's car immediately following the accident. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

Where, in a prosecution for robbery of a store, the central issue at trial was the identity of persons who robbed the store, testimony regarding the capture of the defendant, yielding articles connected with the robbery, was admissible as highly probative of the defendant's identity as one of those persons and relevant. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Fact that alleged threats against crime victim by defendant were made months after the crime was committed did not decrease the relevance of the evidence because if one is going to threaten to harm another for prosecuting a case, the threat will be made sometime between the date of the incident giving rise to the prosecution, and the time of trial. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Victim's testimony, concerning letters defendant allegedly wrote to victim after an aggravated battery, was relevant because someone who was innocent of the charge would be unlikely to threaten the victim or apologize for the act. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Even though no weapon was seen during the course of the robbery, where defendant made a threat implying that a concealed weapon was present, sawed-off shotgun found in defendant's automobile was slightly relevant and was admissible as its probative value was not outweighed by its prejudicial impact. *State v. Waddle*, 125 Idaho 526, 873 P.2d 171 (Ct. App. 1994).

In a suit by distributor against manufacturer, testimony of four ex-distributors from the same time frame and geographical area was relevant to show repeated or flagrant violations of the Idaho Consumer Protection Act. *Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 879 P.2d 1126 (1994).

Testimony by witness that robbery defendant told him he had gotten money to buy

drugs from a robbery was relevant to whether defendant robbed store; it made the existence of a fact of consequence to the determination of the action more probable than it would have been without the testimony. *State v. Guzman*, 126 Idaho 368, 883 P.2d 726 (Ct. App. 1994).

In personal injury action on theory that city was negligent in design of intersection where accident occurred in failing to construct a raised median, admission of evidence of other accidents that took place in the same area both before and after plaintiff's accident was properly admitted since all were of a type which could have been prevented or affected by the proposed median and thus evidence of such accidents had some tendency to make the fact that the street design did not comply with existing standards appear more likely to exist. *Lawton v. City of Pocatello*, 126 Idaho 454, 886 P.2d 330 (1994).

Where defendant argued that it was error for the trial court to admit the testimony of a witness describing his observations of the reckless driving patterns of defendant's truck ten minutes before an accident occurred, the Supreme Court held that the driving observed was relevant as to the probable fashion in which the vehicle was being driven at the time of the accident and admissible. *State v. Johnson*, 126 Idaho 892, 894 P.2d 125 (1995).

The magistrate was correct in admitting the evidence of prior wills where the wills were not offered as testamentary documents; they were offered as relevant evidence to shed light on settlor's donative intent, and the fact that they were revoked by later wills did not affect their relevance as to the decedent's frame of mind. *Salfeety v. Seideman*, 127 Idaho 817, 907 P.2d 794 (1995).

Because the matter to be proved at trial centered on the number of cases of beer sold, the information contained in exhibit — a summary of plaintiff's records of the total number of cases of beer sold — was clearly relevant, and the lower court did not err in admitting exhibit for illustrative purposes over objection. *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995).

Trial court erred in denying sexual abuse defendant's motion to exclude evidence concerning prior imprisonment where such incarceration was not relevant to any element of State's case. Evidence of incarceration would have strengthened defendant's alibi so no prejudice to the State would have resulted from the jury being uninformed, and such evidence would have impermissibly invited the jury to infer that defendant had a criminal propensity and was more likely to have committed the offenses charged. *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

The district court correctly ruled that welfare worker's testimony, that defendant listed that county as his residence on a welfare application, was relevant on the issue of where defendant resided for purposes of proving violation of the Sex Offender Registration Act. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

Where testimony indicated that the defendant stated that a certain person he thought had testified at a previous trial had ruined ten years of his life, and where exclusion of evidence of the fact of the defendant's conviction would have left the jury guessing as to what criminal act was involved and why the defendant's statements were taken as a threat, admission of that evidence was relevant, had a tendency to make the existence of threats against the supposed witness more probable, and was properly admitted. *State v. Baer*, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999).

Evidence of an alternate route the defendant could have taken was relevant for the jury to consider when assessing the degree of causation attributable to each party. *Slack v. Kelleher*, 140 Idaho 916, 104 P.3d 958 (2004).

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to § 18-1506(1)(b), regarding previous activities with the victim may be admissible when they are relevant to the intent of the defendant's actions; evidence that his touchings were for sexual gratification, rather than being accidental or innocent. *State v. Marsh*, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004).

Contrary to the district court's determination, the store manager's testimony with regard to the camera coverage in the store was material and relevant; it would have challenged the store loss prevention investigator's credibility and could have had exculpatory value. *State v. Karpach*, 146 Idaho 736, 202 P.3d 1282 (2009).

In defendant's trial on charges of lewd and lascivious conduct for molesting his daughter, the trial court did not err in admitting defendant's statements to his ex-wife (the victim's mother) that their daughter walked in on him and saw him watching pornography and masturbating because the statements were relevant to help the jury understand why the victim's mother did not immediately act on the victim's initial report of defendant's sexual misconduct. *State v. Johnson*, 148 Idaho 664, 227 P.3d 918 (2010).

Although § 45-501 does not specifically require substantial performance of a contract before a lien attaches, a contractor is required to demonstrate substantial performance. Thus, evidence of construction defects was relevant and should have been admitted in a

dispute regarding the construction of a log home. *Perception Constr. Mgmt. v. Bell*, — Idaho —, 254 P.3d 1246 (2011).

Evidence Held Inadmissible.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he "wanted to kill a cop" was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to "kill a cop" and it was irrelevant if offered for the nonhearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

It is well established that a trial court has considerable discretion to exclude evidence for reasons of foundation, relevance, or that the question was confusing and could have been interpreted in many different ways; inasmuch as counsel for defendant was able to elicit testimony that defendant suffered from problems which impaired her ability, there was no prejudice in the trial court not allowing defendant's mother to answer a question asking if defendant suffered from any physical or mental ailments. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

To the extent that pastor described personal observations of the defendant, his testimony was properly admitted at trial; however, it was his testimony suggesting "demonic possession" which was excluded by the trial court. The witness was allowed to testify and describe personal observations; however, any conclusions as to the cause of defendant's condition were excluded. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

Defendant, having lost a motion in limine made by the state to exclude certain evidence as irrelevant, could not on appeal advance other factual theories as to why the challenged evidence was relevant. *State v. Viera*, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994).

In quid pro quo sexual harassment action, trial court was correct in excluding evidence as irrelevant under this rule that supervisor and alleged harasser were friends because it would take too great a leap of faith to conclude that because they were friends, the supervisor fired plaintiff to protect his friend. *De Los Santos v. J.R. Simplot Co.*, 126 Idaho 963, 895 P.2d 564 (1995).

Attorney-generated letters orchestrating the exchange of children for court-ordered visitation periods were not relevant in a trial

for aggravated battery and firearms charges, especially when the matter of visitation protocol had previously been reduced to a formal order. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Although the injured customer's expert testified about and relied upon a summary of the store's accident history that contained information that would be considered irrelevant under I.R.E. 401 and 403 because it contained information about accidents that were not the result of improperly stacked merchandise, the expert could use the accident summary as a basis for his opinion that the store was on notice that it lacked adequate training procedures for its employees regarding the safe and proper stacking of store merchandise and that this deficiency was an extreme deviation from industry standards of care. I.R.E. 703 allows an expert to rely on inadmissible evidence to form an opinion provided that it is of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004).

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford*, 150 Idaho 355, 247 P.3d 582 (2010).

Evidence of Character.

If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers, however, I.R.E., Rule 404 prohibits the admission of evidence of a person's character, even if in the form of an expert opinion, if offered during the prosecution's case in chief to prove the accused's conduct on a specified occasion. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

Testimony regarding the similarity between an individual's traits and the general characteristics of sexual abuse offenders must be relevant in order to be admissible, whether offered in the prosecution's case in chief or in its rebuttal, and without the requisite intro-

duction of character evidence by the defendant or by other defense witnesses, no such relevancy exists. *State v. Fisher*, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989).

Evidence of Flight.

In a prosecution for lewd conduct with a minor under sixteen, evidence of the defendant's flight from the state was relevant where, upon learning that police wanted to talk to him about the alleged sexual abuse, the defendant immediately left Idaho and returned to Oregon and gave his employer a false reason to explain his sudden departure; these actions reasonably implied a consciousness of guilt and a desire to flee the jurisdiction in order to avoid prosecution. *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998).

Evidence of Intent.

Evidence which included a substantial quantity of pornographic magazines, catalogues and books, combined with the totality of the vast quantity of challenged evidence, was probative of the defendant's preoccupation and attraction toward female children, which was relevant in the jury's determination on the contested issue of whether the defendant had the necessary intent when he committed the charged acts. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (1999).

Expert Testimony.

Where a scientist's research casts doubt upon the ability of eyewitnesses to perceive accurately, or to memorize and recall fully certain observed events, such research meets the criterion of this rule, and any concern for invasion of the jury's factfinding mission is obviated by I.R.E., Rule 704, which permits experts to render opinions on ultimate issues; accordingly, expert testimony concerning eyewitness identification is admissible under appropriate circumstances. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

In criminal case where defendant was charged with driving under the influence in violation of §§ 18-8004 and 18-8005(3) expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses and their opinions were properly admitted into evidence. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

Motion for an expert witness was denied in a case where a potential parolee was challenging the licensing requirements of I.C.A. § 20-223 because an expert's opinion regarding the merit of allowing psychological evaluations to

be conducted by only licensed evaluators was not relevant to the legal determination of whether licensing was required. *Dopp v. Idaho Comm'n of Pardons Parole*, 144 Idaho 402, 162 P.3d 781 (Ct. App. 2007).

Illustrative Evidence.

In murder prosecution, court properly admitted video of computer generated objects falling down stairs, as it was relevant to illustrate state expert's testimony that it was impossible for deceased infant to have sustained his injuries as a result of falling down stairs, as defendant claimed. *State v. Stevens*, 146 Idaho 139, 191 P.3d 217 (2008).

Impeachment Evidence.

A defendant charged with driving under the influence by proof of excessive alcohol content is entitled to offer any competent evidence tending to impeach the results of the evidentiary tests admitted against him; thus, a defendant may introduce evidence of his blood alcohol content, or other direct or circumstantial evidence, to show a disparity between such evidence and the results produced by the chemical testing, so as to give rise to an inference that the prosecution's test results were defective. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Excluded evidence of DUI defendant's blood alcohol level and its relationship to his breath alcohol content specifically contradicted the results of the tests admitted against him, and assuming the jury believed defendant's testimony regarding his alcohol consumption, the excluded testimony would have demonstrated that his alcohol concentration was lower than that shown by the intoximeter, which would have permitted the jury to doubt the accuracy of the state's evidence. Consequently, the exclusion of this testimony may have contributed to a jury finding that defendant was driving while having an alcohol content of .10 percent or more, and the error in excluding impeaching evidence, as it related to the reliability of the breath test results, reasonably could have affected the ultimate outcome of this case. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

In a criminal trial, evidence of the relationship between an eyewitness and the State was irrelevant to defendant's case where the eyewitness' description was given before defendant entered into an agreement with the State, and the eyewitness was receiving no consideration for his testimony. *State v. Tarrant-Folsom*, 140 Idaho 556, 96 P.3d 657 (Ct. App. 2004).

In defendant's trial on charges of drug trafficking, the state's questions regarding whether marks or imperfections on defen-

dant's inner arms were needle/injection marks were relevant to address defendant's contention that the drugs discovered by law enforcement officers belonged to his companion and not to him. Whether or not defendant had injection marks on his arms tended to support the veracity of the companion's testimony, making it more probable that the case in which drugs were found did, in fact, belong to defendant. *State v. Grantham*, 146 Idaho 490, 198 P.3d 128 (2008).

In General.

Evidence that tends to prove the existence of a fact of consequence in the action, and has any tendency to make the existence of that fact more probable than it would be without the evidence, is relevant. *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989).

Jury Verdict.

Where two weeks prior to submission of hearing officer's decision to Board, a jury in an independent action concluded that doctor was not liable for malpractice in care of certain patient and doctor moved the Board to have the jury verdict received in evidence to show that jury concluded that he had met the local community standard of care as to such patient and that such verdict was a judicially cognizable fact which the Board should have considered, since the question the jury answered was "was doctor's negligence the proximate cause of patient's injuries" and the negative answer could have indicated any number of things, such verdict was not relevant under this rule as it did not have a tendency to make the existence of any fact that was of consequence to the proceeding more probable or less probable. *Krueger v. Board of Professional Discipline*, 122 Idaho 577, 836 P.2d 523 (1992), cert. denied, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 672 (1993).

Lay Witness.

Defendant's convictions for burglary and petit theft were appropriate and there was no error in admitting into evidence the opinions of lay witnesses who identified the defendant as the man appearing in security videotape or in photographs derived from the videotape. The opinion of each lay witness, identifying defendant, was rationally based on the perception of the witness and the testimony was helpful to the jury in the determination of a fact in issue. *State v. Barnes*, 147 Idaho 587, 212 P.3d 1017 (2009).

Other Bad Acts and Uncharged Crimes.

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met:

first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal, unless that discretion has been abused. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Where, in a murder prosecution uncharged misconduct evidence was not remote in time since all of the incidents happened within hours or days of the murders of the victims, where the evidence was relevant and probative with regard to defendant's intent to rob and murder the victims where it showed a pattern, plan, motive, intent, and common scheme or plan to rob and harm unsuspecting persons, and where it was probative of defendant's identity, the trial court did not abuse its discretion by admitting evidence of the similar uncharged conduct. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

In defendant's rape and drug case, the court erred by admitting evidence that defendant had supplied two minors methamphetamine, more than one year prior to the incidents he was actually charged with, because there was no evidence "linking" the alleged delivery of the drugs to the instant charges. Given the nearly one year lapse, there was no logical manner in which defendant's providing drugs to the girls was in furtherance of or a precursor to the crimes for which he was charged; rather, it was a distinct and "self-contained" incident. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

Photographs.

Photographic evidence of a homicide victim, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, is admissible at the discretion of the trial court, as an aid to the jury in arriving at a fair understanding of the evidence; proof of the corpus delicti; extent of injury, condition and identification of the body; or for its bearing on the question of the degree of the crime, even though it may have the additional effect of tending to excite the emotions of the jury *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).

Plane Crash.

In action for personal injuries sustained in an airplane crash, evidence about the airline's maintenance practices and records of the plane in question during the time prior to the accident was relevant in explaining why a form that would have covered the reinstallation

of the flight controls on the plane in question was missing and in explaining how an inadequately sized bolt could have been used, without ever being secured with a nut or cotter pin and how the airline did not discover the improperly sized and unsecured bolt. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

Pornographic Images.

Pornographic images and incest stories found on the defendant/father's computer were admissible in a trial on charges of lewd conduct with a minor under 16 years of age and sexual abuse of a child, involving his daughter, as they were relevant to, and corroborated, the victim's testimony that she was shown pornography prior to and during the sexual abuse and helped prove the intent element of the crime. *State v. Rossignol*, 147 Idaho 818, 215 P.3d 538 (2009).

Probative Value.

The determination of whether the proffered evidence lacks probative value because of remoteness in time rests in the sound discretion of the trial court. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or if the evidence has a tendency to mislead the jury, create confusion or undue delay, waste time, or is cumulative. *L & L Furn. Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991).

Review.

When considering a trial court's admission of evidence of prior misconduct, the appellate court will exercise free review of the trial judge's admissibility determination under I.R.E. 404(b). *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

Whether evidence is relevant under this rule is an issue of law which an appellate court should review de novo. *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).

Scientific Tests.

In order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the reliability of the test to produce accurate results. This may be done by establishing the scientific acceptability of the testing process. General scientific acceptance is a proper condition for taking judicial notice. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

Value of Marijuana Plants.

Evidence of the value of marijuana plants seized by police during a search of defendants' residence for marijuana and drug manufacturing materials was relevant to the issue of intent to deliver even though the issue was defendants' intent to deliver the processed marijuana, not to deliver the plants themselves; the value of mature plants necessarily would reflect the potential revenue to be gained by selling the marijuana harvested and processed from such plants. *State v. Randles*, 115 Idaho 611, 768 P.2d 1344 (Ct. App. 1989), *Aff'd in part*, *State v. Randles*, 117 Idaho 344, 787 P.2d 1152 (1990).

Video.

A redacted video of a traffic stop was relevant in a drug possession case where it showed that the defendant was in the particular area in the vehicle where the drugs were found and, through the defendant's elaborate and convoluted explanation for his previous whereabouts, it demonstrated his conscious-

ness of guilt. *State v. Betancourt*, — Idaho —, 262 P.3d 278 (2011).

Cited in: *State v. Martinez*, 109 Idaho 61, 704 P.2d 965 (Ct. App. 1985); *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986); *Roeh v. Roeh*, 113 Idaho 557, 746 P.2d 1016 (Ct. App. 1987); *Nettleton v. Thompson*, 117 Idaho 308, 787 P.2d 294 (Ct. App. 1990); *State v. Brazzell*, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990); *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990); *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991); *Sullivan v. Bullock*, 124 Idaho 738, 864 P.2d 184 (Ct. App. 1993); *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993); *State v. Velasquez-Delacruz*, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); *State v. Holden*, 126 Idaho 755, 890 P.2d 341 (Ct. App. 1995); *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998); *Staff of State Real Estate Comm'n v. Nordling*, 135 Idaho 630, 22 P.3d 105 (2001); *State v. Hauser*, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006); *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008).

RESEARCH REFERENCES

A.L.R. Admissibility and use of evidence of nonuse of bicycle helmets. 2 A.L.R.6th 429.

Admissibility and Effect of Evidence or

Comment on Party's Military Service or Lack Thereof. 24 A.L.R.6th 747.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS**ANALYSIS**

Abuse of Discretion Standard.
Background Evidence.
Character Evidence.
Diagram.
Evidence Irrelevant.
Evidence Relevant.
Exclusion of Relevant Evidence.
Expert Testimony.
Foundation.
Impeachment Evidence.
Other Bad Acts and Uncharged Crimes.
Possession of Controlled Substance.
Probative Prejudicial Evidence.
Rape Prosecution.
—Physical Injury.
Review of Admission.
Scientific Tests.

Abuse of Discretion Standard.

When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice the appellant court uses an abuse of discretion standard. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

Background Evidence.

Admission of testimony by officer that he had been involved in surveillance of a drug lab, which surveillance was unrelated to charge of sale of marijuana by defendant, prior to his meeting with defendant, was not reversible error, where first objection to the testimony was made after the jury had already heard about the surveillance and there was no motion to strike the evidence brought

by counsel, because, although irrelevant evidence is inadmissible, some leeway is allowed even on direct examination for preliminary facts that do not bear directly on the legal issues, but merely provide background for the narrative. *State v. Walker*, 121 Idaho 18, 822 P.2d 537 (Ct. App. 1991).

Character Evidence.

Testimony regarding the similarity between an individual's traits and the general characteristics of sexual abuse offenders must be relevant in order to be admissible, whether offered in the prosecution's case in chief or in its rebuttal, and without the requisite introduction of character evidence by the defendant or by other defense witnesses, no such relevancy exists. *State v. Fisher*, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989).

Diagram.

A diagram is relevant to illustrate witness' testimony where he used the diagram to aid his testimony concerning his investigation of the crime scene. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

Evidence Irrelevant.

Where evidence of a murder victim's past predatory sexual activities was found not admissible pursuant to the defendant's proffered defense under § 19-202A, the evidence was also inadmissible under this rule as being irrelevant to the murder. *State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998).

Police officer's comments during videotaped confession that implied he believed defendant was lying should have been redacted as they did not provide context to a relevant answer by defendant. *State v. Cordova*, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002).

Trial court did not err in granting a motion in limine where an injured employee was unable to show that a dairy owner's statements that the employee would receive a big check from the dairy's insurer constituted an admission of liability; thus, the proffered evidence was inadmissible under an Idaho R. Evid. 402 relevance assessment or an Idaho R. Evid. 403 balancing test. *Loza v. Arroyo Dairy*, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002).

Evidence Relevant.

Letter was relevant evidence, where, due to its "malicious" tone, it lent support to plaintiff's claim that housing authority was engaged in a smear campaign as a "cover-up" for plaintiff's being improperly fired. *Lubcke v. Boise City/ADA City Hous. Auth.*, 124 Idaho 450, 860 P.2d 653 (1993).

In personal injury action on theory that city was negligent in design of intersection where

accident occurred in failing to construct a raised median, admission of evidence of other accidents that took place in the same area both before and after plaintiff's accident was properly admitted since all were of a type which could have been prevented or affected by the proposed median and thus evidence of such accidents had some tendency to make the fact that the street design did not comply with existing standards appear more likely to exist. *Lawton v. City of Pocatello*, 126 Idaho 454, 886 P.2d 330 (1994).

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to § 18-1506(1)(b), regarding previous activities with the victim, may be admissible when they are relevant to the intent of the defendant's actions. *State v. Marsh*, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004).

Although § 45-501 does not specifically require substantial performance of a contract before a lien attaches, a contractor is required to demonstrate substantial performance. Thus, evidence of construction defects was relevant and should have been admitted in a dispute regarding the construction of a log home. *Perception Constr. Mgmt. v. Bell*, — Idaho —, 254 P.3d 1246 (2011).

Exclusion of Relevant Evidence.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or if the evidence has a tendency to mislead the jury, create confusion or undue delay, waste time, or is cumulative. *L & L Furn. Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918 (Ct. App. 1991).

Trial court did not abuse its discretion when it prohibited defendant from taking a police officer's video deposition in another state where defendant scheduled the deposition late in the proceedings and could have taken the officer's deposition at any time over the previous two years; it would have been unduly burdensome to expect plaintiff to travel to California on short notice the week before trial to participate in the deposition. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

Expert Testimony.

If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers, however, I.R.E., Rule 404 prohibits the admission of evidence of a person's character, even if in the form of an expert opinion, if offered during the prosecution's case in chief to prove the accused's conduct on a specified occasion. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

In prosecution for rape and lewd and las-

civious conduct with a minor, expert opinion regarding the social beliefs, characteristics and mores of the local Hispanic people, particularly the females' desire to protect their husbands or lovers, would not be relevant to show that the victim and her mother might have been trying to protect the actual perpetrator of the crimes charged against the defendant, where the defendant did not produce any evidence reasonably tending to show that another person committed the crimes. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Where, in a prosecution for rape and lewd and lascivious conduct with a minor, a physician did not suggest how, when or by whom a bruise could have been caused, but simply opined that a bruise observable one day would likely be visible a few days later, there was no error in allowing the testimony. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

In criminal case where defendant was charged with driving under the influence in violation of §§ 18-8004 and 18-8005(3), expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses and their opinions were properly admitted into evidence. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

Foundation.

Because videotape did not show everything that would be visible to a driver on that road and the lack of information regarding temporal and climatic conditions under which the tape was made, the videotape of the portion of the highway where officer initially observed defendant driving erratically and going through a stop sign lacked adequate foundation; further, even if the tape were admissible, its probative value was outweighed by the danger of unfair prejudice. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

Impeachment Evidence.

In a prosecution for driving while under the influence, where the state has alleged that the defendant was driving while having an alcohol content of .10 percent or more as shown by analysis of his blood, breath or urine, evidence of a contradictory alcohol content, otherwise proper, is admissible for the purpose of impeaching the results of the evidentiary tests submitted by the state. The probative weight to be accorded to such testimony is left to the jury as trier of the facts, as is the weight to be accorded other evidence in the case. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991).

Other Bad Acts and Uncharged Crimes.

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal, unless that discretion has been abused. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Possession of Controlled Substance.

Where defendant claimed that he did not know the nature of the residue in the vial that he possessed, not that he did not know the illegal nature of the substance he possessed; testimony of third party was relevant to the issue of knowledge of what the substance was. *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997).

Probative Prejudicial Evidence.

Where the evidence tended to prove that the irritated vaginal condition of victim was not the product of a single isolated accident because, although father of victim claimed that bubble bath caused the victim's problem with her irritated vaginal area, the evidence of prior conduct showed that the victim had similar problems even when she had not had a bubble bath, the evidence strongly corroborated the victim's allegations, helped to establish the identity of the perpetrator, and was relevant to the parties' credibility; therefore, the trial court correctly ruled that this evidence was relevant and more probative than prejudicial. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

When defendant's accomplice testified against him at trial, the district court erred by excluding evidence that the witness avoided a mandatory three-year prison sentence by testifying against defendant. Because the evidence was relevant to the witness's credibility for purposes of this rule, the district court should have weighed the factors set forth in Idaho R. Evid. 403 before ruling on the admissibility of the evidence. *State v. Ruiz*, 150 Idaho 469, 248 P.3d 720 (2010).

Rape Prosecution.

—Physical Injury.

Evidence of physical injury is not necessary to establish the use of force in a rape prosecution. It was relevant, however, where it tended to corroborate the complaining witness's version of the events surrounding the alleged rape and to contradict the defendant's claim of consent. The photographs showing

the existence of physical bruises was clearly relevant to the critical factual issue to be decided by the jury. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Review of Admission.

When considering a trial court's admission of evidence of prior misconduct, the appellate court will exercise free review of the trial judge's admissibility determination under I.R.E. 404(b). *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

Scientific Tests.

In order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the

reliability of the test to produce accurate results. This may be done by establishing the scientific acceptability of the testing process. General scientific acceptance is a proper condition for taking judicial notice. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

Cited in: *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988); *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989); *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991); *State v. Velasquez-Delacruz*, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); *Orthman v. Idaho Power Co.*, 134 Idaho 598, 7 P.3d 207 (2000); *State v. Mantz*, 148 Idaho 303, 222 P.3d 471 (2009).

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A.L.R. Admissibility and use of evidence of nonuse of bicycle helmets. 2 A.L.R.6th 429.

Admissibility of evidence of prior accidents or injuries at same place. 15 A.L.R.6th 1.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R.6th 747.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion Standard.
Alternate Perpetrator Evidence.
Appellate Review.
Applicability.
Collateral Source Rule.
Common Scheme or Plan.
Defense Counsel as Witness.
Discretion of Court.
— Abuse.
Evidence Held Admissible.
Evidence Held Inadmissible.
Expert Testimony.
Foundation.
Harmless Error.
Illustrative Evidence.
Impeachment of Evidence.
In General.
Inflammatory Evidence.
Judge As Witness.
Medical Testimony.

Photographs.
Prejudicial Effect.
Prior Similar Acts.
Probative Value Outweighed Prejudicial Impact.
Prosecutor As Witness.
Rape Prosecution.
—Physical Injury.
Taped Conversation.
Two-Tiered Analysis.
Uncharged Crimes.

Abuse of Discretion Standard.

The lower court's conclusions that the probative value of the evidence is not outweighed by its unfair prejudice is reviewed under an abuse of discretion standard. *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

A lower court's determination under this section will not be disturbed on appeal unless it is shown to be an abuse of discretion. *State*

v. Birkla, 126 Idaho 498, 887 P.2d 43 (Ct. App. 1994).

Where the district court allowed admission of relevant evidence regarding defendant's prior offense and sentence for sexual abuse of a minor, and where the defendant failed to demonstrate that the probative value of his conviction and probation was substantially outweighed by the danger of unfair prejudice, he failed to show abuse of discretion in the denial of his motion in limine insofar as allowing the fact of, and the procedure in, his prior conviction. *State v. Baer*, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999).

When reviewing a trial court's determination that the probative value of evidence was not substantially outweighed by the danger of unfair prejudice, the appellate court uses an abuse of discretion standard. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (1999).

Alternate Perpetrator Evidence.

This rule is the controlling authority for the admissibility of alternate perpetrator evidence, subject to the relevancy and hearsay standards of the rules of evidence. *State v. Meister*, 148 Idaho 236, 220 P.3d 1055 (2009).

Appellate Review.

Where the admission of the testimony did not constitute fundamental error, and where defendant failed to object under this rule during trial, the issue was not preserved for appeal. *State v. Carlson*, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000).

Applicability.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the testimony of the preliminary hearing witness regarding the defendant's alleged statement in her presence was not hearsay but a party's statement under I.R.E., Rule 801(d)(2); however, on remand the trial court should make a ruling on the application of this rule to this testimony. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

There are very few categories of people whose testimony must be excluded as a matter of law. In general, every person is competent to be a witness, except persons whom the court finds to be incapable of receiving just impression of the facts respecting which they are examined, or of relating them truly. As long as the evidence offered by the testimony is relevant under I.R.E., Rule 402, any person meeting the above qualifications may testify, subject, of course, to exclusion in the discretion of the trial court under this rule. *State v. Rhoades*, 119 Idaho 594, 809 P.2d 455 (1991).

For purposes of Idaho R. Evid. 404(b), some of defendant's prior acts that were placed in evidence were unnerving and carried with them a potential for unfair prejudice; therefore, it was necessary for the trial court to evaluate whether the danger of unfair prejudice from this evidence substantially outweighed its probative value, for purposes of this rule. *State v. Hoak*, 147 Idaho 919, 216 P.3d 1291 (2009).

When defendant's accomplice testified against him at trial, the district court erred by excluding evidence that the witness avoided a mandatory three-year prison sentence by testifying against defendant. Because the evidence was relevant to the witness's credibility, the district court should have weighed the factors set forth in this rule before ruling on the admissibility of the evidence. *State v. Ruiz*, 150 Idaho 469, 248 P.3d 720 (2010).

Collateral Source Rule.

In plaintiff's action to recover damages for personal injuries following a car accident, the district court correctly determined that evidence of Medicare write-offs was inadmissible. By treating a Medicare write-off as a collateral source, the danger of prejudice contemplated in this rule is avoided, and the jury will not be influenced by the existence of Medicare. *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003).

Common Scheme or Plan.

The trial court did not err in permitting evidence of prior uncharged sex acts between the defendant and each of the three victims because such testimony was indeed admissible to show a common scheme or plan; although such evidence was still subject to the limitations imposed by this section which proscribes both the "needless presentation of cumulative evidence," and evidence whose "probative value is substantially outweighed by the danger of unfair prejudice," the trial court found that neither of these limitations was violated in the instant case. *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992).

Defense Counsel as Witness.

Where district court expressly noted that allowing defendant's counsel to testify would confuse and mislead the jury and would be a needless presentation of cumulative evidence under this rule, the Court of Appeals found no abuse of discretion in the district court's refusal to allow counsel to testify. *Cannon Blends, Inc. v. Rice*, 126 Idaho 616, 888 P.2d 790 (Ct. App. 1995).

Discretion of Court.

Where plaintiff's counsel used a *per diem*

argument in his opening statement, made repeated efforts to offer a treatise into evidence and made repeated reference to defendant/manufacturer's stipulation that reducing the combine auger cover opening to 1.3 inches was feasible, it was within the discretion of the trial court to control the contents of opening statements and limit the number of requests for evidence and the number of references to the stipulation. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

It is well established that a trial court has considerable discretion to exclude evidence due to lack of foundation, or because the evidence is confusing and could be interpreted in many different ways. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

The trial court exercised its discretion in excluding the use of the tort claim notices as prior inconsistent statements, reasoning that, because the purpose of a tort claim notice is merely to give notice and not to assert liability, it carries even less evidentiary weight than the pleadings of a complaint, and the probative value of the tort claim notices was substantially outweighed by their potential to confuse or mislead the jury. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

There was no abuse of discretion where the trial court set out the relevance for each item of evidence and weighed its probative value against the harm of prejudice, since this illustrated that the court perceived the issue as one of discretion and also that the decision was made within the correct legal standards. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

— Abuse.

Purchaser of business failed to show that the decision of district court to not allow evidence of later assignment by seller's estate was not an abuse of discretion, where any relevance would have been outweighed by confusing the issues and misleading the jury. *Lloyd v. DeMott*, 124 Idaho 62, 856 P.2d 99 (Ct. App. 1993).

In the trial court's conclusory statement in the written order, no reasoning was mentioned for the ruling concerning this rule; therefore, the trial court abused its discretion in making the ruling. *Dabestani ex rel. Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998).

Evidence Held Admissible.

The district court did not abuse its discretion in admitting bank deposit slips and money order receipts showing that the defen-

dant had handled several thousand dollars during a period of approximately six weeks, where evidence of the financial transactions was relevant to prove the defendant's knowledge of the controlled substances in his possession, and there was nothing inherently inflammatory about the evidence of financial transactions. *State v. Palmer*, 110 Idaho 142, 715 P.2d 355 (Ct. App. 1985).

Although there was no dispute as to the identity of the victim, the testimony of the mother of the victim as to the identity of the victim was clearly relevant in that it proved one of the elements of the state's case, and the prejudicial impact, if any, of having the mother identify the victim was not so great as to show an abuse of discretion. *State v. Buzard*, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986).

Where the evidence tended to prove that the irritated vaginal condition of victim was not the product of a single isolated accident because although father of victim claimed that bubble bath caused the victim's problem with her irritated vaginal area, the evidence of prior conduct showed that the victim had similar problems even when she had not had a bubble bath, the evidence strongly corroborated the victim's allegations, helped to establish the identity of the perpetrator, and was relevant to the parties' credibility; therefore, the trial court correctly ruled that this evidence was relevant and more probative than prejudicial. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

The district court correctly applied the Rules of Evidence when it allowed three women, who were not victims in the case, to testify regarding their accusations of defendant's sexual misbehavior with them when they were minors, where the trial court weighed the proffered testimony and determined that it would be more helpful to the jury in determining the credibility of the victim's testimony than it would be prejudicial to defendant. *State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993).

Even though no weapon was seen during the course of the robbery, where defendant made a threat implying that a concealed weapon was present, sawed-off shotgun found in defendant's automobile was slightly relevant and was admissible as its probative value was not outweighed by its prejudicial impact. *State v. Waddle*, 125 Idaho 526, 873 P.2d 171 (Ct. App. 1994).

Where rape defendant's choice of words in his statement were crude, vulgar and potentially offensive to a jury, this was not, in and of itself, sufficient reason to exclude defendant's uncoerced statement to law enforce-

ment investigators. *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

In prosecution for delivery of and trafficking in methamphetamine, evidence that defendant sent two money orders, both for substantial amounts, to the same person in a city within the same week that two packages were sent from fictitious people and addresses and delivered to defendant through an airline from the same city, made it more probable that defendant was engaged in trafficking methamphetamine and thus such evidence was relevant; however, the trial court's conclusion that the probative value of the evidence was not outweighed by its unfair prejudice was not an abuse of discretion and such evidence was properly admitted. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

In trial of defendant convicted of delivery of a controlled substance, district court did not err in admitting evidence of prior drug transaction with undercover officer because it was relevant to the state's rebuttal of defendant's affirmative defense of entrapment and was relevant to prove defendant's motive or intent. *State v. Canelo*, 129 Idaho 386, 924 P.2d 1230 (Ct. App. 1996).

Where, prior to charged offense of forgery and burglary, evidence showed another business's check had been paid which was signed by the defendant, who had no authorized power of endorsement, and it was paid by the same bank where defendant had attempted to pass the unauthorized check at issue, such proffered evidence was probative and admissible under I.R.E. 404(b) to prove the absence of mistake or accident. *State v. McAbee*, 130 Idaho 517, 943 P.2d 1237 (Ct. App. 1997).

Where, in its analysis, the district court considered several factors, including the similarity of prior occurrences to the offenses charged as to the method of enticement and the age of the children, where the court noted the probative value of the evidence, and where a limiting instruction was given to the jury prior to contested testimony and a general instruction was given in final instructions, the court utilized reason and proper legal standards in deciding to admit the testimony, and did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (1999).

Where the defendant opened the door for the admission of prior act evidence by testifying that he had never fired the gun used in this crime before, that he had never seen

anyone shot before, and that he had never pointed a gun at anyone, evidence contradicting that testimony was relevant and admissible to impeach his credibility. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), *cert. denied*, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000).

Where the district court recognized the discretionary nature of its inquiry into the probative value of prior act evidence, and made a reasoned decision within the boundaries of its discretion after considering the evidence three separate times before the trial and again during the trial, there was no abuse in the admission of the evidence. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), *cert. denied*, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000).

Testimony of defendant's daughter that 23 years ago defendant had been a willing and vigorous participant in sexual assaults on the daughter, in concert with defendant's husband, had substantial probative value addressing the issue of whether defendant knowingly and intentionally committed the charged offense against her grandson. *State v. Law*, 136 Idaho 721, 39 P.3d 661 (Ct. App. 2002).

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to § 18-1506(1)(b), regarding previous activities with the victim, may be admissible when they are relevant to the intent of the defendant's actions; evidence indicated that his touching was for sexual gratification, rather than being accidental or innocent. *State v. Marsh*, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004).

In a criminal prosecution for forgery, the trial court did not err by admitting a loan agreement signed by defendant, which stated that the purpose was to pay for a forged check, and under I.R.E. 403, there was no danger of unfair prejudice. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

In defendant's accessory case, a witness's testimony regarding a drug buy was relevant to explain why she initially gave an untruthful account to the police, and the testimony was thus probative for a purpose other than to show defendant's poor character. In addition, because the witness's credibility was essential to the jury's determination, a rational explanation as to why the witness would alter her story to the police was highly probative; any prejudice to defendant was slight since the witness did not implicate her in the drug purchase. *State v. Hauser*, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006).

Defendant's statements to his ex-wife (the victim's mother) that their daughter walked in on him and saw him watching pornography

and masturbating because the statements were relevant to help the jury understand why the victim's mother did not immediately act on the victim's initial report of defendant's sexual misconduct. Further, the statements were relevant as admissions, as defendant could simply have denied that the victim saw anything at all; the jury was entitled to consider these statements as evidence that some sort of sexual encounter occurred between defendant and his daughter, evidence that could be directly probative of defendant's guilt. *State v. Johnson*, 148 Idaho 664, 227 P.3d 918 (2010).

Where defendant's daughters accused him of having sexual contact with them, the trial court did not err in precluding the defense from impeaching one of the girls about a shower spraying incident between the two sisters in which the girl exaggerated or lied about what specifically occurred during the incident because the incident did not constitute a sex crime under Idaho R. Evid. 412 and because any minimal probative value of the evidence was substantially outweighed by the danger of jury confusion and the waste of trial time. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

During defendant's trial for felony domestic violence, the court did not err in admitting evidence that the victim, his girlfriend, was pregnant at the time of the attack because, while there was no direct evidence of miscarriage, if a miscarriage occurred, it was not an unrelated act or circumstance; instead, it was part and parcel of the crime for which defendant was charged. *State v. Fordyce*, — Idaho —, 264 P.3d 975 (2011).

Evidence Held Inadmissible.

Where, in prosecution for rape, the defendant admitted engaging in intercourse with the alleged victim, and the only material issue was whether the intercourse had been consensual or forced, the testimony concerning "passes" made by the defendant toward other women on the day of the alleged rape had marginal relevancy and carried a high risk of unfair prejudice. *State v. Clay*, 112 Idaho 261, 731 P.2d 804 (Ct. App. 1987).

Where the evidence against defendant, who was convicted of felony injury to child, was wholly circumstantial, the improper testimony about defendant's temper and his alleged choking of victim's mother was not harmless error; this evidence may have led the jury to a guilty verdict based upon an impermissible inference that defendant had a propensity to violence, rather than upon the evidence as to his guilt or innocence of the crime charged. *State v. Wood*, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unrepresented alibi testimony, such evidence would not have likely produced an acquittal and denial of defendant's motion for a new trial was proper. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

In prosecution for felony driving under the influence of alcohol, exclusion of surrebuttal testimony to counter other testimony as to how much defendant had to drink on grounds that such testimony was repetitive of evidence already in the record was not error. *State v. Knight*, 128 Idaho 862, 920 P.2d 78 (Ct. App. 1996).

Trial court erred in denying sexual abuse defendant's motion to exclude evidence concerning prior imprisonment where such incarceration was not relevant to any element of State's case. Evidence of incarceration would have strengthened defendant's alibi so no prejudice to the State would have resulted from the jury being uninformed, and such evidence would have impermissibly invited the jury to infer that defendant had a criminal propensity and was more likely to have committed the offenses charged. *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

Officer's testimony about defendant's conduct while allegedly intoxicated on prior occasions provided little probative value on defendant's ability to form the necessary intent on the night in question and, considering the nature of the testimony, there was a significant danger of unfair prejudice. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

In a prosecution for rape, admission of testimony regarding victim's prior allegations that she was abused by her father was properly denied because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *State v. MacDonald*, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998).

Evidence offered by defendant to attack the victim's credibility, regarding her mental health, medication she was taking for a mood disorder, and alleged instances of her irrational behavior which included threats against other members of her family, had little, if any, relevance to the victim's truthfulness or untruthfulness and any marginal relevance it might have was outweighed by the potential of unfair prejudice and jury confusion. *State v. Crowe*, 135 Idaho 43, 13 P.3d 1256 (Ct. App. 2000).

Where the accountant's testimony was repetitious of that already given by husband and the probative value of his testimony was minimal since his knowledge was primarily based upon representations made by the husband, the court did not abuse its discretion in finding that the probative value of the testimony was substantially outweighed by concerns over the needless presentation of cumulative evidence. *Reed v. Reed*, 137 Idaho 53, 44 P.3d 1108 (2002).

Trial court did not err in granting a motion in limine where an injured employee was unable to show that a dairy owner's statements that the employee would receive a big check from the dairy's insurer constituted an admission of liability; thus, the proffered evidence was inadmissible under an Idaho R. Evid. 402 relevance assessment or an Idaho R. Evid. 403 balancing test as any marginal probative value of the statements was outweighed by the risk of unfair prejudice. *Loza v. Arroyo Dairy*, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002).

In defendant's trial for bank robbery, the court properly excluded evidence of alternative perpetrators. The proffered evidence did not directly link third parties to the crime, and was of little probative value. *State v. Kerchusky*, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003).

In defendant's trial for lewd and lascivious conduct with defendant's minor child, where defendant was allowed to present testimony that the child was not a truthful person, and instances of the child's alleged recantations of prior accusations of sexual abuse occurred several years earlier, evidence of the alleged recantations was properly excluded to avoid a mini-trial of the child's prior allegations. *State v. Harshbarger*, 139 Idaho 287, 77 P.3d 976 (Ct. App. 2003).

Where defendant's daughters accused him of having sexual contact with them, the trial court did not err in precluding the defense from impeaching one of the girls about a shower spraying incident between the two sisters in which the girl exaggerated or lied about what specifically occurred during the incident because the incident did not constitute a sex crime under Idaho R. Evid. 412 and because any minimal probative value of the evidence was substantially outweighed by the danger of jury confusion and the waste of trial time. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

Exclusion of defendant's proffered evidence was proper as defendant's offer of proof did not demonstrate that the child was previously exposed to the sort of acts and bodily conditions that were described in her report of the

charged acts; because the offer of proof did not tend to show that the child had prior knowledge that would have enabled her to fabricate the specific acts alleged against defendant, the proffered evidence was not shown to be relevant. *State v. Molen*, 148 Idaho 950, 231 P.3d 1047 (Ct. App. 2010).

In rape case, the court erred by admitting prior acts evidence because an assertion, and defendant's admission, that he had sexual intercourse with a prior complainant while she was sleeping, that that was a "bad thing" that he had done, and that he was on felony probation for such an act was a classic example of evidence which posed the danger that it would stir the passion of the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. *State v. Jones*, — Idaho —, — P.3d —, 2011 Ida. App. LEXIS 76 (Sept. 12, 2011).

Expert Testimony.

Cumulative testimony by dam operator's expert, regarding his opinion of the reasonableness of designing and constructing a downstream crossing without taking an upstream dam's spillway capacity into consideration, could properly be excluded. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

The court did not err in permitting the fire investigation expert to testify about possible causes of the fire. All reasonably likely causes of the fire were relevant because the fire's cause was a central element of both of the plaintiff's causes of action, and the expert's testimony made it clear that, although he found no physical evidence at the scene of the fire during his on-site investigation three years later, he could not rule out any of the potential causes that he described, and given the process of elimination used by fire investigators to determine the cause of the fire, it was appropriate for the expert to discuss potential causes that he could not rule out. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997).

Although the injured customer's expert testified about and relied upon a summary of the store's accident history that contained information that would be considered irrelevant under I.R.E. 401 and 403 because it contained information about accidents that were not the result of improperly stacked merchandise, the expert could use the accident summary as a basis for his opinion that the store was on notice that it lacked adequate training procedures for its employees regarding the safe and proper stacking of store merchandise and that this deficiency was an extreme deviation from industry standards of care. I.R.E. 703 allows an expert to rely on inadmissible evidence to

form an opinion provided that it is of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004).

Foundation.

In prosecution for manufacturing a controlled substance, the question whether extrinsic evidence of drug-related activities should have been admitted to contradict the informant's cross-examination testimony was committed to the trial court's discretion on remand, the critical question being the foundation laid by the defendant for introducing the evidence. *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988).

Because videotape did not show everything that would be visible to a driver on that road and the lack of information regarding temporal and climatic conditions under which the tape was made, the videotape of the portion of the highway where officer initially observed defendant driving erratically and going through a stop sign lacked adequate foundation; further, even if the tape were admissible, its probative value was outweighed by the danger of unfair prejudice. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

Harmless Error.

Although evidence of uncharged murder was admitted in error, where, beyond a reasonable doubt, the evidence did not influence the jury's verdict, the error was harmless. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

Where the relevant portion of a witness' preliminary hearing testimony related only to events giving rise to a sexual battery charge, a nearly identical account of which was provided at trial by another witness, and where the defendant himself argued on appeal that the trial court should have excluded the preliminary hearing testimony as needlessly cumulative, the trial court's error in admitting that testimony was harmless. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

Illustrative Evidence.

In murder prosecution, court properly admitted video of computer generated objects falling down stairs, as it was relevant to illustrate state expert's testimony that it was impossible for deceased infant to have sustained his injuries as a result of falling down stairs, as defendant claimed. The probative value of the video was not outweighed by its prejudicial effect, particularly in light of limiting instructions issued by the court. *State v. Stevens*, 146 Idaho 139, 191 P.3d 217 (2008).

Impeachment of Evidence.

Court did not err by excluding testimony

from a lay witness concerning shareholder's involvement in a recent auto accident, offered to show lack of memory and lack of credibility in order to impeach shareholder's testimony. *Ramco v. H-K Contractors*, 118 Idaho 108, 794 P.2d 1381 (1990).

In considering the testimony, the trial court properly found that project engineer's prior deposition testimony on the size of the opening in manufacturer's combine which mangled plaintiff's foot had been impeached; the trial court gave the limiting instruction that the portions of project engineer's deposition testimony read to the jury were only for the purpose of impeachment and not for the purpose of proving that the combine's design was defective or to prove negligence or culpable conduct in connection with plaintiff's accident. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

The court properly excluded testimony by dam operator's expert, which was based on data gathered four years after the 1984 flood, as being too remote in time from the events in issue. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

In a criminal trial, evidence of the relationship between an eyewitness and the State was irrelevant to defendant's case where the eyewitness' description was given before defendant entered into an agreement with the State, and the eyewitness was receiving no consideration for his testimony; therefore, the probative value of this evidence was outweighed by the possibility of confusing and misleading the jury. *State v. Tarrant-Folsom*, 140 Idaho 556, 96 P.3d 657 (Ct. App. 2004).

In child sexual abuse prosecution, trial court was within its discretion to deny defendant's request to present evidence that one of his minor victims had lied when she initially reported to her foster mother that defendant refused to stop. The evidence was not relevant either to rebut the foster mother's statement that the victims had never lied to her about a matter of significance, or to impeach the victims, and any marginal probative value of that evidence was substantially outweighed by the danger of confusing or misleading the jury with extraneous issues and wasting trial time. *State v. Perry*, 144 Idaho 665, 168 P.3d 49 (Ct. App. 2007).

In General.

This rule does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to the party's case; it protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis. *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

Inflammatory Evidence.

It was not reversible error to admit four photographs taken of the victim lying on an autopsy table; whether to admit allegedly inflammatory evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

Judge As Witness.

The trial court did not abuse its discretion in prohibiting a judge's testimony on behalf of attorney sued for malpractice, as a judge brings the authority of his office to the stand, and jurors might be likely to give greater weight to his testimony than to the testimony of other witnesses; furthermore, the trial court reached its conclusion with consideration to the fact that other competent experts who were not sitting judges could be called. *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991).

Medical Testimony.

In view of the deference that the jury may have held for "nonexpert" doctor's testimony, the probative value of his opinion regarding alleged sexual abuse was substantially outweighed by the danger of unfair prejudice and should have been excluded from evidence. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Photographs.

Trial judge did not abuse his discretion by admitting several photographs, including one depicting victim's bruised face and neck, into evidence since the existence of physical bruises was clearly relevant to the material issue of whether "great bodily harm" had been inflicted, as alleged in the prosecutor's information, and since the one photograph was sobering but not gruesome. *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989).

Although a photograph of a victim's scalp lying in the snow on the side of the road should not have been admitted into evidence since the photograph had no probative value, and carried with it some prejudicial impact not necessary to prove the vehicular manslaughter charges against defendant, when viewed against the totality of the evidence, the erroneous admission of the photograph was harmless. *State v. Phillips*, 117 Idaho 609, 790 P.2d 390 (Ct. App. 1990).

Where, in a murder prosecution, a total of ten photographs were presented to the trial court by the State for admission into evidence, and where of those ten photographs the trial court admitted four, the trial court properly balanced the unfair prejudicial value

of the photographs with their relative probative value and concluded that the four photographs allowed into evidence were less inflammatory than the others, and that they also clearly contained relevant evidence to a contested issue in the case, there was no abuse of discretion in admitting the four photographs. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

The fact that photographs offered in evidence during a murder trial depicted the actual body of the victim and the wounds inflicted on the victim, and that they may have tended to excite the emotions of the jury, was not a basis for excluding them. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

There was no abuse of discretion in the district court's admission of photographs where such photographs were relevant and, since the photographs were not particularly gruesome, and the enlargements did not show greater amounts of detail than were visible in the originals, the moderate increase in size alone did nothing to turn otherwise admissible photographs into prejudicial, inflammatory exhibits. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (Ct. App. 1994).

In a first-degree murder prosecution, the trial court did not abuse its discretion by admitting three photographs of the victim that showed the crime scene and were probative of the cause of death. *State v. Hawkins*, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998).

In a first-degree murder prosecution, trial court's admission of a photograph showing speaker wire in a car parked near where the body was found was not error because it was relevant to show that defendant had access to wire similar to that used in the murder. *State v. Hawkins*, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998).

Where the state had the burden of showing that the victim was murdered by torture and there was testimony that the victim had suffered dozens of injuries, the use of 28 photographs was not excessive. *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).

Hospital and autopsy photographs showing the number and extent of child/victim's internal and external injuries were admissible as they were relevant to the state's burden of proving the identity of the victim, connected those who testified with their work to revive the victim at the hospital and supported the testimony of those witnesses as to the condition of the victim upon her arrival at the hospital, and assisted in proving the chain of custody of the victim's body from the time she was pronounced dead until the body bag was

opened before the autopsy. *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).

Photographic evidence of a homicide victim, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, is admissible at the discretion of the trial court, as an aid to the jury in arriving at a fair understanding of the evidence; proof of the corpus delicti; extent of injury, condition and identification of the body; or for its bearing on the question of the degree of the crime, even though it may have the additional effect of tending to excite the emotions of the jury *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).

Photographs of the victims were admissible because they were relevant to the manner in which the victims died, the time of death, corroboration of the coconspirators' testimony about the fatal injuries, and about how the coconspirators attempted to dispose of the bodies. *State v. Reid*, — Idaho —, 253 P.3d 754 (2011).

Prejudicial Effect.

If it appears that a party is seeking the introduction of evidence of subsequent remedial measures to imply culpability under the guise of impeachment or any other purpose, certainly the trial court should disallow the evidence; however, the trial court is in the best position to assess the prejudicial effect of the evidence. If the trial court is satisfied that the evidence has substantial probative value on the issue on which it is introduced and that the issue is genuinely in dispute, it should be allowed, and a limiting instruction can aid the jury, but if the trial court concludes that factors of undue prejudice, confusion of issues, misleading the jury or a waste of time outweigh the probative value of the evidence it should properly be excluded. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

The fact that the prosecution has a very strong case does not lead to the conclusion that the probative value of relevant evidence of prior misconduct is inherently outweighed by undue prejudicial impact. *State v. Nichols*, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993).

Where much of the videotape of victims contained highly prejudicial, detailed statements about defendant's conduct that had little or no relevance to the issue raised on cross-examination, i.e., credibility or consistency, under this rule, admissibility of the entire videotape was error. *State v. Bingham*, 124 Idaho 698, 864 P.2d 144 (1993).

Although defendant was not directly responsible for striking the victim, the injuries suffered in the robbery were due in part to defendant's role in keeping the victim's com-

panion from helping him. Therefore, no unfair prejudice resulted from the admission of the photograph showing injuries which were also described by several witnesses who testified at the trial. *State v. Waggoner*, 124 Idaho 716, 864 P.2d 162 (Ct. App. 1991).

The trial court did not abuse its discretion in excluding diagnosis testimony where it was based almost entirely on allegations and statements that the court had ruled inadmissible because of its prejudicial value, and where the court considered all the relevant evidence, recognized the probative value, and exercised its discretion in concluding that the probative value was outweighed by the prejudicial effect. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

The district court erred in determining the photographs offered by defendant were irrelevant, but did not err in excluding the photographs on the basis that their prejudicial impact outweighed their probative value. *State v. Page*, 135 Idaho 214, 16 P.3d 890 (2000).

In defendant's rape and drug case, the court erred by admitting evidence that defendant had supplied two minors methamphetamine, more than one year prior to the incidents he was actually charged with, because there was no evidence "linking" the alleged delivery of the drugs to the instant charges. Given the nearly one year lapse, there was no logical manner in which defendant's providing drugs to the girls was in furtherance of or a precursor to the crimes for which he was charged; rather, it was a distinct and "self-contained" incident. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

Trial court did not err in a medical malpractice action in excluding the Idaho Administrative Code rules governing physician assistants in 2003 because those rules did not establish the standard of care in the case and their probative value was substantially outweighed by the danger of confusing the jury. *Schmechel v. Dille, M.D.*, 148 Idaho 176, 219 P.3d 1192 (2009).

Prior Similar Acts.

Testimony by former wife of a murder defendant as to defendant's activities while on hunting trips was admissible as relevant where those activities included his removing the sexual organs of game animals, and where defendant was charged with the mutilation and removal of the sexual organs of the victim. *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989), cert. denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989).

The passage of time between two different criminal acts is one of the circumstances for a trial court to consider in determining whether

there are sufficient similarities between the two acts to justify an inference that the same person committed both acts. *State v. Martin*, 118 Idaho 334, 796 P.2d 1007 (1990).

The fact that defendant's prior sex offenses occurred ten and twelve years before the charged sex offense does not make evidence of those prior wrongful acts irrelevant or unfairly prejudicial due to remoteness in time where the defendant was incarcerated for nearly the entire period, and where within one or two months after being released he continued to employ the same *modus operandi* demonstrated in the earlier sex offenses. *State v. Martin*, 118 Idaho 334, 796 P.2d 1007 (1990).

In a case regarding the murder of a bail bondsman, the district court did not abuse its discretion in determining that the probative value of evidence of a prior incident where defendant pointed a gun toward a door where a police officer stood was not substantially outweighed by the danger of unfair prejudice, as the probative value of the incident was great in that it was strong evidence from which premeditation for the charged crime could be inferred. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

Idaho Rules of Evidence required that trial courts treat the admission of evidence of uncharged misconduct in child sex crimes no differently than the admission of such evidence in other cases; where defendant was charged with sexually abusing his live-in girlfriend's daughter, the trial court erred in admitting evidence that defendant had similarly abused his ex-wife's daughter because it incorrectly determined that the proffered evidence was governed by a body of law unique to sexual abuse cases. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009).

Defendant was found guilty under this section of engaging in improper touching of a minor child while providing therapeutic massage services to her; testimony of other massage clients who had similar experiences with the defendant was properly admitted as showing common scheme or intent and lack of accidental touching. *State v. Parmer*, 147 Idaho 210, 207 P.3d 186 (2009).

In defendant's trial on a charge of lewd conduct with a child under the age of 16, evidence that he had similarly molested his girlfriend's other children was admissible because evidence of instances involving similar touching of the victim's sisters and friend was relevant to demonstrate that defendant had the opportunity to engage in that type of touching under uniquely similar circumstances and was further relevant to establish the victim's credibility. *State v. Gomez*, — Idaho —, 254 P.3d 47 (2011).

Probative Value Outweighed Prejudicial Impact.

Where prosecution simply presented the fact that the defendant admitted to having used makeup to cover his birthmark in a prior robbery as well as some other similar methods of operation, and the prosecution did not focus on any other details of prior robbery, there was no abuse of discretion in the implicit conclusion that the probative value of the evidence outweighed the risk of unfair prejudicial impact. *State v. Nichols*, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993).

Corroborated testimony of witnesses relating conversations they had had with minor victim's grandmother, where grandmother related that defendant was "interested in" and "after" the victim, was properly admitted in the trials of the grandmother and her boyfriend for conspiracy to commit lewd conduct with a minor, as such evidence was highly probative and clearly relevant, and the probative value was not substantially outweighed by the danger of unfair prejudice, particularly since it did not describe any additional sexual acts. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995).

In a prosecution for lewd conduct with a minor under sixteen the trial court did not abuse its discretion in admitting evidence of the defendant's flight from the state, as the defendant was allowed to explain his reasons for leaving the state so the evidence of flight was not unfairly prejudicial, and the probative value of the evidence outweighed any prejudicial affect. *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998).

Where the evidence highlighted the defendant's preoccupation and attraction toward female children, even though it was arguably prejudicial, it was probative on the contested issue of the defendant's state of mind at the time of the alleged acts, and the trial court did not err in ruling it admissible. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (1999).

The testimony of the victim and the DNA evidence proving defendant's paternity of the victim's child in a charge of rape, were both relevant to a determination of the parties' credibility and to show a common intent or plan on the part of the defendant, and the probative value of such evidence outweighed any potential unfair prejudice to defendant. *State v. Spor*, 134 Idaho 315, 1 P.3d 816 (Ct. App. 2000).

Defendant's statement that he had carried methamphetamine in the bag in the past was relevant to both his knowledge of whether the substance found in the gym bag was metham-

phetamine and to his knowledge of possession of the substance; based upon the probative value of defendant's admission, and the evidence of defendant's drug involvement already presented to the jury, the probative value was not substantially outweighed by the danger of unfair prejudice. *State v. Dreier*, 139 Idaho 246, 76 P.3d 990 (Ct. App. 2003).

Trial court did not err when it precluded defendant from testifying that she consented to take a breath test because trial court had previously excluded the State's evidence of the breath test results as a sanction for the State's discovery violation in failing to disclose a witness; to have allowed defendant's testimony that she consented to the test while excluding the test results would have misled the jury into thinking that defendant passed the test or that officers declined to administer the test because they believed she would pass it. *State v. Davis*, 139 Idaho 731, 85 P.3d 1130 (Ct. App. 2003).

Evidence of defendant's prior misconduct toward the victim was highly probative to show that defendant's subsequent stalking behavior would have alarmed the victim and caused the victim substantial emotional distress, plus it was relevant to show that the stalking was done maliciously, the mens rea element of the stalking charge; the court could not say that the trial court's decision to admit the evidence exceeded the boundaries of its discretion. *State v. Hoak*, 147 Idaho 919, 216 P.3d 1291 (2009).

A physician could testify regarding the nature and extent of the victim's injuries because, although the testimony would result in prejudice to defendant and could be cumulative to some extent, the injuries received by the victim were relevant in determining whether they were consistent with being hit by a fast-moving car and dragged, with being simply struck, or struck and run over. *State v. Ellington*, — Idaho —, 253 P.3d 727 (2011).

Prosecutor As Witness.

Court properly allowed testimony of assistant city attorney as eyewitness to defendant's arrest for driving while under the influence of alcohol, since the attorney did not appear before the court and jury in his prosecutorial role, but rather the state called him as an independent eyewitness to the defendant's conduct at the time of arrest, and it was the defense, not the prosecution, that elicited the evidence that he was a "prosecutor." *State v. Bradley*, 120 Idaho 566, 817 P.2d 1090 (Ct. App. 1991).

Rape Prosecution.

While on trial for the rape of defendant's half-sister, another relative testified that de-

fendant raped her in 1982, and despite defendant's objection to the testimony as prejudicial, the district court properly admitted the evidence regarding the uncharged misconduct as evidence of credibility or a common plan or scheme, and where the district court considered the similarity of the occurrences and their proximity in time and found that the evidence regarding the 1982 rape was relevant and not more prejudicial than probative, the admission of such evidence was not an abuse of the court's discretion. *State v. Pugsley*, 128 Idaho 168, 911 P.2d 761 (Ct. App. 1995).

—Physical Injury.

Evidence of physical injury is not necessary to establish the use of force in a rape prosecution. It was relevant, however, where it tended to corroborate the complaining witness's version of the events surrounding the alleged rape and to contradict the defendant's claim of consent. The photographs showing the existence of physical bruises were clearly relevant to the critical factual issue to be decided by the jury. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Taped Conversation.

The trial court did not err by allowing the state to introduce, in rebuttal to evidence presented by the defense, a tape-recorded conversation between defendant and the victim's mother where the tape contradicted defendant's testimony on issues relevant to the case as, *inter alia*, even though defendant admitted to making the statements on the tape, its use was probative with regard to determining whether, as defendant claimed, his taped remarks were not meant to be taken seriously. *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989).

Two-Tiered Analysis.

This rule creates a balancing test. On one hand, the trial judge must measure the probative worth of the proffered evidence by focusing upon the degree of relevance and materiality of the evidence, and the need for it on the issue on which it is to be introduced. At the other end of the equation, the trial judge must consider whether the evidence amounts to unfair prejudice. *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987).

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion

of the trial judge and will not be disturbed on appeal unless that discretion has been abused. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

A two-tiered analysis is used to determine the admissibility of evidence concerning other crimes, wrongs or acts; the trial court must determine that the evidence is relevant and if the trial court finds that the evidence is relevant it must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Uncharged Crimes.

In a murder prosecution based largely upon circumstantial evidence involving defendant's alleged use of the same firearm in homicides in both Idaho and Arizona, the trial court did not abuse its discretion in allowing the testimony of witnesses concerning defendant's shooting of a police officer in Arizona, as without showing that the gun held by defendant was fired into the officer's body, the state could not link the bullets in the officer's body with the bullet in the Idaho victim's brain; the trial court demonstrated that it understood the necessary balancing test as it balanced the relevancy of the testimony against the prejudice to defendant and concluded that the probative value of the evidence outweighed the prejudice. *State v. Smith*, 117 Idaho 891, 792 P.2d 916 (1990).

Where, in a murder prosecution, uncharged misconduct evidence was not remote in time since all of the incidents happened within hours or days of the murders of the victims, where the evidence was relevant and probative with regard to defendant's intent to rob and murder the victims where it showed a pattern, plan, motive, intent, and common scheme or plan to rob and harm unsuspecting persons, and where it was probative of defendant's identity, the trial court did not abuse its discretion by admitting evidence of the similar uncharged conduct. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Where a witness's credibility was called into question by the defendant, evidence that witness had been sexually abused by the defendant for over a year prior to being charged was relevant for the purpose of ex-

plaining why she could not clearly remember specific times and dates relating to the charged conduct. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

Cited in: *Masters v. Dewey*, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985); *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986); *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987); *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988); *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988); *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989); *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989); *State v. Smith*, 117 Idaho 225, 786 P.2d 1127 (1990); *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990); *State v. Rodriguez*, 118 Idaho 948, 801 P.2d 1299 (Ct. App. 1990); *State v. Peters*, 119 Idaho 382, 807 P.2d 61 (1991); *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991); *State v. Grinolds*, 121 Idaho 673, 827 P.2d 686 (1992); *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992); *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993); *State v. Velasquez-Delacruz*, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); *State v. Blackstead*, 126 Idaho 14, 878 P.2d 188 (Ct. App. 1994); *State v. McAway*, 127 Idaho 54, 896 P.2d 962 (1995); *Martin v. Hackworth*, 127 Idaho 68, 896 P.2d 976 (1995); *State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995); *State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996); *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997); *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997); *State v. Byington*, 132 Idaho 589, 977 P.2d 203 (Ct. App. 1999); *State v. Mace*, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000); *Cook v. Skyline Corp.*, 135 Idaho 26, 13 P.3d 857 (2000); *Beard v. George*, 135 Idaho 685, 23 P.3d 147 (2001); *State v. Eytchison*, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001); *Jen-Rath Co. v. KIT Mfg. Co.*, 137 Idaho 330, 48 P.3d 659 (2002); *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008); *State v. Wright*, 147 Idaho 150, 206 P.3d 856 (2009); *State v. Barnes*, 147 Idaho 587, 212 P.3d 1017 (2009); *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103, 244 P.3d 247 (2010); *State v. Truman*, 150 Idaho 714, 249 P.3d 1169 (2010); *State v. Betancourt*, — Idaho —, 262 P.3d 278 (2011).

RESEARCH REFERENCES

A.L.R. Admissibility, in rape case, of evidence that accused raped, or attempted to

rape, person other than prosecutrix — prior offenses. 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape, person other than prosecutrix — subsequent acts, 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix — offenses unspecified as to time. 88 A.L.R.5th 429.

Admissibility in state criminal case of results of polygraph (lie detector) test—Post-Daubert cases. 10 A.L.R.6th 463.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R.6th 747.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. (Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998.)

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion Standard.
 "Bad Act Evidence".
 Character of Defendant.
 Character of Victim.
 Credibility of Witness.
 Evidence Held Admissible.
 —Absence of Mistake.
 —Chain of Conduct.
 —Credibility.
 —Dismissed Charges.
 —Lewd Conduct.
 —Prior Drug Transactions.
 —Prior Uncharged Conduct.
 —Probative Value.

Evidence Held Inadmissible.
 —Prior Imprisonment.
 —Traits of Child Abusers.
 —Truthfulness.
 Failure To Appear Before Court.
 Fundamental Error.
 Harmless Error.
 Identity.
 Impeachment Evidence.
 Impeachment of Defendant's Testimony.
 In General.
 Intent.
 Not Reversible Error.
 "Opening the Door."
 Other Crimes, Wrongs, or Acts.

Plan.
 Pornographic Images.
 Preservation for Appeal.
 Prior Acts.
 Reversible Error.
 Review.
 Rule Inapplicable to Evidence of Habit.
 Standard of Review.
 Subsequent Conduct.
 Two-Tiered Analysis.
 Uncharged Conduct.
 Uniqueness.

Abuse of Discretion Standard.

When reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice the appellate court uses an abuse of discretion standard. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

Since whether evidence is relevant is a matter of law when considering trial court's admission of evidence under subsection (b) of this rule, the appellate court exercises free review of the trial court's determination; however, when reviewing the determination that the probative value of the evidence substantially outweighs the danger of unfair prejudice — the second tier of the analysis, the appellate court will use an abuse of discretion standard. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

“Bad Act Evidence”.

To admit “bad act evidence” under this rule it must be shown that the evidence is relevant to a material issue concerning the crime charged. Secondly, a determination must be made that the probative value of the evidence substantially outweighs the danger of unfair prejudice. In the course of the trial, it was learned that the act of swinging a “child carrier with a baby in it” at the defendant occurred almost one year after the date upon which the victim in this case was injured. There were no other times attributed to the offer of proof by the defendant. The defendant never established relevance of the acts contained in his offer of proof to the issue of opportunity for the mother of the child to have committed the act of injury to the victim. *State v. Anderson*, 129 Idaho 763, 932 P.2d 886 (1997).

Evidence of a party's “bad conduct” was properly excluded from a trial regarding specific performance of an oral contract to convey land because it was not relevant under the provisions of Idaho R. Evid. 404(b). *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 50 P.3d 975 (2002).

Admissibility of evidence of prior bad acts

hinges on the question of whether its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. Evidence of an uncharged sex offense is relevant, and may be admissible, where it proves motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Gomez*, 254 P.3d 47, 2011 Ida. App. LEXIS 15.

Character of Defendant.

Before the adoption of the Idaho Rules of Evidence, which were not yet in effect when this action was tried, proof of good character was limited to the defendant's reputation in the community. The new rules permit a defendant to prove good character either by reputation or by opinion testimony; however, proof of good character through specific instances of good conduct is generally impermissible under both the rules and general case law. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

Character of Victim.

In a prosecution against bookkeeper/office manager for forgery and embezzlement, evidence as to company owner's extramarital affair was properly not admitted as evidence of the character of a crime victim; the evidence was irrelevant to the crime charged and was offered merely to impugn the owner's character. *State v. Vierra*, 125 Idaho 465, 872 P.2d 728 (Ct. App. 1994).

Admission of the victim's prior conviction for aggravated assault was not admissible under this Rule where the defendant sought to admit it to question the truth and veracity of the victim and to show the victim's reputation for “quarrelsomeness, violence and dangerousness.” *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

A defendant in a criminal prosecution may introduce evidence of a pertinent trait of the victim's character in order to raise an inference that the victim acted consistently with that trait on the occasion in question. *State v. Hernandez*, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

When character evidence is offered to show conforming behavior by the victim, the defendant need not show that he had prior knowledge of the victim's violent disposition because whether he was aware of the victim's propensity for violence has no bearing upon the likelihood that the victim acted in conformity with that propensity on a particular occasion. *State v. Hernandez*, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

It was error for the district court to exclude evidence of the victim's reputation for vio-

lence on the ground that the defendant was unaware of that reputation where the defense sought to offer the evidence in order to show that the victim was the aggressor. *State v. Hernandez*, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

Credibility of Witness.

Where a witness's credibility was called into question by the defendant, evidence that she had been sexually abused by the defendant for over a year prior to defendant being charged was relevant for the purpose of explaining why witness could not clearly remember specific times and dates relating to the charged conduct. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

In defendant's accessory case, a witness's testimony regarding a drug buy was relevant to explain why she initially gave an untruthful account to the police, and the testimony was thus probative for a purpose other than to show defendant's poor character. In addition, because the witness's credibility was essential to the jury's determination, a rational explanation as to why the witness would alter her story to the police was highly probative; any prejudice to defendant was slight since the witness did not implicate defendant in the drug purchase. *State v. Hauser*, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006).

Evidence Held Admissible.

Where, in a prosecution for robbery of a store, the central issue at trial was the identity of persons who robbed the store, testimony regarding the capture of the defendant, yielding articles connected with the robbery, was admissible as relevant and highly probative of the defendant's identity as one of those persons. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

In a prosecution for rape and kidnapping, trial court did not err in denying defendant's objection to testimony by the victim's sister that victim would not have left her children home alone from midnight to 4:00 a.m., as the testimony could reasonably have been perceived as pertaining to victim's habits in making arrangements for her children when she left them at night rather than with her general character trait for being a good mother. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989).

Where the evidence tended to prove that the irritated vaginal condition of victim was not the product of a single isolated accident because, although father of victim claimed that bubble bath caused the victim's problem with her irritated vaginal area, the evidence of prior conduct showed that the victim had similar problems even when she had not had

a bubble bath, the evidence strongly corroborated the victim's allegations, helped to establish the identity of the perpetrator, and was relevant to the parties' credibility; therefore, the trial court correctly ruled that this evidence was relevant and more probative than prejudicial. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

The district court correctly applied the Rules of Evidence when it allowed three women, who were not victims in this case, to testify regarding their accusations of defendant's sexual misbehavior with them when they were minors, where the trial court weighed the proffered testimony and determined that it would be more helpful to the jury in determining the credibility of the victim's testimony than it would be prejudicial to defendant. *State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993).

The district court's decision to admit evidence of prior uncharged misconduct was proper in a sexual abuse case because the testimony was relevant to proving intent where said testimony came from a girl who claimed that she was sexually molested. *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

Where defense counsel attacked victim's credibility as to her allegations of lewd and lascivious contact against her father, the prosecution was allowed, upon redirect examination, to elicit from the victim testimony regarding other incidents of uncharged sexual misconduct. *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994).

The district court did not err in allowing acquaintances of murder defendant to testify about conversations they had with defendant in which defendant made references to, or asked about, the victim. The evidence proffered by these acquaintances tended to prove matters of consequence to the case, that is, that the defendant knew the victim and was interested in her; this was directly contrary to a statement given by the defendant to the police in which he denied any acquaintance with, or interest in, the victim. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), cert. denied, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Where the allegations in case before the court and the prior uncharged sexual misconduct involved the same victim and similar acts committed within a relatively brief span of time, court concluded that the evidence was relevant and that the district court did not abuse its discretion in finding it more probative than prejudicial, and the district court did not err in admitting the evidence of prior uncharged misconduct under subsection (b) of

this rule. *State v. Hansen*, 127 Idaho 675, 904 P.2d 945 (Ct. App. 1995).

Corroborated testimony of witnesses relating conversations they had had with minor victim's grandmother, where grandmother related that defendant was "interested in" and "after" the victim, was properly admitted in the trials of the grandmother and her boyfriend for conspiracy to commit lewd conduct with a minor, as such evidence was highly probative and clearly relevant, and the probative value was not substantially outweighed by the danger of unfair prejudice, particularly since it did not describe any additional sexual acts. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995); *State v. Castillo*, 127 Idaho 257, 899 P.2d 967 (1995).

Where, prior to charged offense of forgery and burglary, evidence showed another business's check had been paid which was signed by the defendant, who had no authorized power of endorsement, and it was paid by the same bank where defendant had attempted to pass the unauthorized check at issue, such proffered evidence was probative and admissible under subsection (b) of this section to prove the absence of mistake or accident. *State v. McAbee*, 130 Idaho 517, 943 P.2d 1237 (Ct. App. 1997).

Where, in its analysis, the district court considered several factors, including the similarity of prior occurrences to the offenses charged as to the method of enticement and the age of the children, where the court noted the probative value of the evidence, and where a limiting instruction was given to the jury prior to contested testimony and a general instruction was given in final instructions, the court utilized reason and proper legal standards in deciding to admit the testimony, and did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (1999).

Where defendant's defense was that he did not premeditate killing his wife and merely acted in a rage attributable to post-traumatic stress disorder, the prior acts evidence was relevant to show his capacity to premeditate, while the evidence of his apparently conscious abuse of his daughter fifteen years before was relevant to show that his prior conduct had been volitional. *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000).

Evidence of defendant's prior drug use was admissible because it was not presented to show his character or to show that he acted in conformity with a particular trait of charac-

ter, rather, the challenged evidence was relevant to prove the specific intent element of the charged offense of possession of drug paraphernalia. *State v. Williams*, 134 Idaho 590, 6 P.3d 840 (Ct. App. 2000).

Magistrate did not err in admitting testimony of witnesses concerning a prior incident for which the juvenile was acquitted, as the proffered testimony was relevant to a material disputed issue and the probative value of the evidence was not substantially outweighed by unfair prejudice. *State v. Doe*, 136 Idaho 427, 34 P.3d 1110 (Ct. App. 2001).

Where defendant argued that the State's Idaho R. Evid. 404(b) notice did not adequately describe the incidents about which testimony would be given, the appellate court held that the notice was sufficient to alert the defense to the general nature of the additional testimony and to thereby avoid surprise; the witnesses were identified in the notice, and the general type of conduct alleged to have been committed was revealed also. That information was sufficient to allow the admissibility issue to be raised by defendant although the trial court elected not to rule on admissibility before the trial. *State v. Jones*, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003).

Where State presented evidence of two incidents of improper touching of the victim that were not the bases of the charges and were not described at the preliminary hearing, that did not amount to a fatal variance because the jury could not have used that evidence to convict defendant where that testimony was specifically admitted as evidence of other misconduct for purposes that were permissible under paragraph (b) of this rule; immediately after presentation of this evidence, the court gave the jurors a limiting instruction. *State v. Jones*, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003).

Witness's testimony that defendant attempted to cover up his accomplice's use of the stolen card, by claiming the credit card as his own, was probative to show defendant's awareness that the credit card was stolen. The evidence addressed the State's burden to prove that defendant used the credit card with intent to defraud, I.C. § 18-3123, and there was no risk of unfair prejudice from its introduction. *State v. Waller*, 140 Idaho 764, 101 P.3d 708 (Ct. App. 2004).

Defendant was found guilty of engaging in improper touching of a minor child while providing therapeutic massage services to her; testimony of other massage clients who had similar experiences with the defendant was properly admitted as showing common scheme or intent and lack of accidental touching. *State v. Parmer*, 147 Idaho 210, 207 P.3d 186 (2009).

—Absence of Mistake.

Evidence was relevant to prove the absence of mistake or accident where the testimony of witnesses tended to corroborate the testimony of the victim, whose evidence conflicted with that of the defendant. *State v. Cardell*, 132 Idaho 217, 970 P.2d 10 (1998).

Where adult witnesses who had been massage clients of the defendant were older than the minor victim, the age difference did not render the adults' testimony regarding absence of mistake or accident irrelevant. *State v. Cardell*, 132 Idaho 217, 970 P.2d 10 (1998).

—Chain of Conduct.

In prosecution for three counts of lewd conduct with a minor, district court did not err in holding that other acts of lewd conduct with a minor were not so remote that their probative value was not substantially outweighed by the danger of unfair prejudice where evidence of defendant's engaging in lewd conduct beginning in 1977 showed a continuous chain of such conduct by defendant. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

While on trial for the rape of defendant's half-sister, another relative testified that defendant raped her in 1982, and despite defendant's objection to the testimony as prejudicial, the district court properly admitted the evidence regarding the uncharged misconduct as evidence of credibility or a common plan or scheme, and where the district court considered the similarity of the occurrences and their proximity in time and found that the evidence regarding the 1982 rape was relevant and not more prejudicial than probative, the admission of such evidence was not an abuse of the court's discretion. *State v. Pugsley*, 128 Idaho 168, 911 P.2d 761 (Ct. App. 1995).

—Credibility.

In a prosecution for lewd conduct with a minor, victim's testimony of prior sexual misconduct with defendant was admissible where the parties' credibility was at issue. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

In prosecution for driving under the influence of alcohol, testimony as to prior DUI convictions by girlfriend of defendant might have been admissible as evidence impeaching her credibility where she first testified that she, not defendant, had been driving which contradicted what she had first told police officers. *State v. Pilik*, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996).

—Dismissed Charges.

Trial court did not err by failing to strike from the record all evidence pertaining to the

grand theft and kidnapping charges after those charges had been dismissed for lack of jurisdiction since the circumstances of the acts indicated the hostility of the defendant toward the victim. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989), cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989), cert. denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

—Lewd Conduct.

Trial court properly admitted testimony by daughter of defendant convicted of lewd conduct with a minor, that defendant had digitally penetrated her, where the court made clear that her testimony was permitted as a direct rebuttal to defendant's claim that he had never digitally penetrated anyone and not as evidence of other crimes. *State v. Lewis*, 126 Idaho 77, 878 P.2d 776 (1994).

In the trials of her grandmother and grandmother's boyfriend for conspiracy to commit lewd conduct with a minor, the district court did not abuse its discretion in admitting minor victim's testimony concerning two subsequent acts of sexual intercourse by the boyfriend which occurred in the grandmother's house because, pursuant to subsection (b) of this rule, the testimony was highly probative, explained the victim's delay in reporting, and clearly reflected a common scheme or plan to use the grandmother's influence over the victim to compel her actions, and, pursuant to § 18-1701, it was evidence of the conspiracy itself. *State v. Tapia*, 127 Idaho 249, 899 P.2d 959 (1995); *State v. Castillo*, 127 Idaho 257, 899 P.2d 967 (1995).

—Prior Drug Transactions.

In trial of defendant convicted of delivery of a controlled substance, district court did not err in admitting evidence of prior drug transaction with undercover officer because it was relevant to the state's rebuttal of defendant's affirmative defense of entrapment and was relevant to prove defendant's motive or intent. *State v. Canelo*, 129 Idaho 386, 924 P.2d 1230 (Ct. App. 1996).

—Prior Uncharged Conduct.

District court did not err in admitting evidence of defendant's prior uncharged sexual misconduct in his trial for lewd conduct with a minor; there were sufficient similarities between the two incidents to demonstrate a general plan by defendant to exploit and sexually abuse minor females who were friends of his children and visited his home; the evidence was relevant, and probative

value did not substantially outweigh the danger of unfair prejudice. *State v. Hoots*, 131 Idaho 592, 961 P.2d 1195 (1998).

Evidence that defendant spoke to child sexual battery victim about a prior sexual scenario involving a stripper immediately before he touched the victim's breast was relevant and admissible to prove intent and because it was interconnected with the charged offense. *State v. Avila*, 137 Idaho 410, 49 P.3d 1260 (Ct. App. 2002).

In a lewd conduct with a minor under 16 case, the evidence of defendant's behavior towards the victim, including his first sexual comments towards her when she was 12 years old, showing her pornography, the use of rewards and punishments depending on whether she gave in to his sexual demands, as well as the sexual acts the two engaged in, was admissible evidence under subsection (b) to establish defendant's continuing criminal design to cultivate a relationship with the victim, such that she would concede to his sexual demands. *State v. Truman*, 150 Idaho 714, 249 P.3d 1169 (2010).

In a lewd conduct with a minor under 16 case, evidence of sexual contacts between another woman and defendant that occurred in the minor victim's presence was admissible under subsection (b) because the testimony that the victim witnessed his sexual activity with the other woman, that defendant asked the victim to film that sexual activity, and that the first sexual encounter between the victim and defendant occurred when the other woman was present, largely corroborated the victim's testimony. *State v. Truman*, 150 Idaho 714, 249 P.3d 1169 (2010).

—Probative Value.

The probative value of testimony of three adult massage clients that they believed the defendant's contact with their vaginal areas was not accidental was not substantially outweighed by the prejudice to the defendant, where he had introduced evidence in his trial on a charge of sexual battery of a minor that his massages were not sexual in nature. *State v. Cardell*, 132 Idaho 217, 970 P.2d 10 (1998).

Defendant's statement that he had carried methamphetamine in the bag in the past was relevant to both his knowledge of whether the substance found in the gym bag was methamphetamine and to his knowledge of possession of the substance; based upon the probative value of defendant's admission and the evidence of defendant's drug involvement already presented to the jury, the probative value was not substantially outweighed by the danger of unfair prejudice. *State v. Dreier*, 139 Idaho 246, 76 P.3d 990 (Ct. App. 2003).

Evidence Held Inadmissible.

In trial on charge of lewd and lascivious conduct with a 14-year-old boy, defendant's sexual misdeed with victim's mother was not relevant to prove the conduct committed with the son. *State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985).

Absent evidence that the specific contents of the reports contained in newspaper clippings of unrelated arrests and charges pending against defendant, which were in defendant's possession at the time of alleged rape and which he displayed to the victim, were known to the victim, and had been communicated to the victim in the form of a threat, the danger of unfair prejudice so outweighed the probative value of the evidence that the content of the clippings, charging defendant with various violent acts, should have been excluded. *State v. Winkler*, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987).

Where the prior uncharged burglaries and the crimes charged were not shown to be progressive stages of a single plan formed in the minds of the defendants, but were connected only in the sense that they shared the common goal of getting money, neither did the burglaries have a distinctively similar *modus operandi* where the "plan" for the uncharged burglaries included more premeditation and greater professionalism than was exhibited during the charged crimes, and the potential for unfair prejudice was outweighed by probative value, the evidence of uncharged crimes should not have been admitted to prove the crimes charged. *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988).

Using evidence of a person's character in the prosecution's case in rebuttal, when no character evidence has been proffered by the defendant, simply to support the ultimate conclusion that the defendant acted in conformance with those characteristics in committing a crime, is inadmissible. *State v. Fisher*, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989).

Evidence of other acts was inadmissible under this rule to prove that informant acted in conformity with a character trait of being an overreaching government informant who would coerce innocent people into dealing in drugs, and was not a sufficient indication of the existence of a habit to permit admission of the evidence under I.R.E., Rule 406. *State v. Rodriguez*, 118 Idaho 948, 801 P.2d 1299 (Ct. App. 1990).

Where the State should not have been permitted to elicit testimony by victim's mother about defendant's alleged attempt to choke mother in the first instance, the State could not predicate the admissibility of otherwise inadmissible testimony by mother's coworker

upon its value to impeach other evidence that was itself inadmissible and should have been excluded. *State v. Wood*, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

In prosecution for driving under the influence of alcohol, admission of judgments of defendant's prior convictions introduced late in trial during the state's case in chief and which served no purpose other than to prove defendant's prior bad acts was error. *State v. Pilik*, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996).

Officer's testimony about defendant's conduct while allegedly intoxicated on prior occasions provided little, if any, probative value on defendant's ability to form the necessary intent on the night in question and, considering the nature of the testimony, there was a significant danger of unfair prejudice; therefore, even if the evidence was relevant, because the danger of unfair prejudice of the evidence substantially outweighed its probative value, the district court erred in admitting officer's testimony. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

The trial court erred when it allowed the prosecutor to ask the defendant's ex-wife why she had divorced him, where the court apparently believed evidence of the reason was already in evidence, but the answer the witness gave introduced evidence that was not admissible. *State v. Thompson*, 132 Idaho 628, 977 P.2d 890 (1999).

In prosecution for child abuse, trial court properly excluded testimony that defendant's girlfriend (child's mother) had slapped child on one previous occasion; evidence was improper character evidence. *State v. Shutz*, 143 Idaho 200, 141 P.3d 1069 (2006).

In defendant's lewd conduct and sexual battery case, the court erred by admitting evidence of defendant's prior bad acts against a witness because the comments to the witness were of a different type and under different circumstances; the testimony did not show either that the witness experienced the same type of inappropriate sexual touching that the complainant did, or that the complainant was subjected to the same sort of comments that the witness was. The testimony regarding other "bad acts" committed by defendant was not relevant to a material issue of the crimes charged. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007).

In rape case, the court erred by admitting prior acts evidence because an assertion, and defendant's admission, that he had sexual intercourse with a prior complainant while she was sleeping, that that was a "bad thing" that he had done, and that he was on felony probation for such an act was a classic ex-

ample of evidence which posed the danger that it would stir the passion of the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. *State v. Jones*, — Idaho —, — P.3d —, 2011 Ida. App. LEXIS 76 (Sept. 12, 2011).

—Prior Imprisonment.

Trial court erred in denying sexual abuse defendant's motion to exclude evidence concerning prior imprisonment where such incarceration was not relevant to any element of State's case. Evidence of incarceration would have strengthened defendant's alibi so no prejudice to the State resulted from the jury being uninformed, and such evidence would have impermissibly invited the jury to infer that defendant had a criminal propensity and was more likely to have committed the offenses charged. *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

—Traits of Child Abusers.

If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers; however, this rule prohibits the admission of evidence of a person's character (even if in the form of an expert opinion) if offered during the prosecution's case in chief to prove the accused's conduct on a specified occasion. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

In the absence of some other reason for its admission, besides that prohibited by subdivision (a)(1) of this rule, evidence regarding the traits typically exhibited by child abusers is not admissible; neither is evidence that a particular defendant possesses those same characteristics admissible. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

The fact that child victim had learned of another accusation of molestation against defendant was irrelevant to any material issue before the jury, and lacking relevance, the statement that defendant had molested another boy, even if only an accusation, was inadmissible, and its introduction during victim's testimony by the state was not harmless. *State v. Shepherd*, 124 Idaho 54, 855 P.2d 891 (Ct. App. 1993).

In prosecution for three counts of lewd conduct with a minor, evidence in the form of testimony of defendant's daughter and stepdaughter that defendant had committed other acts of molestation was relevant to show general plan to exploit and sexually abuse an identifiable group of young female victims. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

—Truthfulness.

Admission of character evidence as to

truthfulness of a defendant was improper and warranted a new trial where a direct attack on the truthfulness of defendant could not be inferred from the tone of cross-examination questions posed to the defendant nor from the fact that defendant was asked to explain some apparent inconsistencies between his testimony and previous statements. *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989).

Failure To Appear Before Court.

The district court did not clearly abuse its discretion in admitting the evidence of defendant's failures to appear before the court where the district court concluded that there was no other inference that could be drawn from defendant's failures to appear other than consciousness of guilt. *State v. Friedley*, 122 Idaho 321, 834 P.2d 323 (Ct. App. 1992).

Fundamental Error.

Fundamental error is one that so profoundly distorts the proceedings that it produces manifest injustice, depriving the criminal defendant of the fundamental right to due process; error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

District court's alleged error in admitting evidence of uncharged crimes in instant case did not rise to the level of fundamental error. Therefore, because defendant failed to object under subsection (b) of this rule to the challenged evidence, the appellate court would not consider the issue for the first time on appeal. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

Defendant failed to demonstrate that a prosecutor's alleged misconduct under subsection (b), in disobeying a pretrial order that no mention be made regarding a televised law enforcement inquiry regarding defendant, violated defendant's constitutional rights; no fundamental error was shown. *State v. Jackson*, — Idaho —, 256 P.3d 784 (2011).

An abuse of discretion in admitting evidence is a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to his defense; therefore, appellate review of a claimed error, to which no objection was made in the trial court, on the basis that it constituted fundamental error is the exception, not the rule, as the fundamental error doctrine is not a mechanism for criminal defendants to obtain judicial review of every plausible claim of

trial error. *State v. Norton*, — Idaho —, 254 P.3d 77 (Ct. App. 2011).

Harmless Error.

Although the testimony about defendant's drug addiction should not have been admitted to show motive to commit burglary and battery with the intent to commit robbery, the error was harmless. *State v. Boman*, 123 Idaho 947, 854 P.2d 290 (Ct. App. 1993).

Although evidence of prior unspecified murder was admitted in error, where, beyond a reasonable doubt, the evidence did not influence the jury's verdict, the error was harmless. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

Where the evidence against defendant, who was convicted of felony injury to child, was wholly circumstantial, the improper testimony about defendant's temper and his alleged choking of victim's mother was not harmless error; this evidence may have led the jury to a guilty verdict based upon an impermissible inference that defendant had a propensity to violence, rather than upon the evidence as to his guilt or innocence of the crime charged. *State v. Wood*, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unrepresented alibi testimony, such evidence would not have likely produced an acquittal and denial of defendant's motion for a new trial was proper. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996).

Evidence of witness that two months after the alleged drug transaction arresting officer found more marijuana in the same desk where informant said that defendant was storing marijuana when informant made the buy was not relevant because it did not show intent, identity, or absence of mistake or accident and thus admission of such testimony was error; however, since both the informant and the officer involved in the undercover operation testified regarding the incident, court was convinced beyond a reasonable doubt that the jury would have reached the same result absent the error and thus district court's err in admitting witness's testimony was harmless. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

Although the interjection of the "couple other shootings" statement was plainly improper, it was harmless beyond a reasonable doubt where the witness who made the statement was the state's twentieth witness, and

prior to his testimony the jury had been told by the defense that defendant had a prior felony conviction, and had heard testimony from numerous other witnesses that linked defendant to the murder. *State v. Barcella*, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

Court did not err in refusing to grant defendant a mistrial after dismissing conspiracy charges because, even if the conspiracy evidence was not relevant to an issue other than propensity in regard to the remaining charges, the admission was harmless error given the extensive and convincing evidence of defendant's guilt. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

Although the prosecutor's reference to defendant as a clown was meant to improperly impugn defendant's character, there was no need to determine whether the prosecutor's misconduct rose to the level of fundamental error, since the result of the trial would not have been different considering all of the other evidence presented against defendant. *State v. Barnes*, 147 Idaho 587, 212 P.3d 1017 (2009).

Identity.

Evidence of other crimes may be relevant to a question of identity if it shows that the charged and uncharged crimes were linked together as stages in the execution of an underlying plan developed by the defendants; under this test, the nexus among the crimes must be clear and direct. *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988).

Evidence of male bank robber applying makeup to disguise a distinguishing facial birthmark was tantamount to a "signature" identifying the perpetrator; thus, the evidence of a prior bank robbery did bear logical relevance to the identity of the robber. *State v. Nichols*, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993).

Evidence of prior misconduct is relevant on the issue of identity when the evidence demonstrates sufficiently similar, as well as distinctive, characteristics or patterns between the prior misconduct and the charged crime. However, even if there are numerous similarities between the uncharged misconduct and the charged crime, no inference of identity can arise if the similar characteristics, considered either singly or together, are not unusual. *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997), cert. denied, 523 U.S. 1126, 118 S. Ct. 1813, 140 L. Ed. 2d 951 (1998).

Impeachment Evidence.

Evidence offered for the purpose of impeachment may be admissible even though not listed in this rule. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied,

529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000).

Where the defendant opened the door for the admission of prior act evidence by testifying that he had never fired the gun used in this crime before, that he had never seen anyone shot before, and that he had never pointed a gun at anyone, evidence contradicting that testimony was relevant and admissible to impeach his credibility. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed. 2d 963 (2000).

Impeachment of Defendant's Testimony.

The evidence of a prior DUI conviction was relevant to directly impeach and contradict defendant's testimony that he did not engage in that type of behavior when he said in his testimony, "I don't drink and drive." *State v. Mace*, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000).

In General.

If the trial judge finds the evidence relevant to motive, intent, absence of mistake or accident, common scheme or plan, identity of the accused, or other similar issues, he or she must weigh the probative value of such evidence against any unfair prejudice it may cause to the defendant; the weighing process is committed to the judge's sound discretion. *State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986).

Evidence of a defendant's criminal past is generally inadmissible to prove the character of a person in order to show criminal propensity or guilt of the crime charged; however, such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988).

Testimony regarding the similarity between an individual's traits and the general characteristics of sexual abuse offenders must be relevant in order to be admissible, whether offered in the prosecution's case in chief or in its rebuttal, and without the requisite introduction of character evidence by the defendant or by other defense witnesses, no such relevancy exists. *State v. Fisher*, 116 Idaho 978, 783 P.2d 317 (Ct. App. 1989).

To admit evidence of other crimes, wrongs or acts, the evidence must be relevant to a material and disputed issue concerning the crime charged, other than propensity, and if the evidence is deemed relevant, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of causing unfair prejudice to the

defendant; this balancing process is within the discretion of the trial judge. *State v. Medina*, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996).

Intent.

Intent is not always sufficiently at issue in the prosecution of a specific intent crime to allow admission of evidence of other crimes. *State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985).

Where the defendant threatened the murder victim with a machete only hours before the stabbing and the machete incident was the basis of the argument which eventually led to the stabbing, the machete incident was relevant to the defendant's motive and intent toward the victim, and the trial judge did not abuse his discretion in permitting the testimony into evidence. *State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986).

Testimony from a witness/informant that she had purchased up to twenty pounds of marijuana from defendant in the past was admissible under the intent exception to subsection (b) of this rule, as defendant's theory of defense at trial was that the marijuana belonged to a woman who was at his residence at the time of the arrest and evidence of prior marijuana transactions was clearly relevant to show defendant's intent to deliver because it increased the likelihood that the marijuana seized in this case was awaiting sale. *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).

In order to prove the defendant's guilt of the charged offense, the state bore the burden to show that he harbored the specific intent to rape the victim. Evidence bearing upon his capacity to form such a specific intent was therefore relevant to a material issue, particularly in light of the defendant's intoxication-based defense. *State v. Dopp*, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996).

Not Reversible Error.

Where minor victim's mother blurted out a reference to defendant's prior felony connection on direct examination during the state's case in chief, but the testimony was not solicited by the prosecutor's questioning nor introduced for the improper purpose of showing character evidence, or for any other admissible purpose, and the defense's objection came after the witness had answered, and the defense did not thereafter make a motion to strike or a motion for mistrial, admission of mother's testimony was not reversible error. *State v. Frederick*, 126 Idaho 286, 882 P.2d 453 (Ct. App. 1994).

Where defendant argued that it was error for the trial court to admit the testimony of a

witness describing his observations of the reckless driving patterns of defendant's truck ten minutes before an accident occurred as the testimony was prejudicial under subsection (b) of this rule, the Supreme Court held that the alleged error in admitting the witnesses' testimony did not rise to the level of fundamental error. *State v. Johnson*, 126 Idaho 892, 894 P.2d 125 (1995).

Prosecutor could not mention, during opening statements, defendant's statements to his cousin because of the statement's implicit admission of prior misconduct that was inadmissible under Idaho R. Evid. 404(b); however, reversible error was not shown as testimony about defendant's statement was later presented at trial without objection, so it was impossible to attribute independent harm to the prosecutor's revelation of this testimony in her opening statement. *State v. Pickens*, 148 Idaho 554, 224 P.3d 1143 (2010).

"Opening the Door."

Where, in a narcotics prosecution defense counsel in questioning defendant's wife elicited whether the witness had ever known her husband to have possessed drugs in their home, while this inquiry may have implied that defendant possessed a character trait of temperance, the thrust of the question focused upon the witness' awareness of the presence of drugs in the residence she shared with her husband, and did not "open the door" regarding evidence of good character of the accused. *State v. Rupp*, 118 Idaho 17, 794 P.2d 287 (Ct. App. 1990).

This rule prohibits introduction of any evidence of a pertinent character trait unless it is offered by the accused, however, since such evidence had been introduced and admitted by the accused, the state was allowed to rebut that evidence. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

The state did not offer the testimony of defendant's prior bad acts. It was defendant, not the state, who presented evidence of defendant's wife's infidelity and her opinion that defendant had induced a miscarriage by striking her womb. Therefore, because defendant either offered the challenged testimony himself or opened the door for the state to do so, the admission of this evidence did not provide a basis to overturn defendant's convictions. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

Where defendant-appellant argued that testimony concerning evidence which was the subject of a motion in limine and which was excluded under this rule by the district court should not have been elicited by the plaintiff's attorney at trial, and further, that the plaintiff's attorney was guilty of misconduct, and

that these actions by plaintiff's attorney should justify a new trial, the Supreme Court opined that the defendant-appellant had opened the door by testifying, at trial about the matter which he sought to have excluded in his motion. *Spence v. Howell*, 126 Idaho 763, 890 P.2d 714 (1995).

Couple's testimony as to having seen defendant, convicted of felony injury to a child, disciplining child in a restaurant by squeezing his head until he cried, was properly admitted under this section because defense counsel had opened the door to the testimony by eliciting testimony from mother that father had not ever inappropriately disciplined the child. *State v. Gardiner*, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995).

Other Crimes, Wrongs, or Acts.

In a murder prosecution based largely upon circumstantial evidence involving defendant's alleged use of the same firearm in homicides in both Idaho and Arizona, the trial court did not abuse its discretion in allowing the testimony of witnesses concerning defendant's shooting of a police officer in Arizona, as without showing that the gun held by defendant was fired into the officer's body, the state could not link the bullets in the officer's body with the bullet in the Idaho victim's brain; the trial court demonstrated that it understood the necessary balancing test as it balanced the relevancy of the testimony against the prejudice to defendant and concluded that the probative value and necessity of the evidence outweighed the prejudice. *State v. Smith*, 117 Idaho 891, 792 P.2d 916 (1990).

The fact that the defendant's prior sex offenses occurred ten and twelve years before the charged sex offense did not make evidence of those prior wrongful acts irrelevant or unfairly prejudicial due to remoteness in time where the defendant was incarcerated nearly the entire period, and where, within one or two months after being released, he resumed the same *modus operandi* demonstrated in the earlier sex offenses. *State v. Martin*, 118 Idaho 334, 796 P.2d 1007 (1990).

While subsection (b) of this rule does not specifically authorize the introduction of bad acts or crimes other than the one for which defendant; being prosecuted to be used for impeachment purposes, neither does it prohibit such use. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Generally, subsection (b) of this rule forbids the introduction of other crimes, wrongs or acts if the purpose in doing so is to prove the character of the person in order to show that he acted in conformity therewith, however, such acts may be admissible if relevant to prove motive, opportunity, intent, prepara-

tion, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Where, in a murder prosecution, uncharged misconduct evidence was not remote in time since all of the incidents happened within hours or days of the murders of the victims, where the evidence was relevant and probative with regard to defendant's intent to rob and murder the victims where it showed a pattern, plan, motive, intent, and common scheme or plan to rob and harm unsuspecting persons, and where it was probative of defendant's identity, the trial court did not abuse its discretion by admitting evidence of the similar uncharged conduct. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Instruction informing the jury that defendant had no right to refuse to submit to a Blood Alcohol Concentration test was proper, despite defendant's contention that this language amounted to evidence of prior bad acts prohibited by subsection (b) of this rule and that it raised an inference that defendant was guilty of other offenses, thereby prejudicing him. *State v. Tate*, 122 Idaho 366, 834 P.2d 883 (Ct. App. 1992).

Where defendant was charged with violating § 18-1501 for injuring a child, the question of defendant's intent under § 18-1501 opened the door for introduction of evidence of prior bad acts, where such evidence was logically relevant to the crime charged, and where evidence from approximately nine years earlier was not too remote in time since defendant had been incarcerated during part of that time. *State v. Hassett*, 124 Idaho 357, 859 P.2d 955 (Ct. App. 1993).

In order to admit evidence of other acts, crimes, or wrongs, the trial court must initially determine whether the evidence is relevant to a material issue other than propensity. If the evidence is deemed relevant, then the court must, in the exercise of its discretion, determine whether the probative value of the evidence is substantially outweighed by the danger of causing unfair prejudice to the defendant. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

In cases where uncharged criminal acts of the defendant were in furtherance of an underlying plan to commit the charged crime,

those acts are admissible to show the accomplishment of the criminal goal. *State v. Blackstead*, 126 Idaho 14, 878 P.2d 188 (Ct. App. 1994).

Where all of the missing business and payroll checks were “part of the whole scheme” and where the four checks defendant was charged with forging “came within that framework”, evidence of the additional missing checks was relevant even though it potentially implicated defendant in the commission of other crimes not charged. *State v. Wallmuller*, 125 Idaho 196, 868 P.2d 524 (Ct. App. 1994).

In prosecution for driving under the influence of alcohol, admission of the defendant’s prior convictions, introduced late in the trial during the state’s case in chief, and which served no purpose other than to prove defendant’s prior bad acts, was error. *State v. Pilik*, 129 Idaho 50, 921 P.2d 750 (Ct. App. 1996).

Evidence of juvenile defendant’s misconduct at school was admissible solely for impeachment purposes, where it was relevant to credibility, there was no evidence that the judge considered the testimony for anything other than impeachment, and there was, thus, no danger of unfair prejudice. *State v. Doe (In re Doe)*, 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004).

Victim’s testimony that defendant tried to molest the victim’s younger brother was admissible to explain why the victim decided to tell his mother about the abuse that he had received, and went to the victim’s credibility; as limited by the court’s instructions; the testimony was not improperly introduced as evidence of the defendant’s character. *State v. Diggs*, 141 Idaho 303, 108 P.3d 1003 (Ct. App. 2005).

Statements by a defendant charged with sexual abuse of a child under 16, pursuant to § 18-1506(1)(b), regarding previous activities with the victim, may be admissible when they are relevant to the intent of the defendant’s actions as evidence that his touching was for sexual gratification rather than being accidental or innocent. *State v. Marsh*, 141 Idaho 862, 119 P.3d 637 (Ct. App. 2004).

For purposes of paragraph (b), some of defendant’s prior acts that were placed in evidence were unnerving and carried with them a potential for unfair prejudice; therefore, it was necessary for the trial court to evaluate whether the danger of unfair prejudice from that evidence substantially outweighed its probative value, for purposes of Idaho R. Evid. 403. *State v. Hoak*, 147 Idaho 919, 216 P.3d 1291 (2009).

Evidence of defendant’s prior misconduct toward the victim was highly probative to

show that defendant’s subsequent stalking behavior would have alarmed the victim and caused the victim substantial emotional distress, plus it was relevant to show that the stalking was done maliciously, the mens rea element of the stalking charge; the court could not say that the trial court’s decision to admit the evidence exceeded the boundaries of its discretion. *State v. Hoak*, 147 Idaho 919, 216 P.3d 1291 (2009).

In defendant’s trial on charges of lewd and lascivious conduct for molesting his daughter, evidence that defendant had molested his eight-year-old sister when he was 15 or 16 years old was inadmissible because the similarities were far too unremarkable to demonstrate a common scheme or plan in defendant’s behavior. *State v. Johnson*, 148 Idaho 664, 227 P.3d 918 (2010).

Plan.

A desire for money is not a unifying “plan” within the meaning of subsection (b) of this rule. *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988).

The trial court did not err in permitting evidence of prior uncharged sex acts between the defendant and each of the three victims because such testimony was indeed admissible to show a common scheme or plan; although such evidence was still subject to the limitations imposed by I.R.E. 403 which proscribes both the “needless presentation of cumulative evidence,” and evidence whose “probative value is substantially outweighed by the danger of unfair prejudice,” the trial court found that neither of these limitations was violated in the instant case. *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992).

The outer boundary of the admissibility of conduct offered to prove a plan is whether that plan is a fact of consequence to the determination of the action. The facts of consequence in this action were the elements of first-degree kidnapping and there is no plan element in a first-degree kidnapping. The existence of facts that support an inference that defendant had a plan to pick up young girls was irrelevant to any issue in dispute. Therefore, the court exceeded the bounds of its discretion when it chose to apply the legal standard of “common scheme or plan” to facts that were not relevant to any disputed issue. *State v. Medrano*, 123 Idaho 114, 844 P.2d 1364 (Ct. App. 1992).

Under Idaho R. Evid. 404(b), the trial court did not abuse its discretion in admitting evidence of a prior incident where defendant pointed a gun toward a door where a police officer stood because the incident was relevant to the existence of premeditation or plan, as both incidents involved an authority

that could take defendant into custody, who came to his residence after his failure to appear at pretrial conferences and after warrants were issued for his arrest. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

Pornographic Images.

Pornographic images and incest stories found on the defendant/father's computer were admissible in a trial on charges of lewd conduct with a minor under 16 years of age and sexual abuse of a child, involving his daughter, as they were relevant to, and corroborated, the victim's testimony that she was shown pornography prior to and during the sexual abuse and helped prove the intent element of the crime. *State v. Rossignol*, 147 Idaho 818, 215 P.3d 538 (2009).

Preservation for Appeal.

Defendant did not preserve the right to raise on appeal whether the trial court violated this section by admitting the testimony of the state's child abuse expert concerning the profile of an offender in an incestuous family to show that defendant fit this profile. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

Where appellant framed issue of applicability of permissible purposes enumerated under this rule as they applied to the admission of evidence in her brief, the issue was sufficiently preserved for review. *State v. McAbee*, 130 Idaho 517, 943 P.2d 1237 (Ct. App. 1997).

Prior Acts.

Where defendant's prior bad acts of stalking and harassing his girlfriend were not similar to the aggravated assaults committed against police officers, the admission of the acts was erroneous but harmless. *State v. Alसानea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003).

Trial court did not err in admitting evidence of defendant's argument with the victim three days before the murder, and his arrest due to trespassing on her property, as the evidence was clearly relevant to demonstrate that he had a motive to shoot the victim where she had rejected him and had precipitated his arrest. The evidence also provided the jury a more complete picture of the hostility that existed between defendant and the victim. *State v. Cherry*, 139 Idaho 579, 83 P.3d 123 (Ct. App. 2003).

Under Idaho R. Evid. 404(b), the trial court did not abuse its discretion in admitting evidence that defendant removed plastic bags placed on his hands by law enforcement because it was relevant as an inference could be drawn from the incident that defendant was trying to destroy evidence, and the probative

value was not outweighed by the danger of unfair prejudice. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

Where defendant was tried for a series of burglaries, the court did not err by admitting the testimony of a victim who saw defendant at her home on the day of the burglaries; the evidence was relevant because it showed that defendant was in the vicinity of the burglaries on the date they occurred. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

Court erred, during a trial for trafficking in methamphetamine, in allowing a confidential informant to testify that the informant had previously purchased methamphetamine from defendant, because it was highly doubtful that the evidence was relevant to any substantive facts of the case other than propensity: the evidence was highly prejudicial and of low probative value. *State v. Naranjo*, — Idaho —, 267 P.3d 721 (2011).

Reversible Error.

Trial court committed reversible error by admitting rebuttal evidence concerning defendant's reputation since, under the circumstances of this case, defendant did not "open the door" with regard to evidence of good character, and where, because the case turned largely on the jury's assessment of witness' testimony and the amount of credibility the jury gave those witnesses, including the rebuttal witness testimony regarding defendant's reputation, it could not be held beyond a reasonable doubt, that the jury would have found defendant guilty without the reputation testimony given by the rebuttal witness. *State v. Rupp*, 118 Idaho 17, 794 P.2d 287 (Ct. App. 1990).

Admission of testimony by victim's mother, in a felony injury to child prosecution, about defendant's alleged attempt to choke mother or about defendant's temper, was in error where the only logical relevance of this evidence was to show defendant's propensity for violence—the very purpose for which use of other misconduct evidence is prohibited by this rule. *State v. Wood*, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

In defendant's rape and drug case, the court erred by admitting evidence that defendant had supplied two minors methamphetamine, more than one year prior to the incidents he was actually charged with, because there was no evidence "linking" the alleged delivery of the drugs to the instant charges. Given the nearly one year lapse, there was no logical manner in which defendant's providing drugs to the girls was in furtherance of or a precursor to the crimes for which he was charged; rather, it was a distinct and "self-contained"

incident. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007).

State's failure to provide notice of its intent to present other acts evidence was reversible error, as defendant suffered substantial prejudice due to its admission. Defendant's statements regarding past dealings in methamphetamine did not prove he knew of the methamphetamine in the vehicle the night of his arrest. *State v. Sheldon*, 145 Idaho 225, 178 P.3d 28 (2008).

Review.

When considering a trial court's admission of evidence of prior misconduct, the appellate court will exercise free review of the trial judge's admissibility determination under this section. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993), cert. denied, 511 U.S. 1076, 114 S. Ct. 1659, 128 L. Ed. 2d 376 (1994).

Rule Inapplicable to Evidence of Habit.

In a medical malpractice action, defendant doctor's referral patterns and referral of other patients to other doctors were not evidence of the doctor's character; they were evidence of his habit of making referrals. *Hake v. DeLane*, 117 Idaho 1058, 793 P.2d 1230 (1990).

In a medical malpractice action, the trial court should not have excluded, pursuant to subsection (a) of this rule, evidence concerning defendant's habit of referring patients to other doctors, but under the circumstances of this case the exclusion of this evidence was harmless error. *Hake v. DeLane*, 117 Idaho 1058, 793 P.2d 1230 (1990).

Standard of Review.

When reviewing a trial court's admission of evidence under this rule, the appellate court exercises free review of the admissibility determination. *State v. Byington*, 132 Idaho 597, 977 P.2d 211 (Ct. App. 1998), *aff'd*, 132 Idaho 589, 977 P.2d 203 (1999).

Subsequent Conduct.

Where defendant argued that the trial court erred by admitting testimony as to an incident which apparently occurred subsequent to the incidents charged in the information, the Idaho Supreme Court rejected the notion that evidence of subsequent misconduct is *per se* inadmissible. *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992).

Two-Tiered Analysis.

The decision to admit evidence of other crimes involves a two-tiered analysis. First, as with all evidence, the proof must be relevant to a material issue concerning the crime charged. Second, and only if the evidence is

deemed relevant, it must be determined whether the probative value of the evidence is outweighed by unfair prejudice to the defendant. This balancing is left to the discretion of the trial judge and will be disturbed only if his discretion is abused. *State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985).

Proof of good acts, like bad acts, should be admitted if it is relevant to a material issue; however, the trial judge may exclude the evidence if its probative value is substantially outweighed by such dangers as confusing the issues or misleading the jury. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

The decision to admit or exclude evidence of other crimes involves a two-tiered analysis. First, the evidence must be relevant to a material and disputed issue concerning the crime charged. Second, and only if the evidence is deemed relevant, it must be determined whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant. *State v. Winkler*, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987).

Whether evidence of other bad acts or crimes may be admitted ultimately depends on whether a two-tiered test has been met: first, the evidence must be relevant to a material issue concerning the crime charged; second, the probative value of the evidence must outweigh its prejudicial effect. This balancing process is left to the sound discretion of the trial judge and will not be disturbed on appeal, unless that discretion has been abused. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Applying the two-tiered analysis, where defendant's intent to sexually abuse his adopted daughter was at issue, evidence of contemporaneous sexual abuse of another minor female relative in his home was relevant to show that defendant had the requisite intent at the time of the incident involving his adopted daughter, and the probative value of the evidence outweighed the danger of unfair prejudice because of the similarities in time, place, opportunity and age of the victims in the two incidents. *State v. Marks*, 120 Idaho 727, 819 P.2d 581 (Ct. App. 1991).

The trial court did not abuse its discretion in denying defendant's motion in limine to suppress evidence of alleged prior uncharged sexual misconduct, where, applying the two-tiered analysis of this rule used to determine admissibility of evidence concerning other crimes, the evidence was (a) relevant to: demonstrating a common criminal plan, showing defendant's motives or lustful disposition, indicating specific intent, and was relevant to

the issue of credibility and corroboration of the victim's testimony, and (b) evidence was not too remote in time to be probative or relevant, despite gaps of 11 and three years prior to the present charged offense, because the opportunity for defendant to enact his plan or scheme of sexual abuse allegedly occurred only when there was a minor female present in his household and she reached the appropriate age for defendant's design. *State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (Ct. App. 1991).

A two-tiered analysis is used to determine the admissibility of evidence concerning other crimes, wrongs, or acts; first the trial court must determine if the evidence is relevant and second, if the trial court finds that the evidence is relevant, it must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Cochran*, 129 Idaho 944, 935 P.2d 207 (Ct. App. 1997).

A two-tiered analysis is used to determine the admissibility of evidence concerning other crimes, wrongs or acts; the trial court must determine that the evidence is relevant and if the trial court finds that the evidence is relevant it must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

The trial court must determine whether the evidence is relevant for a purpose other than that prohibited by Idaho R. Evid. 404(b), and if so, the court must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Dixon*, 140 Idaho 301, 92 P.3d 551 (Ct. App. 2004).

Uncharged Conduct.

To determine whether evidence of a defendant's uncharged misconduct should be admitted, the court must determine whether the evidence is relevant to a material and disputed issue concerning the crime charged. *State v. Cardell*, 132 Idaho 217, 970 P.2d 10 (1998).

Testimony of defendant's daughter that 23-years earlier defendant had been a willing and vigorous participant in sexual assaults on her daughter, in concert with defendant's husband, had substantial probative value addressing the issue of whether defendant knowingly and intentionally committed the

charged offense against her grandson. *State v. Law*, 136 Idaho 721, 39 P.3d 661 (Ct. App. 2002).

State supreme court clarified that the Idaho Rules of Evidence require that trial courts treat the admission of evidence of uncharged misconduct in child sex crimes no differently than the admission of such evidence in other cases. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009).

Evidence of uncharged misconduct may not be admitted pursuant to Idaho R. Evid. 404(b) when its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009).

Evidence of uncharged offenses that is offered for the purpose of corroboration must actually serve that purpose; courts must not permit the introduction of impermissible propensity evidence merely by relabeling it as corroborative or as evidence of a common scheme or plan. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009).

Uniqueness.

Evidence of prior misconduct is admissible if it establishes a distinct, though not completely unique, method or pattern of behavior. *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997), cert. denied, 523 U.S. 1126, 118 S. Ct. 1813, 140 L. Ed. 2d 951 (1998).

Cited in: *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985); *State v. Palmer*, 110 Idaho 142, 715 P.2d 355 (Ct. App. 1985); *State v. Simonson*, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987); *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988); *State v. Smith*, 117 Idaho 225, 786 P.2d 1127 (1990); *State v. Peters*, 119 Idaho 382, 807 P.2d 61 (1991); *State v. Velasquez-Delacruz*, 125 Idaho 320, 870 P.2d 673 (Ct. App. 1994); *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994); *Reynolds v. State*, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994); *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996); *State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996); *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996); *State v. Welker*, 129 Idaho 805, 932 P.2d 928 (Ct. App. 1997); *State v. Muraco*, 132 Idaho 130, 968 P.2d 225 (1998); *State v. Eytchison*, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001); *State v. Siegel*, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002); *State v. Payne*, 146 Idaho 548, 199 P.3d 123 (2008).

RESEARCH REFERENCES

A.L.R. Admissibility, in rape case, of evidence that accused raped, or attempted to

rape, person other than prosecutrix, — prior offenses. 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape, person other than prosecutrix — subsequent acts. 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person

other than prosecutrix — offenses unspecified as to time. 88 A.L.R.5th 429.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of the Federal Rules of Evidence, in civil cases. 171 A.L.R. Fed. 483.

Rule 405. Methods of proving character.

(a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Character of Victim.

Proof of Good Character.

Two-Tiered Analysis.

Victim's Reputation.

Character of Victim.

Proof of a pertinent trait of character may be made by testimony as to the person's reputation or by testimony in the form of an opinion. *State v. Hernandez*, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

Proof of Good Character.

Before the adoption of the Idaho Rules of Evidence, which were not yet in effect when this action was tried, proof of good character was limited to the defendant's reputation in the community. The new rules permit a defendant to prove good character either by reputation or by opinion testimony; however, proof of good character through specific instances of good conduct is generally impermissible under both the rules and general case law. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

Rule 406. Habit; routine practice.

Evidence of a habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. (Adopted January 8, 1985, effective July 1, 1985.)

Two-Tiered Analysis.

Proof of good acts, like bad acts, should be admitted if it is relevant to a material issue; however, the trial judge may exclude the evidence if its probative value is substantially outweighed by such dangers as confusing the issues or misleading the jury. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

Victim's Reputation.

Where a victim's prior conviction was ruled inadmissible, the defendant was nevertheless permitted to testify, without mentioning any specific acts, about his knowledge of the victim's reputation for being quarrelsome, violent and dangerous, the jury being instructed that this reputation evidence could be used to determine the reasonableness of the defendant's beliefs under the circumstances then apparent to him. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Cited in: *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

JUDICIAL DECISIONS

ANALYSIS

Distinguished from Character Evidence.

Evidence Held Admissible.

Evidence of Habit Excluded.

Insufficient Evidence of Habit.

Distinguished from Character Evidence.

In a medical malpractice action defendant doctor's referral patterns and referral of other patients to other doctors were not evidence of the doctor's character; they were evidence of his habit of making referrals. *Hake v. DeLane*, 117 Idaho 1058, 793 P.2d 1230 (1990).

Evidence Held Admissible.

In a prosecution for rape and kidnapping, trial court did not err in denying defendant's objection to testimony by the victim's sister that victim would not have left her children home alone from midnight to 4:00 a.m., as the testimony could reasonably have been perceived as pertaining to victim's habits in making arrangements for her children when she left them at night rather than with her general character trait for being a good mother. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989).

Evidence of Habit Excluded.

Where, in a medical malpractice action,

defendant doctor was allowed to testify as to his referrals of plaintiff to other doctors, and where the medical charts of the doctor concerning his treatment of plaintiff that were admitted in evidence indicated that the doctor had suggested consultations with others, including a neurological consultation, if the patient would agree, in light of this evidence the exclusion of evidence of defendant's habit of referring patients to other doctors was not inconsistent with substantial justice and did not affect the substantial rights of the doctor; accordingly, such an exclusion did not warrant a new trial. *Hake v. DeLane*, 117 Idaho 1058, 793 P.2d 1230 (1990).

Insufficient Evidence of Habit.

Evidence of other acts was inadmissible under I.R.E., Rule 404 to prove that informant acted in conformity with a character trait of being an overreaching government informant who would coerce innocent people into dealing in drugs and was not a sufficient indication of the existence of a habit to permit admission of the evidence under this rule. *State v. Rodriguez*, 118 Idaho 948, 801 P.2d 1299 (Ct. App. 1990).

Cited in: *Idaho First Nat'l Bank v. David Steed & Assocs., Inc.*, 121 Idaho 356, 825 P.2d 79 (1992); *Gillingham Constr., Inc. v. Newby-Wiggins Constr., Inc.*, 136 Idaho 887, 42 P.3d 680 (2002).

Rule 407. Subsequent remedial measures.

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct, or a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. (Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.

Impeachment Purposes.

Probative Value.

Discretion of Court.

The question of whether or not to admit or

exclude evidence of subsequent remedial measures taken by a third party is a matter of the trial court's discretion and will not be overturned on appeal absent clear abuse of that discretion. A new trial is merited only if an error in excluding evidence affects a substantial right of one of the parties. *Jones v.*

Crawforth, 147 Idaho 11, 205 P.3d 660 (2009).

Impeachment Purposes.

Where the trial court admitted exhibit for impeachment purposes only, and recognizing exhibit as a document that might be interpreted as a “remedial measure,” gave a proper limiting instruction instructing the jury to consider the evidence for impeachment purposes only, there was no error. *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 846 P.2d 207 (1993).

Probative Value.

If it appears that a party is seeking the introduction of evidence of subsequent remedial measures to imply culpability under the guise of impeachment or any other purpose,

the trial court should disallow the evidence; however, the trial court is in the best position to assess the prejudicial effect of the evidence; if the trial court is satisfied that the evidence has substantial probative value on the issue on which it is introduced and that the issue is genuinely in dispute it should be allowed and a limiting instruction can aid the jury, but if the trial court concludes that factors of undue prejudice, confusion of issues, misleading the jury or a waste of time outweigh the probative value of the evidence it should properly be excluded. *Watson v. Navistar Int’l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Cited in: *Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 788 P.2d 1293 (1990).

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass mediation. (Adopted January 8, 1985, effective July 1, 1985; amended March 23, 1990, effective July 1, 1990.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.

— Admissible.

—Factors Considered.

—Inadmissible.

— —Inadmissible.

Harmless Error.

Prior Inconsistent Statements.

Discretion of Court.

In cases where there is an agreement between a plaintiff and one of the defendants relating to trial procedures, which does not include a guarantee to the plaintiff of a minimum sum, or create an incentive on the agreeing defendant’s part to increase plaintiff’s damage award, the decision whether such an agreement will or will not be disclosed is committed to the broad discretion of

the trial court; the trial court shall make this determination in accordance with the rules governing the admissibility of evidence involving compromises, offers to compromise, and relevancy. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

Trial judges have broad discretion in determining the admissibility of evidence relating to compromises or offers to compromise and their decision will not be overturned absent a clear showing of abuse. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

— Admissible.

This rule does not require exclusion of evidence relating to compromises or offers to compromise if the evidence being introduced is used to show witness bias or prejudice. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

A trial judge may admit statements contained in settlement negotiations to be used to impeach contrary testimony given at trial, only after deciding their probative value outweighs the resulting prejudicial effect. *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987).

Where construction partner was to sell partnership property, but rescinded approval of sale and had to pay real estate broker who had negotiated the sale, evidence of the amount of an actual settlement with real estate broker was admissible to show the amount of out-of-pocket damages suffered by investment partners. *Jensen v. Westberg*, 115 Idaho 1021, 772 P.2d 228 (Ct. App. 1988).

The trial court did not abuse its discretion in admitting evidence of a settlement agreement where it carefully limited the use of the agreement, where the defendant was invited to submit a jury instruction stating that the settlement could be considered for bias and not for liability, and where such an instruction was given. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

—Factors Considered.

This rule by its terms does not operate to exclude evidence of compromise and offers of compromise unless it is offered to prove liability or invalidity of claim, and whether to admit evidence for another purpose is within the discretion of the trial court; whether the evidence is admissible shall be determined by rules concerning relevancy and possible outweighing prejudice. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

—Inadmissible.

Statement in letter that “a similar offer” had been “refused” should not have been admitted, where the letter did not rise to the level of strongly suggesting perjury, and the risk of unfair prejudice was insubstantial and manifest. *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986), modified on

other grounds, *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987).

—Inadmissible.

From a general partner’s attempt to disassociate from an LLP, the district court erred by admitting a settlement letter into evidence under this rule where it was offered to prove liability for, or the amount of the LLP’s wrongful dissociation claim against the partner. *St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 148 Idaho 479, 224 P.3d 1068 (2009).

Harmless Error.

Even if the trial court did err in refusing to disclose contents of the agreement between the plaintiff and certain defendants to the jury, there was no prejudice resulting from the district court’s decision which would warrant reversal. *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

Prior Inconsistent Statements.

Prior inconsistent statements made during settlement negotiations may be used for the purpose of impeachment, but only if they strongly suggest that a witness is perjuring himself at trial or if any unfair prejudice is likely to be insubstantial. *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986), modified on other ground, *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987).

Where statement in settlement letter, indicating that the defendant’s offer of a tractor to the plaintiff had previously been rejected, was contrary to the defendant’s trial testimony, that the plaintiff had accepted the tractor in full satisfaction of the debt, the probative value of the statement in the settlement letter was great in that it tended to show the defendant’s testimony was unreliable. *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987).

Cited in: *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387 (1992).

Rule 409. Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, funeral, or similar expenses occasioned by an injury or death, or damage to or loss of property of another, is not admissible to prove liability for the injury, death or damage. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

(a) **Inadmissibility.** Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against

the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
 - (2) a plea of nolo contendere;
 - (3) any statement made in the course of any proceedings under Rule 11 of the Idaho Rules of Criminal Procedure or comparable Federal or state procedure regarding either of the foregoing pleas; or
 - (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
- (b) **Exceptions.** Notwithstanding the foregoing, such a statement is admissible:

- (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or
- (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel; or
- (3) under subsection (a)(3) above, in the same criminal action or proceeding for impeachment purposes. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Nolo Contendere Plea
Payment of Traffic Citation.

Nolo Contendere Plea

Magistrate properly refused to accept defendant's nolo contendere plea to a charge of vehicular manslaughter because such pleas are no longer accepted in Idaho. State v. Salisbury, 143 Idaho 476, 147 P.3d 108 (Ct. App. 2006).

Payment of Traffic Citation.

When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. Kuhn v. Proctor, 141 Idaho 459, 111 P.3d 144 (2005).

Cited in: State v. Simonson, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987).

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Evidence Not Admissible.
Harmless Error.
Purpose.

Voir Dire.

Evidence Not Admissible.

The trial judge properly excluded testimony that the defendants had a careless attitude

because they were insured. *Evans v. Park*, 112 Idaho 400, 732 P.2d 369 (Ct. App. 1987).

Trial court did not err in granting a motion in limine where an injured employee was unable to show that a dairy owner's statements that the employee would receive a big check from the dairy's insurer constituted an admission of liability; thus, the proffered statements were not rendered inadmissible by this rule as evidence of liability insurance but were inadmissible under an Idaho R. Evid. 402 relevance assessment or an Idaho R. Evid. 403 balancing test. *Loza v. Arroyo Dairy*, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002).

Harmless Error.

Although a comment in closing argument by the defense attorney that a verdict would ruin the defendant intimated that the defendant had no insurance and thus violated this rule, because the jury was instructed not to consider insurance and was instructed by the court that counsel's comment's are not evidence, the violation did not warrant a new trial. *Leavitt v. Swain*, 131 Idaho 765, 963 P.2d 1202 (Ct. App. 1998).

Where the trial court both instructed the jury prior to trial, and admonished it to disregard testimony regarding insurance imme-

diately after such testimony was presented, no prejudicial error was committed, and the refusal to grant a motion for mistrial was not abuse of discretion. *Inama v. Brewer*, 132 Idaho 377, 973 P.2d 148 (1999).

Purpose.

The purpose of this rule is to assure that jurors reach their conclusions on liability based solely upon the facts at issue and upon the merits of the case, rather than upon passion or prejudice which may arise from unwarranted consideration of insurance coverage. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

Voir Dire.

A party may properly make a good faith inquiry into issues on voir dire such as whether potential jurors have had media exposure to commercials on the "medical malpractice crisis" issues, subject to appropriate limitations imposed by the trial court, and upon a proper showing that members of the prospective jury panel may have been exposed to media accounts concerning allegations about the effect of jury awards on insurance costs. *Kozlowski v. Rush*, 121 Idaho 825, 828 P.2d 854 (1992).

Cited in: *Bramwell v. S. Rigby Canal Co.*, 136 Idaho 648, 39 P.3d 588 (2001).

Rule 412. Sex crime cases; relevance of victim's past behavior.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sex crime, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sex crime is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sex crime, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the sex crime is alleged; or

(C) false allegations of sex crimes made at an earlier time; or

(D) sexual behavior with parties other than the accused which occurred at the time of the event giving rise to the sex crime charged.

(c)

(1) If the person accused of committing a sex crime intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than five days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the sex crime is alleged.

(e) For purposes of this rule, the term "sex crime" means —

(1) rape, the infamous crime against nature, forcible penetration with a foreign object; sexual abuse of a child under age sixteen years, sexual exploitation of a child, lewd conduct with a minor child under sixteen, or sexual battery of a minor child sixteen or seventeen years of age;

(2) any other crime under the law of the state of Idaho that involved: contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; or contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(3) assault with intent to commit any of the crimes included in subsections (1) and (2);

(4) battery with intent to commit any of the crimes included in subsections (1) and (2);

(5) kidnaping for the purpose of committing any of the crimes included in subsections (1) and (2); or

(6) any attempt or conspiracy to commit any of the crimes included in subsections (1) and (2). (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended February 26, 1997, effective July 1, 1997.)

JUDICIAL DECISIONS

ANALYSIS

Alleged Lies of Victim.

Ineffective Assistance of Counsel.

Past Behavior.

Prosecutor's Remarks.

Recantations.

Sex Crime.

Alleged Lies of Victim.

In child sexual abuse prosecution, trial court was within its discretion to deny defendant's request to present evidence that one of his minor victims had lied when she initially reported to her foster mother that defendant refused to stop. The evidence was not relevant either to rebut the foster mother's statement that the victims had never lied to her about a matter of significance, or to impeach the victims, and any marginal probative value of that evidence was substantially outweighed by the danger of confusing or misleading the jury with extraneous issues and wasting trial time. *State v. Perry*, 144 Idaho 665, 168 P.3d 49 (Ct. App. 2007).

Ineffective Assistance of Counsel.

Inmate's claim that his counsel had been ineffective due to trial court's exclusion of evidence his counsel had failed to disclose was without merit. The testimony about the two victims engaging in sexual acts with one another would have been just as likely to corroborate the boys' claims of abuse as it would have been to exonerate the inmate. *Curless v. State*, 146 Idaho 95, 190 P.3d 914 (2008).

Past Behavior.

The evidence of complaining witness' sexual advances, over a period of several years, toward some of the men she had met in a bar was not relevant, in itself, to establish that she consented to have sex with defendant. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

District court properly excluded evidence of a rape victim's sexual contact with someone other than defendant, as the evidence did not establish that someone else was responsible for semen that matched defendant's genetic

markers and that was found on the victim's quilt. *State v. Self*, 139 Idaho 718, 85 P.3d 1117 (Ct. App. 2003).

Prosecutor's Remarks.

In trial where defendant was convicted of lewd conduct, the prosecutor's statement, in closing argument, that defendant murdered the victim's innocence was beyond the permissible bounds of proper argument. *State v. Reynolds*, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991).

It was not improper for prosecutor to say in opening remarks that the jurors would get to judge the victim for themselves to see what kind of a 13-year old girl she was, as this was a request that the jurors disregard any generalized biases or prejudices that they may hold concerning young teen-aged girls and that they judge the victim as presented. *State v. Reynolds*, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991).

Recantations.

In defendant's trial for lewd and lascivious conduct with defendant's minor child, where defendant was allowed to present testimony that the child was not a truthful person, and instances of the child's alleged recantations of prior accusations of sexual abuse occurred several years earlier, evidence of the alleged recantations was properly excluded to avoid a mini-trial of the child's prior allegations. *State v. Harshbarger*, 139 Idaho 287, 77 P.3d 976 (Ct. App. 2003).

Sex Crime.

Where defendant's daughters accused him of having sexual contact with them, the trial court did not err in precluding the defense from impeaching one of the girls about a shower spraying incident between the two sisters in which the girl exaggerated or lied about what specifically occurred during the incident because the incident did not constitute a sex crime under this rule and because any minimal probative value of the evidence was substantially outweighed by the danger of jury confusion and the waste of trial time. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

Cited in: State v. MacDonald, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998).

RESEARCH REFERENCES

A.L.R. Admissibility in sex offense case, of evidence of victim's past sexual behavior. under Rule 412 of Federal Rules of Evidence, 166 A.L.R. Fed. 639.

Rule 413. Proceedings of medical malpractice screening panels.

Evidence of the proceedings or of conduct or statements made in proceedings before a hearing panel for prelitigation consideration of medical malpractice claims, or the results, findings or determinations thereof is inadmissible in a civil action or proceeding by, against or between the parties thereto or any witness therein. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 414. Inadmissibility of expressions of condolence or sympathy.

(1) In any civil action brought by or on behalf of a patient who experiences an unanticipated outcome of medical care, or in any arbitration proceeding related to, or in lieu of, such civil action, all statements and affirmations, whether in writing or oral, and all gestures or conduct expressing sympathy, commiseration, condolence, or compassion, made by a health care professional or an employee of a health care professional to a patient or family member or friend of a patient, which relate to the care provided to the patient, or which relate to the discomfort, pain, suffering, injury, or death of the patient as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or on the issue of damages.

(2) Notwithstanding subsection (1) of this rule, a statement of fault which is otherwise admissible and is part of or in addition to a statement identified in subsection (1) shall be admissible.

(3) For purposes of this rule:

(a) "Health care professional" means any person licensed, certified, or registered by the state of Idaho to deliver health care and any clinic, hospital, nursing home, ambulatory surgical center or other place in which health care is provided. The term also includes any professional corporation or other professional entity comprised of such health care professionals as permitted by the laws of Idaho.

(b) "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected, hoped for or desired result. (Adopted March 21, 2007, effective July 1, 2007).

ARTICLE V. PRIVILEGES.

Rule 501. Privileges recognized only as provided.

Except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 502. Lawyer-client privilege.

(a) **Definitions.** As used in this rule:

(1) **Client.** A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) **Representative of the client.** A "representative of the client" is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.

(3) **Lawyer.** A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) **Representative of the lawyer.** A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal service.

(5) **Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of

the client, or (5) among lawyers and their representatives representing the same client.*

(c) **Who may claim the privilege.** The privilege may be claimed by the client or for the client through the client's lawyer, the guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the lawyer or lawyer's representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Furtherance of crime or fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **Claimants through same deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) **Breach of duty by a lawyer or client.** As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer;

(4) **Document attested by a lawyer.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) **Joint clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

(6) **Shareholder actions.** As to a communication between a corporation and its lawyer or a representative of the lawyer, which was not made for the purpose of facilitating the rendition of professional legal services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against

*Comment: IRE 502(b)(3) is intended to provide that when clients who share a common interest in a legal matter are represented by different lawyers they can communicate with each other in an effort to develop a joint strategy or otherwise advance their interests, and their communications in that endeavor will be privileged; that each client involved has a privilege for all such communications; and that this privilege will survive a later falling-out among the parties. The privilege does not, however, extend to communications solely between the clients or their representatives when no lawyer is present. The rationale for this privilege was stated in *In Re: Grand Jury Subpoenas*, 902 F.2d 244, 249, 28 A.L.R.5th 775 (4th Cir. 1990): "[P]ersons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." The original IRE 502(b)(3) was amended to expand the scope of the privilege to include all communications among clients, their representatives, their lawyers, and their lawyer's representatives when engaged in discussion of common legal concerns.

the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action by a shareholder on behalf of the corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of this exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure. (Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

ANALYSIS

Application of Privilege.
Confidentiality.

Application of Privilege.

In order for the attorney-client privilege to apply, two findings are requisite: (1) the communication must be confidential within the meaning of the rule, and (2) the communication must be made between persons described in the rule for the purpose of facilitating the rendition of professional legal services to the client. *State v. Allen*, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993), overruled on other grounds, *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

Documents that fell into the category of confidential communications made for the purpose of facilitating professional legal services to the client were properly held to be privileged documents and not subject to discovery. *Star Phoenix Mining Co. v. Hecla*

Mining Co., 130 Idaho 223, 939 P.2d 542 (1997).

In a product liability case, a trial court did not compel the production of suspension orders regarding the preservation of test data since they were not subject to discovery because they were protected by the attorney-client privilege; the communications were confidential and were made for the purpose of rendering professional legal advice. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 116 P.3d 27 (2005).

Confidentiality.

Letter to attorney from seller of business regarding relationship with former client was not a "confidential communication" within the meaning of this rule where the letter was kept in a file which was turned over to buyers of business as part of business' assets; seller did not act in a manner indicating letter was confidential where he failed to remove the letter prior to sale of business. *Farr v. Mischler*, 129 Idaho 201, 923 P.2d 446 (1996).

RESEARCH REFERENCES

A.L.R. Application of Attorney-Client Privilege to Electronic Documents. 26 A.L.R.6th 287.

Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege. 47 A.L.R.6th 255.

Applicability of attorney-client privilege to communications made in presence of or solely to or by other attorneys, coparties, and their staff. 47 A.L.R.6th 255.

Rule 503. Physician and psychotherapist-patient privilege.

(a) **Definitions.** As used in this rule:

(1) **Patient.** A "patient" is the person who consults or is examined or interviewed by a physician or psychotherapist for the purpose of obtaining diagnosis or treatment of a physical, mental or emotional condition, including alcohol or drug addiction.

(2) **Physician.** A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) **Psychotherapist.** A “psychotherapist” is (A) a physician while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) **Confidential communication.** A communication is “confidential” if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient’s family.

(b) **General rules of privilege.**

(1) **Civil action.** A patient has a privilege in a civil action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient’s physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient’s physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient’s family.

(2) **Criminal action.** A patient has a privilege in a criminal action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition, including alcohol or drug addiction, among the patient, the patient’s psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient’s family.

(c) **Who may claim the privilege.** The privilege may be claimed by the patient or for the patient through the patient’s lawyer, guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication may claim the privilege but only on behalf of the patient. The authority of the physician or psychotherapist to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.**

(1) **Proceedings for guardianship, conservatorship or hospitalization.** There is no privilege under this rule for communications relevant to an issue in proceedings for the appointment of a guardian or conservator for a patient for mental illness or to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) **Examination by order of court.** If the court orders an examination of the physical, mental or emotional condition of a patient, whether a

party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) **Condition an element of claim or defense.** There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

(4) **Child related communications.** There is no privilege under this rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Application.
Child Related Communications
Repeal of Insanity Defense.
Testimony Improper.
Waiver.

Application.

This rule does not apply to communications by a psychotherapist that have become part of the court records in a juvenile proceeding; the privilege or confidentiality of these records is governed by the provisions of former I.C. § 16-1816 (now § 20-525). *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

Any physical injury is likely to have a mental component in the form of pain suffered by an injured person, and to allow a defendant to claim that statements he made during medical treatment for physical injuries are privileged would defeat the plain language of paragraph (b)(2) of this rule. *State v. Langford*, 136 Idaho 334, 33 P.3d 567 (Ct. App. 2001).

Victim's statement to a doctor that defendant caused the injuries was not barred by doctor-patient privilege, in defendant's domestic battery case, where the statement was not related to the victim's treatment. *State v. Hoover*, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003).

Defendant's Fifth Amendment rights were not violated when he was ordered to undergo an examination by a state expert in an attempted murder case, because defendant had indicated an intent to introduce psychiatric

evidence in his defense; moreover, Idaho R. Evid. 503 was not violated either since the communications were not confidential and his defense was based on a mental condition. *State v. Santistevan*, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006).

Defendant's Fifth Amendment rights were not violated when he was ordered to undergo an examination by a State expert in an attempted murder case because defendant had indicated an intent to introduce psychiatric evidence in his defense; moreover, Idaho R. Evid. 503 was not violated either since the communications were not confidential and his defense was based on a mental condition. *State v. Santistevan*, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006).

Child Related Communications

Where a father is accused of child molestation and the child is in therapy, presumably to deal with the emotional aftermath of the alleged molestation, the accused parent should not be entitled to access to the communications made by the child to the therapist. *State v. Rossignol*, 147 Idaho 818, 215 P.3d 538 (2009).

Repeal of Insanity Defense.

In the wake of Idaho's repeal of the insanity defense, mental defect is no longer an assertable defense and thus, this rule, and pre-repeal case law recognizing the State's right to compel a psychological evaluation of a defendant who pleads the defense of insanity, no longer apply. *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

Testimony Improper.

The trial court improperly required defendant's personal psychiatrist to testify at the sentencing hearing, invading privileged communications with the defendant. *State v. Wilkins*, 125 Idaho 215, 868 P.2d 1231 (1994).

Waiver.

Where it appears from the trial record that the defendant gave his counselor permission to discuss his therapy and progress with the state's presentence investigator and where

the record shows that at no time during the trial did defendant object to the counselor's testimony or assert his psychotherapist-patient privilege, his privilege is considered waived, and defendant is estopped from asserting on appeal that the trial court erred in the admission of this evidence. *State v. Gallipeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994).

Cited in: *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998).

Rule 504. Husband-wife privilege.

(a) **Definition.** A communication is "confidential" if it is made during marriage privately by any person to the person's spouse, and is not intended for disclosure to any other person.

(b) **General rule of privilege.** A person has a privilege to prevent testimony as to any confidential communication between the person and his or her spouse made during the marriage.

(c) **Who may claim the privilege.** The privilege may be claimed by the person or by the spouse on behalf of the person, or by the lawyer for the person on behalf of the person. The authority of the spouse or the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(2) **Criminal action.** In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a person residing in the household of either spouse, or (C) a third person committed in the course of committing a crime against the other spouse or a person residing in the household of either spouse.

(3) **Special proceeding.** In proceedings (A) under the Reciprocal Enforcement of Support Act, or (B) concerning desertion or non-support of a spouse.

(4) **Civil action.** In a civil action or proceeding by one spouse against the other involving the person or property of the other.

(5) **Proceedings for guardianship, conservatorship or hospitalization.** There is no privilege under this rule for communications relevant to an issue in proceedings for the appointment of a guardian or conservator for a person for mental illness or to hospitalize the person for mental illness. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 18, 1998, effective July 1, 1998.)

JUDICIAL DECISIONS

ANALYSIS

Harmless Error.

Letter from Defendant to Spouse.

Meaningful Glance.

Scope of Privilege.

Surveillance of Property.

Harmless Error.

Although the district court erred when it admitted testimony by a defendant's wife about a conversation in which he told her that he had been contacted by the police and had agreed to an interview with an officer, the error was harmless as numerous other witnesses, including the defendant himself, testified that he had been contacted by the police and that an interview had been scheduled. *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998).

Letter from Defendant to Spouse.

Subsection (b) of this rule only addresses compelled testimony from a spouse with regard to a privileged communication; hence, no marital privilege was applicable to the prosecution's use of a letter from defendant to his wife where the letter was confiscated while defendant was in jail awaiting trial, and where defendant denied that the document was a letter to his wife and further denied any intent to deliver it to his wife. *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989), cert.

denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989).

Meaningful Glance.

"Meaningful glance" that passed between defendant and his wife at the viewing of a news story on the murder, although communicative, occurred in the presence of wife's parents and was therefore far from confidential. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

Scope of Privilege.

Where defendant asserted that his motion to suppress evidence found in the search of his residence was meritorious in that the search warrant was based upon confidential communications between defendant and his wife which were subject to the marital privilege under this rule, the Court of Appeal held that this rule is an evidentiary rule that governs only testimony given by one spouse against the other in an action or proceeding and it does not preclude one spouse from reporting the criminal activity of the other to police. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Surveillance of Property.

The surveillance of victim's property by defendant and his wife could not be regarded as a privileged marital communication. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

RESEARCH REFERENCES

A.L.R. Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. 119 A.L.R.5th 275.

"Communications" Within Testimonial

Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse. 23 A.L.R.6th 1.

Rule 505. Religious privilege.

(a) **Definitions.** As used in this rule:

(1) **Clergyman.** A "Clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed to be a clergyman by the person consulting.

(2) **Confidential communication.** A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in the clergyman's professional character as spiritual adviser.

(c) **Who may claim the privilege.** The privilege may be claimed by the person, or for the person by the person's lawyer, the guardian or conservator, or by the personal representative if that person is deceased. The clergyman at the time of the communication may claim the privilege but only on behalf of the person. The authority of the clergyman to do so is presumed in the absence of evidence to the contrary. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

No Privilege.

Conversation between a rape defendant and minister was not a privileged confidential communication where the conversation did not take place in private and a third person was present. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989).

Defendant's objections to testimony by a minister and by an outpatient counselor at a substance abuse treatment facility were properly overruled where defendant made no showing of any confidential communication with either witness upon which to base a privilege. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989).

Where hospital chaplain also described his

duties as being a liaison between hospital staff and families, and where statements made to chaplain by defendant were made in presence of another family member, with the door open and other personnel just outside the room and did not appear that they were intended to be confidential, such communication was not received in the chaplain's "professional character as spiritual adviser," nor "made privately" and therefore did not constitute privileged communication protected by this rule. *State v. Gardiner*, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995).

Cited in: *Jones v. Whiteley*, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987).

RESEARCH REFERENCES

A.L.R. Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser. 93 A.L.R.5th 327.

Rule 506. Political vote.

(a) **General rule of privilege.** Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot.

(b) **Exceptions.** This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the State of Idaho. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 507. Conduct of mediations.

(1) **Definitions.** In this rule:

(a) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(b) "Mediation communication" means a statement, whether oral or in a records or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(c) "Mediator" means an individual who conducts a mediation.

(d) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(e) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(f) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; government subdivision, agency or instrumentality; public corporation, or any other legal or commercial entity.

(g) "Proceeding" means any proceeding referenced in Idaho Rule of Evidence 101(c).

(h) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(i) "Sign" means:

(1) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(2) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record; or

(3) to assent on a record with the present intent to authenticate a record.

(2) Scope.

(a) Except as otherwise provided in subsection (b) or (c), this Rule applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an exception that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

(b) The Rule does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the Rule applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all parties are students or

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a

mediation is not privileged, the privileges under subparts 3 through 5 do not apply to the mediation or part agreed upon.

(3) Privilege against disclosure; admissibility; discovery.

(a) Except as otherwise provided in subpart 5, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in subpart 4.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely be reason of its disclosure or use in a mediation.

(4) Waiver and preclusion of privileges.

(a) A privilege under subpart 3 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under subpart 3, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under subpart 3.

(5) Exceptions to privilege.

(a) There is no privilege under subpart 3 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under the Idaho Open Records Act or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participates in the mediation.

(b) There is no privilege under subpart 3 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony or misdemeanor; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

This exception to privilege does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(6) Application to existing agreements or referrals.

(a) The privileges created in this rule apply to communication made in the course of a mediation pursuant to a referral or an agreement to mediate made on or after the effective date of this Rule.

(b) On or after one year following the effective date, the privileges created in this rule apply to any mediation regardless of when the referral or agreement to mediate was made. (Adopted January 3, 2008, effective July 1, 2008; amended April 27, 2012, effective July 1, 2012.)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Party to Subsequent Proceeding.
Prevailing Party.

Party to Subsequent Proceeding.

Because the privilege found in this rule cannot be invoked in a subsequent proceeding unless the mediation client is a party to that proceeding, a district court erred when it determined that a statement made by the

defendant's wife, who was a witness in his criminal trial, was subject to the mediator privilege. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Prevailing Party.

District court correctly refused to consider mediation communications in making its prevailing party determination. *Jorgensen v. Coppedge*, 148 Idaho 536, 224 P.3d 1125 (2010).

Rule 508. Secrets of State and other official information; governmental privileges.

(a) **Federal.** If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) **State.** No other governmental privilege is recognized except as created by the Constitution or statutes of this State.

(c) **Effect of sustaining claim.** If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 509. Identity of informer.

(a) **Rule of privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who may claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions:

(1) **Voluntary disclosure.** No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action.

(2) **Informer as a Witness.** If an informer appears as a witness for the public entity disclosure of the informer's identity shall be required unless the court finds, in its discretion, that the witness or others may be subjected to economic, physical or other harm or coercion by such disclosure. Any disclosure under this subsection shall be subject to any protective order deemed necessary by the court.

(3) **Testimony on relevant issue.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: (A) requiring the prosecuting attorney to comply, (B) granting the defendant additional time or a continuance. (C) relieving the defendant from making disclosures otherwise required of the defendant, (D) prohibiting the prosecuting attorney from introducing specified evidence, or (E) dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present. (Adopted January 8, 1985, effective July 1, 1985; amended March 26, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.
 Extension of Privilege.
 Hearing on Disclosure Warranted.
 Presence of Defendant.
 Purpose.
 Request for Disclosure Denied.

Discretion of Court.

The government's privilege to withhold from disclosure the identity of confidential informers gives way if the informant is produced as a witness at trial or if otherwise ordered by the court, and the decision whether to require disclosure of the identity of the confidential informant is left to the discretion of the trial court. *State v. Davila*, 127 Idaho 888, 908 P.2d 581 (Ct. App. 1995).

Extension of Privilege.

Although this privilege belongs to the law enforcement agencies of the United States, there was no logical reason not to extend it to

a Canadian officer where the defense counsel elicited testimony about the Canadian officer's confidential source; otherwise, the purposes of this rule would be defeated. *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986).

Hearing on Disclosure Warranted.

A district court erred in failing to hold an in camera hearing under this section after the defendant had requested an in camera determination as to the identity of an informer, allowing the defendant to explore the relevant issue of the informer's reliability as it related to probable cause for the warrantless automobile search which led to the defendant's arrest. *State v. Hosey*, 132 Idaho 117, 968 P.2d 212 (1998).

Where a district court found that the facts in a drug case showed that a confidential informant (CI) could have possibly given testimony relevant to the issues at trial, it erred by failing to conduct an in-camera review upon defendant's motion to disclose the iden-

tify of the CI. A remand was necessary to determine if a new trial was warranted. *State v. Farlow*, 144 Idaho 444, 163 P.3d 233 (Ct. App. 2007).

Presence of Defendant.

Defendant failed to demonstrate that participation by his counsel in the I.R.E. 509 hearing was either required or necessary where the trial judge addressed the issues of the credibility and reliability of the confidential informant in the in camera hearing and determined that disclosure of the informant's identity was not necessary because the informant could provide no relevant testimony on the issue of probable cause. *State v. Hosey*, 134 Idaho 883, 11 P.3d 1101 (2000).

Purpose.

The privilege against identifying informers is founded upon the general proposition that an informer — whether motivated by good citizenship, promise of leniency or prospect of pecuniary reward — may condition his cooperation upon an assurance of anonymity to protect himself or his family. *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986).

Request for Disclosure Denied.

The magistrate at the preliminary hearing determined, contrary to defendant's argument, that the informant was not a participant in the commission of the crime of possession with intent to deliver; rather, the informant's activities confirmed the presence

of controlled substances in the defendant's trailer, upon which the magistrate based his assessment that there was probable cause to have defendant answer for the crime; therefore, the magistrate and the district judge did not abuse their discretion in denying defendant's requests for disclosure of the informant's identity in pre-trial proceedings. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

In prosecution for delivery and trafficking in methamphetamine in violation of §§ 37-2732 and 38-2732B, where defendant failed to articulate any basis for her assertion that the in camera hearing was insufficient to protect her rights and also failed to demonstrate how the informant's identity would have presented her with necessary information that the in camera hearing did not, trial court did not err in refusing to disclose the informant's identity. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994).

Defendant's claim that he was entitled to an in-camera interview to determine if a confidential informant could provide testimony relevant to an issue in his case was without merit where informant's veracity was of no consequence in defendant's prosecution, where state did not call informant at trial, proof that informant had lied would not have invalidated search warrant, and an attack on informant's truthfulness would not have benefitted defendant at trial. *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996).

Rule 510. Waiver of privilege by voluntary disclosure.

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Psychotherapist-Patient Privilege.

Where it appears from the trial record that the defendant gave his counselor permission to discuss his therapy and progress with the state's presentence investigator and where the record shows that at no time during the trial did defendant object to the counselor's

testimony or assert his psychotherapist-patient privilege, his privilege is considered waived, and defendant is estopped from asserting on appeal that the trial court erred in the admission of this evidence. *State v. Gallipeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994).

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege (Adopted January 8, 1985, effective July 1, 1985.)

Rule 512. Comment upon or inference from claim of privilege; instruction.

(a) **Comment or inference not permitted.** The claim of any privilege created by these rules, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) **Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom. (Adopted January 8, 1985, effective July 1, 1985; amended April 27, 2011, effective July 1, 2011.)

Rule 513. Lawyer may exercise claim of privilege.

Whenever a person has a right to claim a privilege on behalf of the person or for another, it may be exercised by the lawyer for such person. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 514. Parent-child; guardian or legal custodian-ward privilege.

(a) **Definition.** A communication is "confidential" if it is made by a minor child to the child's parent or a minor ward to the ward's guardian or legal custodian, and is not intended for disclosure to any other person.

(b) **General rule of privilege.** A child or ward has a privilege in a civil or criminal action or proceeding to which the child or ward is a party to refuse to disclose and to prevent the child's or ward's parent, guardian or legal custodian from disclosing any confidential communication made by the child or ward to the parent, guardian or legal custodian of the child or ward.

(c) **Who may claim the privilege.** The privilege may be claimed by the child or ward, the lawyer for the child or ward, or by the parent, guardian or legal custodian on behalf of the child or ward. The authority of the lawyer, parent, guardian or ward to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Civil action.** In a civil action or proceeding by one of the parties to the confidential communication against the other.

(2) **Criminal action.** In a criminal action or proceeding for a crime committed by one of the parties to the confidential communication against

the person or property of the other. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 515. Accountant-client privilege.

(a) **Definitions.** As used in this rule:

(1) **Client.** A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional accounting services by an accountant, or who consults an accountant with a view to obtaining professional accounting services from the accountant.

(2) **Representative of the client.** A “representative of the client” is one having authority to obtain professional accounting services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the accountant of the client.

(3) **Accountant.** An “accountant” is any licensed public accountant or certified public accountant authorized, or reasonably believed by the client to be authorized, to engage in the practice of accounting in any state or nation.

(4) **Representative of the accountant.** A “representative of the accountant” is one employed by the accountant to assist the accountant in the rendition of professional accounting service.

(5) **Confidential communication.** A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional accounting services to the client or those reasonably necessary for the transmission of the communication.

(b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional accounting services to the client which were made (1) between the client or the client’s representative and the accountant or the accountant’s representative, (2) between the accountant and the accountant’s representative, or (3) by the client or the client’s representative or the client’s accountant or a representative of the accountant to an accountant or a representative of an accountant representing another concerning a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among accountants and their representatives representing the same client.

(c) **Who may claim the privilege.** The privilege may be claimed by the client or for the client through the client’s lawyer, accountant, guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the accountant or the accountant’s representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the accountant or the accountant’s representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Furtherance of crime or fraud.** If the services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **Claimants through same deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) **Breach of duty by an accountant or client.** As to a communication relevant to an issue of breach of duty by the accountant to the client or by the client to the accountant;

(4) **Document attested by an accountant.** As to a communication relevant to an issue concerning an attested document to which the accountant is an attesting witness;

(5) **Joint clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an accountant retained or consulted in common, when offered in an action between or among any of the clients.

(6) **Shareholder actions.** As to a communication between a corporation and its accountant or a representative of the accountant, which was not made for the purpose of facilitating the rendition of professional accounting services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action by a shareholder on behalf of the corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of this exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 516. School counselor-student privilege.

(a) **Definitions.** As used in this rule:

(1) **Student.** A "student" is a person regularly enrolled on a part-time or full-time basis in any public or private school located in the State of Idaho, who consults or is examined or interviewed by a school counselor.

(2) **School counselor.** A "school counselor" is any person duly appointed, regularly employed and designated for the purpose of counseling students by any public or private school located in the State of Idaho, or reasonably believed by the student so to be.

(3) **Confidential communication.** A communication is "confidential" if made to the school counselor while acting in the counselor's capacity as a school counselor or reasonably believed by the student to be so acting,

and if not intended to be disclosed to third persons except persons present to further the interest of the student in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the student under the direction of the school counselor, including members of the student's family.

(b) **General rule of privilege.** A student has a privilege in any civil or criminal action to which the student is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of counseling services to the student, among the student, the student's school counselor, and persons who are participating in the counseling under the direction of the school counselor, including members of the student's family.

(c) **Who may claim the privilege.** The privilege may be claimed by the student, or for the student through the student's counselor, lawyer, parent, guardian or conservator, or the personal representative of a deceased student. The authority of the counselor, lawyer, parent, guardian, or conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(2) **Proceeding for guardianship, conservatorship or hospitalization.** As to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a student for mental illness or to hospitalize the student for mental illness.

(3) **Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(4) **Contemplation of crime or harmful act.** If the communication reveals the contemplation of a crime or harmful act. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

Rule 517. Licensed counselor-client privilege.

(a) **Definitions.** As used in this rule:

(1) **Client.** A "client" is a person who is rendered licensed counselor services.

(2) **Licensed counselor.** A "licensed counselor" is any person licensed to be a licensed professional counselor or a licensed counselor in the State of Idaho pursuant to Title 54, Chapter 34, Idaho Code, or reasonably believed by the client so to be.

(3) **Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons except persons present to

further the interest of the client in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the client under the direction of the licensed counselor, including members of the client's family.

(b) **General rule of privilege.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed counseling services to the client, among the client, the client's licensed counselor, and persons who are participating in the licensed counseling under the direction of the licensed counselor including members of the client's family.

(c) **Who may claim the privilege.** The privilege may be claimed by the client, or for the client through the client's licensed counselor, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed counselor, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(2) **Proceedings for guardianship, conservatorship or hospitalization.** As to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a client for mental illness or to hospitalize the client for mental illness.

(3) **Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition, of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(4) **Licensing board proceedings.** In an action, case or proceeding under Idaho Code § 54-3404.

(5) **Contemplation of crime or harmful act.** If the communication reveals the contemplation of a crime or harmful act. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

Cited in: State v. Young, 136 Idaho 113, 29 P.3d 949 (2001).

Rule 518. Licensed social worker-client privilege.

(a) **Definitions.** As used in this rule:

(1) **Client.** A "client" is the person who is rendered licensed social worker services.

(2) **Licensed social worker.** A “licensed social worker” is any person licensed to be a licensed certified social worker or a licensed social worker in the State of Idaho pursuant to Title 54, Chapter 32, Idaho Code.

(3) **Confidential communication.** A communication is “confidential” if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation or interview, or persons reasonably necessary to the transmission of the communication, or persons who are participating in the rendition of social services to the client under the direction of the licensed social worker, including members of the client’s family.

(b) **General rule of privilege.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed social services to the client, among the client, the client’s licensed social worker, and persons who are participating in the licensed social work under the direction of the licensed social worker, including members of the client’s family.

(c) **Who may claim the privilege.** The privilege may be claimed by the client, or for the client through the client’s licensed social worker, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed social worker, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Contemplation or execution of crime or harmful act.** If the communication reveals the contemplation or execution of a crime or harmful act.

(2) **Charges against licensee.** When the client waives the privilege by bringing charges against the licensee.

(3) **Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(4) **Proceedings for guardianship, conservatorship or hospitalization.** As to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a client for mental illness or to hospitalize the client for mental illness.

(5) **Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

Rule 519. Hospital, in-hospital medical staff committee and medical society privilege.

(a) **Definitions.** As used in this rule:

(1) **Hospital.** A “hospital” is a facility defined in Idaho Code § 39-1301(a)(1) and either licensed under Idaho Code §§ 39-1301 through 39-1314 or similarly licensed in another jurisdiction.

(2) **In-hospital medical staff committee.** An “in-hospital medical committee” is any individual doctor who is a hospital staff member, or any hospital employee, or any group of such doctors or hospital employees, or any combination thereof, who are duly designated a committee by hospital staff by-laws, by action of an organized hospital staff, or by action of the board of directors of a hospital, and which committee is authorized by said by-laws, staff or board of directors, to conduct research or study of hospital patient cases, or of medical questions or problems using data and information from hospital patient cases.

(3) **Medical society.** A “medical society” is any duly constituted, authorized and recognized professional society or entity made up of physicians licensed to practice medicine in Idaho, having as its purpose the maintenance of high quality in the standards of health care provided in Idaho or any region or segment of the state, operating with the approval of the Idaho State Board of Medicine, or any official committee appointed by the Idaho State Board of Medicine.

(4) **Confidential communication.** A communication is a “confidential communication” under this Rule if it (A) is made in connection with a proceeding for research, discipline, or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity and mortality, or improving the standards of medical practice or health care in the State of Idaho; (B) is a statement of opinion or conclusion concerning the subject matter of the proceeding; and (C) is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

(b) **General rule of privilege.** A hospital, in-hospital medical staff committee, medical society, and maker of a confidential communication has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication.

(c) **Who may claim the privilege.** The privilege may be claimed by the maker of the confidential communication, by a representative of the hospital, in-hospital medical staff committee or medical society, or for the holder of the privilege by its lawyer. The authority of the representative or lawyer to do so is presumed in the absence of evidence to the contrary.

(d) **Exception.** There is no privilege under this rule as to a communication made in connection with the on-going provision of medical care to a patient.

(e) **Waiver of privilege by testimony.** The privilege as to a confidential communication under this rule is waived if the maker of the confidential communication gives evidence of his opinion or conclusion concerning the subject matter of the confidential communication. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Cited in: State v. Young, 136 Idaho 113, 29 P.3d 949 (2001).

Rule 520. Medical malpractice screening panel privilege.

(a) **Confidential communication.** A communication is a “confidential communication” under this rule if it is made in a proceeding conducted or maintained under the authority of Idaho Code §§ 6-1001 to 6-1011 and is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

(b) **General rule of privilege.** In any civil action or proceeding, a medical malpractice screening panel or any member thereof, any party to the medical malpractice screening panel proceeding, and any witness or other person who participated in the medical malpractice screening panel proceedings has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication under this rule.

(c) **Who may claim the privilege.** The privilege may be claimed by any holder of the privilege or for such person through the person’s lawyer. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary. (Adopted January 8, 1985, effective July 1, 1985.)

ARTICLE VI. WITNESSES.

Rule 601. General rule of competency.

Every person is competent to be a witness except:

(a) **Incompetency determined by court.** Persons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

(b) **Claim against estate.** Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person as to any communication or agreement, not in writing, occurring before the death of such deceased person.

(c) **Other exceptions.** As otherwise provided in these rules. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS	Testimony of Deceased Witness.
Child Witness.	Child Witness.
Construction with Other Laws.	In prosecution for sexual molestation, the
Defense Against Claim.	child victim’s alleged lack of competency and
Incompetent.	the court’s failure to administer a formal oath
Not Incompetent.	did not represent fundamental error where,
Out-of-Court Statements by Children.	after a thorough inquiry of the witness, the

trial judge reasonably could conclude that the child was competent to perceive, recall and accurately retell past events, and mere lack of formal oath did not destroy fairness of the trial for the court's lengthy qualifying inquiry adequately impressed upon the child the importance of telling the truth. *State v. Mader*, 113 Idaho 409, 744 P.2d 137 (Ct. App. 1987).

Where trial court excluded child's testimony in lewd conduct case based on the Confrontation Clause, the trial court should have first ruled whether or not child was competent under this rule. *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993).

Construction with Other Laws.

This rule repealed I.C. § 19-3002; this rule clearly takes precedence over I.C. § 19-3002 by virtue of Idaho Rule of Evidence 1102. *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994).

Where defendant filed motion asserting that a search warrant was invalid because it was based upon information provided by spouse-witness given in violation of § 19-3002, and that spouse-witness's preliminary hearing testimony and potential trial testimony were inadmissible for the same reasons, the Supreme Court held in *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994) that this rule and I.R.E. 1102 repealed § 19-3002 when the Idaho Rules of Evidence became effective in 1985, and, as such, the Court of Appeals opined the spousal incompetency provision was ineffective when defendant originally pleaded guilty, and § 19-3002 would not have prevented the state's use of the spouse-witnesses' testimony. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Defense Against Claim.

Subdivision (b) of this section does not apply to evidence used to defend against a claim. *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989).

Incompetent.

In prosecution for second-degree murder and aggravated burglary, the trial court erred in admitting the testimony of a witness who expressed uncertainty as to whether his testimony was based on actual memories or on

"dreams" after the shootings, even though the court admonished the jury that the witness's testimony was to be disregarded except as it was specifically corroborated. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Not Incompetent.

Defendant's grand theft conviction in violation of §§ 18-2403(3) and 18-2407(1)(b) was proper pursuant to Idaho R. Evid. 601 because the trial court considered the testimony of the victim's guardian as well as the victim's treating physician in determining the victim's competency on the day of her deposition. To the extent that the deposition responses were inconsistent or incorrect, that went more to the weight and credibility of her testimony than to its admissibility. *State v. Vondenkamp*, 141 Idaho 878, 119 P.3d 653 (Ct. App. 2005).

Out-of-Court Statements by Children.

Out-of-court statements by child who was an alleged victim of sexual abuse were not per se unreliable, or presumptively unreliable, on the ground that the trial court found the child incompetent to testify at trial. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Testimony of Deceased Witness.

Although the trial court erred in admitting testimony regarding a telephone conversation with a party that died before trial, the error was harmless because the testimony was repetitive of other properly admitted evidence. *Lunders v. Estate of Snyder*, 131 Idaho 689, 963 P.2d 372 (1998).

District court did not abuse its discretion by admitting evidence concerning a beneficiary's intent when signing a promissory note on behalf of a relative because the action did not concern a demand against an estate or a claim against an executor or administrator under Idaho Code § 9-202(3); moreover, the evidence did not constitute hearsay because it was offered for the purpose of showing the beneficiary's state of mind. *Rowan v. Riley*, 139 Idaho 49, 72 P.3d 889 (2003).

Cited in: *State v. Ransom*, 124 Idaho 703, 864 P.2d 149 (1993); *State v. Durst*, 126 Idaho 140, 879 P.2d 603 (Ct. App. 1994).

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.
Lack of Foundation.

Discretion of Court.

The trial court did not abuse its discretion in admitting owner's testimony concerning the fair market value of her business or her opinion of the loss of profits due to defendant's breach of contract. *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 896 P.2d 949 (1995).

Lack of Foundation.

In the trial for the murder of a bail bonds-

man, there was clearly no foundation for the habit testimony of the bondsman's business partner that the bondsman never used a weapon to apprehend anyone, because the partner testified that the bondsman had never taken a bail jumper into custody, and he could not say how the victim would have acted in attempting to apprehend; however, the error in admission of the testimony was harmless, as it was equally clear that the jury knew that fact. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress upon the mind of the witness of the duty to do so. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Prosecutor's Comments.
Refusal.

Prosecutor's Comments.

By contradicting a witness's testimony in front of the jury, the prosecutor, in effect, presented his own unsworn testimony in violation of this rule and in violation of I.R.E. 103(c). *State v. Gerardo*, 147 Idaho 22, 205 P.3d 671 (2009).

Refusal.

Defendant could have refused to raise his

hand when making his affirmation, but he failed to make his objection clear, the act complained of was not outside of defendant's preventive or corrective powers, and there was no indication that the court would have refused defendant's option not to raise his hand if defendant had made his objection clearly known, therefore, it appeared to the court that defendant was voluntarily giving up his right to testify. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Failure to Swear Interpreter.
Presumption of Accuracy.
Sufficiency of Oath.

Witness.

Failure to Swear Interpreter.

Failure to swear an interpreter is not reversible error per se, and the testimony pro-

vided by an unsworn interpreter is not nullified by a lack of oath; failure to require an oath of an interpreter does not require reversal in the absence of a suitable objection at trial. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Presumption of Accuracy.

Where defendant has failed to indicate that interpreter was not qualified or that her translations were somehow deficient, she is presumed to have translated accurately. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Sufficiency of Oath.

In the instant case, the interpreter at ap-

propriate times testified that she was under a "continuing oath" and her translations were received without objection or any other signs that the defendant could not understand her; therefore, any objection as to the sufficiency of her oath was waived. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Witness.

An interpreter is considered a witness in the sense that the accuracy of her translation is a question of fact for the jury which may be disputed by counsel. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

Rule 605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Cited in: *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998).

Rule 606. Competency of juror as witness.

(a) **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the person is sitting as a juror. If a juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry to validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Affidavits.
Discretion of Court.
Impeachment of Verdict.
Inquiry into Verdict.
—Prejudicial Information.
Intent.
Juror Affidavits.
Juror Interviews.
Jury Instructions Misunderstood.
New Trial Properly Denied.
Purpose.
Quotient Verdict.

Affidavits.

Even if affidavits from every juror are not presented with the motion for a new trial, the affidavits filed with the court must establish by a clear showing that all jurors agreeing to the “quotient verdict” were impermissibly bound. *Watson v. Navistar Int’l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Evidence of one juror’s brief expression of opinion that the defendant would receive light punishment is not admissible to challenge the validity of the verdict. *State v. Setzer*, 136 Idaho 477, 36 P.3d 829 (Ct. App. 2001).

The testimony of the jurors regarding the alleged compromise by which the verdict was reached was precisely the type of evidence that was rendered inadmissible by this rule. *State v. Setzer*, 136 Idaho 477, 36 P.3d 829 (Ct. App. 2001).

Discretion of Court.

The determination of whether the conduct of the jury in returning a verdict based on averaging has deprived a party of a fair trial, and whether to grant or deny a new trial, is left to the sound discretion of the trial court. *Watson v. Navistar Int’l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Impeachment of Verdict.

Jurors may not impeach their verdict by the use of affidavit or otherwise, unless the verdict was determined by chance. *State v. Bell*, 115 Idaho 81, 764 P.2d 448 (Ct. App. 1988).

Where the juror’s alleged statements regarding the rationale behind the jury’s verdict were clearly inadmissible to impeach the verdict, and defendants presented no evidence to show that the extraneous prejudicial information was improperly brought to the jury’s attention, that any outside influence was improperly brought to bear upon juror, or that the jury determined any issue by resort to chance, the district court correctly concluded

that the defendants had failed to present any evidence upon which the jury’s verdict would be impeached. *State v. Webster*, 123 Idaho 233, 846 P.2d 235 (Ct. App. 1993).

Inquiry into Verdict.

In a personal injury action, the juror affidavits offered in an attempt to demonstrate that the jury reached its decision based upon the belief that a verdict against the defendant would force him to personally pay for any damages and alleging that this belief arose from the court’s instructions that no insurance was involved or was to be considered were not admissible to impeach the jury’s verdict and could not be considered as a basis for a motion for new trial. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

The reasons for excluding evidence attempting to impeach the verdict include insuring the freedom of deliberations, the stability and finality of verdicts and the protection of jurors. *Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

Where no information was presented suggesting that extraneous prejudicial information was improperly brought to the jury’s attention, that outside influence was improperly brought to bear on any juror, or that the jury resorted to chance, the evidence of a juror’s statement contained in the affidavit, to the effect that several jurors refused to participate in deliberations, was inadmissible. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

The proper standard in determining whether to grant a new trial on the basis of extraneous prejudicial information is whether prejudice reasonably could have occurred, rather than whether prejudice actually has occurred. *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989).

In the determination of whether to grant a new trial on the basis of extraneous prejudicial information, a rebuttable presumption of prejudice is unnecessary; the judge needs simply to determine whether prejudice reasonably could have occurred. *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989).

Where the trial judge implicitly found that extraneous information had reached the jury and where the judge denied a new trial because he believed that no prejudice actually had resulted, since the judge did not apply the test of whether prejudice reasonably could have resulted, the proper appellate response was to vacate his decision and to remand the

case for reconsideration. *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989).

Where court remanded case to the trial court to reconsider motion denying new trial, judge was to distinguish between those parts of the jurors' affidavits which would be admissible in evidence under this rule and those parts which would not; the judge was to consider those parts which would identify the extraneous information and the circumstances under which it reached some or all of the jurors; however, the judge was not to consider the affiants' statements as to whether the extraneous information affected their votes on the verdict. *Roll v. City of Middleton*, 115 Idaho 833, 771 P.2d 54 (Ct. App. 1989).

Where defendant argued that the judgment of conviction should have been set aside because, after the trial, a juror submitted an affidavit which stated he felt pressured into finding defendant guilty of possessing psilocybin mushrooms with the intent to deliver, jury's verdict could not be impeached by affidavit or otherwise except where the verdict was determined by chance or where extraneous prejudicial information or outside influence was identified. *State v. Burnside*, 115 Idaho 882, 771 P.2d 546 (Ct. App. 1989).

The distinction the appellants attempted to draw between "directly" attacking a verdict and "indirectly" attacking a verdict by challenging juror conduct during voir dire was one which was not legally cognizable when analyzing the applicability of this rule, thus, the district court properly struck the juror's responses to the voir dire questionnaire. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

Trial court's refusal, pursuant to subsection (b) of this rule, to consider juror's testimony that the jury had considered the defendant's failure to testify in his trial for sexual abuse of a minor, did not violate the Fifth Amendment of the U.S. Constitution; the instruction not to consider the defendant's failure to testify was sufficient to protect the defendant's constitutional privilege not to testify. *State v. DeGrat*, 128 Idaho 352, 913 P.2d 568 (1996).

—Prejudicial Information.

Where the district court recognized the proper standard, stating that the court could still make the determination that certain evidence, if presented, would have a likelihood of changing the jurors' minds, the district court did not err in refusing to allow jurors to testify how the prejudicial information affected their verdict or whether the result would have been different had more evidence on the victim's

credibility been adduced. *Reynolds v. State*, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994).

Intent.

The focus of subsection (b) of this section on outside evidence or influence to prove jury misconduct manifests an intent to avoid the policy concerns articulated by the courts that verdicts be final and that jury deliberations not be the subject of post-trial inquiry or harassment; not only does subsection (b) of this section have a sound basis in policy, but it also attempts to avoid the practical concern that an affidavit by a juror to impeach his or her own verdict is potentially unreliable. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Juror Affidavits.

Because the reason a juror abstained from deliberation was unrelated to whether the verdict was one of chance or any of the other exceptions governed by this section, the general rule prohibiting evidence of "any matter or statement occurring during the course of the jury's deliberations" is applicable; a court may not consider juror affidavits indicating reasons that certain jurors abstained from the deliberations. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Where the district judge found that juror affidavits were offered to demonstrate the effect that having certain information would have had on certain jurors' minds while deliberating, he did not err in striking the affidavits. *Roberts v. State*, 132 Idaho 494, 975 P.2d 782 (1999).

When a doctor sued a hospital under the Americans with Disabilities Act of 1990, 42 U.S.C.S § 12101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C.S. § 701 et seq., for terminating his hospital privileges due to his bipolar illness diagnosis, *Idaho R. Evid. 606(b)* did not bar the introduction of a juror's affidavit stating that another juror made a prejudicial comment during voir dire to show the second juror's dishonesty, but the doctor's motion for a new trial under *Idaho R. Civ. P. 59(a)(2)*, which alleged juror misconduct, did not point to a material question the juror failed to answer honestly on voir dire, or show that a correct answer to the question would have provided a basis for a challenge for cause, so, because his allegation that a juror lied during voir dire was not raised before the trial court, the trial court correctly denied his motion for new trial. *Levinger v. Mercy Med. Ctr.*, 139 Idaho 192, 75 P.3d 1202 (2003).

Juror Interviews.

Although the trial court erred in finding

that this rule restricts the permissible scope of postconviction juror interviews to those topics on which the jurors themselves might testify, it was correct in finding that lines of inquiry related to the jurors' deliberations, mental processes, minds, or emotions were improper. *Hall v. State*, — Idaho —, 253 P.3d 716 (2011).

Jury Instructions Misunderstood.

In ruling on a motion for new trial, the court did not err in refusing to consider affidavits from two jurors stating that they misunderstood the jury instructions; the review of the internal deliberation process of the jury is prohibited unless affected by extraneous prejudicial information or outside influence. *Andrews v. Idaho Forest Indus., Inc.*, 117 Idaho 195, 786 P.2d 586 (Ct. App. 1990).

New Trial Properly Denied.

Where court did not state a time when jury would be considered "hung", and where it was unclear whether statement regarding judge leaving town for the weekend was made by bailiff or another juror, it was not erroneous to deny motion for a new trial. *State v. Vaughn*, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993).

Court did not err in failing to grant a new trial for the defendant after the defendant presented an investigator's affidavit that ju-

rors had considered the defendant's decision not to testify in their deliberations, where the court, in a jury instruction, had instructed the jury not to consider the defendant's decision. *State v. Turner*, 136 Idaho 629, 38 P.3d 1285 (Ct. App. 2001).

Purpose.

By avoiding potentially misleading affidavits of jurors attempting to impeach their verdict, subsection (b) of this section helps focus on the true purpose of the chance verdict rule; the purpose of the rule is to assure that a jury participate in "solemn deliberation," and avoid a verdict that was irrationally skewed by a minority of "inveterate juror[s]." *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Quotient Verdict.

When a jury engages in a process of averaging, coupled by a prior agreement by each of the jurors to be bound, the resulting verdict has been labeled a quotient verdict; because an average is permissible without a prior agreement, an agreement to be bound has been called "the vitiating fact" of a quotient verdict. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Cited in: *Fussell v. St. Clair*, 120 Idaho 591, 818 P.2d 295 (1991).

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party including the party calling the witness. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

State's Witnesses.

Court, in defendant's domestic battery case, did not err by allowing the State to impeach the victim where the State examined the victim for a purpose other than that of simply

impeaching her before the jury with otherwise inadmissible substantive evidence. *State v. Hoover*, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

- Admissions.
- Contradictory Statements.
- Effect of Impeachment.
- Foundation for Impeachment.
- In General.
- Medical Records.
- Nature of Prior Statements.
- Prejudicial Remarks.
- Previous Testimony.
- Prior Inconsistent Statements.
- Proof of Prior Statements.
- State's Witnesses.

Surprise.

Admissions.

Evidence of statements in the nature of admissions made by a party to the suit may be proved without first calling his attention to them, or laying any foundation for impeachment. This is true in spite of the fact that the tendency of such evidence or statements is to impeach such party. *Coffin v. Bradbury*, 3 Idaho 770, 35 P. 715 (1894).

Contradictory Statements.

Proof of contradictory statements made out

of court is sufficient to impeach witness without further finding that such statements were wilfully and intentionally false. *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922).

An appraisal of a ranch did not tend to impeach the testimony of a witness concerning its value but, in the broader sense of impeachment, it did contain representations of value contradictory of the witness' testimony. *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966).

Effect of Impeachment.

Written statements of defendant's witnesses, offered by defendant for the purpose of impeaching the testimony of such witnesses, could only have affected their credibility and would not have been evidence of the facts recited therein; hence their exclusion was not prejudicial to defendant. *Davis v. Schmidt Bros.*, 92 Idaho 312, 442 P.2d 448 (1968).

Impeaching evidence of prior contradictory statements can be considered only as affecting the credibility of the witness sought to be impeached. *Bodenhamer v. Pacific Fruit & Produce Co.*, 50 Idaho 248, 295 P. 243 (1931).

Foundation for Impeachment.

Where a witness was asked if he did not write a certain letter containing certain matter, and objection was made to such question without such witness being shown such letter or given an opportunity to identify the same, it was error for the court to overrule such objection. *Keane v. Pittsburg Lead Mining Co.*, 17 Idaho 179, 105 P. 60 (1909).

Where no proper foundation is laid for introduction of alleged conversation wherein witness has made certain statements, court may properly exclude such evidence. *State v. Farmer*, 34 Idaho 370, 201 P. 33 (1921).

Where evidence was offered solely for impeachment, foundation therefor should have been laid. *State v. Cox*, 37 Idaho 397, 216 P. 724 (1923).

It is gross error and subversive of substantial justice to allow a party to litigation to introduce ex parte and extrajudicial statements not made in the presence or by the authority of the party to be bound, and it is equally erroneous to allow such questions to be asked by way of laying the foundation for impeaching the witness. Witnesses can only be impeached by proof of contradictory statements of a material fact.. *State v. Jones*, 62 Idaho 552, 113 P.2d 1106 (1941).

It was not error to refuse to allow wife of accused in burglary trial to testify concerning conversation she had with her brother relative to his testimony since no ground was laid for impeachment and such conversation was not shown to be either material, relevant or

competent. *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

Bookkeeper, who testified favorably for the employer in a proceeding by alleged common-law wife to recover compensation for death of employee, could not be impeached by a memorandum reportedly made by bookkeeper to claimant that she might be entitled to social security benefits as widow of the employee, where the memorandum was not shown to the bookkeeper, and she was not questioned concerning same during her testimony. *Foster v. Diehl Lumber Co.*, 77 Idaho 26, 287 P.2d 282 (1955).

In a proceeding for ejectment filed by plaintiff, as purchaser of north portion of a lot, against defendant, as purchaser of the south portion of the lot, arising out of dispute over boundary line, the defendant on rebuttal was not entitled to introduce testimony that plaintiff's witness had made contradictory statements to that testified to by him, where the defendant failed to lay a proper foundation. *Paurley v. Harris*, 77 Idaho 336, 292 P.2d 765 (1956).

The purpose of the former rule requiring foundation, the showing of the time, place and persons present to be shown in order to lay a foundation for impeachment of testimony, was to avoid unfair surprise and to afford the witness attacked, and the party calling him, an opportunity to correct his testimony or explain the contradiction. *Gayhart v. Schwabe*, 80 Idaho 354, 330 P.2d 327 (1958).

Companion of injured minor in whose behalf suit had been brought to recover for his injuries sustained when he rode his motor scooter out from the private driveway of his parents' residence into the highway and was struck some seven feet beyond the curb line, who was a witness to such accident and from whom a statement was taken by an insurance investigator two days after occurrence, could be contradicted in his testimony on the trial of such cause as to conditions surrounding the accident by calling his attention to the time, place and persons present when the statement was made, he being extensively examined in regard to such statement and the writing being shown to him. *Gayhart v. Schwabe*, 80 Idaho 354, 330 P.2d 327 (1958).

A deposition could not be used to impeach a witness where the deposition was not shown to the witness and he was not given opportunity to explain the statements and any changes made. *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966).

In a prosecution for kidnapping and assault with intent to commit infamous crime against nature, the admission into evidence of a handwritten document for the purpose of impeach-

ing defendant's testimony at trial consisting of an alibi placing him out of the area at the time the offenses occurred was not error, where before he was subjected to any questions defendant inspected the document which had been prepared in the presence of two cellmates while defendant was in the county jail awaiting trial, and where defendant offered no testimony to explain any inconsistency in the written statement with his testimony at trial. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

In General.

Witness called may be contradicted and rebutted by the party calling him. *Franklin v. Wooters*, 55 Idaho 619, 45 P.2d 804 (1935).

Medical Records.

In an action for negligence by a patient against a hospital, written statements of an attending physician, made when the patient was discovered to have a fractured femur, that it probably occurred at the time of her fall from the hospital bed, were admissible to impeach his refusal as a witness to give an opinion as to when the fracture occurred. *Butler v. Caldwell Mem. Hosp.*, 90 Idaho 434, 412 P.2d 593 (1966).

Nature of Prior Statements.

Witness could not be impeached by testimony that he previously had stated that the shooting for which defendant was on trial "was as cold blooded a murder as could be," as such statement was merely an opinion of witness. *State v. Crea*, 10 Idaho 88, 76 P. 1013 (1904).

For the purpose of impeaching witness by proof of contradictory statements they must have reference to some fact that has become material in case. *Hilbert v. Spokane Int'l Ry.*, 20 Idaho 54, 116 P. 1116 (1911).

If a witness' prior statement shows inconsistencies with testimony only by an inference and another inference in favor of consistency may be drawn, the statement is inadmissible for impeachment purposes. *State v. Bush*, 50 Idaho 166, 295 P. 432 (1930).

Prejudicial Remarks.

While party producing witness may contradict him by other evidence and may show that he has made statements inconsistent with his testimony, yet prosecutor in a criminal case should not ask witness if he had made conflicting statements for the purpose of prejudicing him before the jury, and then fail to produce evidence of such statements, and if he does so, court should specifically instruct jury to disregard such questions. *State v. Fowler*, 13 Idaho 317, 89 P. 757 (1907).

Previous Testimony.

If witness admits making contradictory statements there is no necessity of introducing transcript of testimony taken at preliminary examination. If he does not absolutely admit that he made contradictory statements, then adverse party should be allowed to prove them. *State v. Fellis*, 35 Idaho 584, 207 P. 1074 (1922).

The trial court erred in refusing to admit in evidence for impeachment purposes a sketch made by the defense attorney at the preliminary hearing showing where a witness testified she was at the time of the collision; however, the defendant was not harmed by such ruling in view of other evidence. *State v. Wendler*, 83 Idaho 213, 360 P.2d 697 (1961).

Prior Inconsistent Statements.

Where witness for state testifies contrary to his testimony at coroner's inquest, such testimony may be introduced to contradict him. *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Permitting the prosecuting attorney to examine a state's witness concerning previous testimony he had given at the preliminary examination did not constitute prejudicial error, where the witness simply denied having any recollection of the incident and facts about which he was interrogated. *State v. Walters*, 61 Idaho 341, 102 P.2d 284 (1940).

There is no requirement that the party producing a witness must show that the witness is hostile before he may impeach the witness by showing that he has made statements inconsistent with his present testimony. *Wyman v. Dunne*, 83 Idaho 179, 359 P.2d 1010 (1961).

Proof of Prior Statements.

Transcript of questions asked of witness in office of prosecutor cannot be offered to impeach witness where it was not signed or adopted by him. In such case demand that transcript be shown witness or counsel is properly refused. *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

State was not required to call all impeaching witnesses to whom inconsistent statements were made. *State v. Allen*, 54 Idaho 459, 34 P.2d 45 (1934).

It was an abuse of discretion to refuse to permit more than two of the four persons present to testify to a statement of a witness sought to be impeached. *State v. Calico*, 55 Idaho 96, 38 P.2d 1002 (1934).

Assignment of error of the trial court in

denying admission of plaintiff's exhibit, a written statement relating to the accident elicited about a month and a half after the accident occurred, where court afforded opportunity to cross-examine party making statements which appellant contended were inconsistent with prior testimony and which would tend to impeach the party as a witness, was without merit. *Morford v. Brown*, 85 Idaho 480, 381 P.2d 45 (1963).

State's Witnesses.

The court did not err in permitting the state

to impeach its own witness by showing previous contradictory statements and the defendant was not prejudiced thereby. *State v. Mundell*, 66 Idaho 339, 158 P.2d 799 (1945).

Surprise.

A party who claims surprise at the changed statements of his witness has the right to show contrary statements. *Franklin v. Wooters*, 55 Idaho 619, 45 P.2d 804 (1935).

RESEARCH REFERENCES

A.L.R. Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness. 3 A.L.R.6th 269.

Rule 608. Evidence of character and conduct of witness.

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning (1) the character of the witness for truthfulness or untruthfulness, or (2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) **Effect of giving testimony.** The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege of the witness against self-incrimination when examined with respect to matters which relate only to credibility. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Evidence Held Improper.
Opinion Testimony.
"Otherwise."
Particular Wrongful Acts.
Prior Alleged Perjury.
Prosecutor's Remarks.

Remote Events.
"Truthfulness" and "Honesty."

Evidence Held Improper.

Admission of character evidence as to truthfulness of a defendant was improper and warranted a new trial where a direct attack on the truthfulness of defendant could not be

inferred from the tone of cross-examination questions posed to the defendant nor from the fact that defendant was asked to explain some apparent inconsistencies between his testimony and previous statements. *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989).

Trial judge's allowance of opinion testimony as to defendant's character for truthfulness was improper and it afforded grounds for a new trial under I.R.C.P., Rule 59 (a)(1) where cross-examination of defendant concerning inconsistent statements was neither accompanied by derogatory allegations or accusatory insinuations regarding defendant's character, nor were the questions directed to matters collateral to the litigation. *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989).

Testimony by one witness that another witness was, or was not, telling the truth when they made a particular statement is not admissible evidence. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

Questions designed to rebut anticipated impeachment or attacks upon the character of a witness are improper because the credibility and character of a witness may not be supported before they have been attacked. *State v. Ellington*, — Idaho —, 253 P.3d 727 (2011).

Trial court did not err by excluding testimony of three witnesses that the infant victim's mother had been unfaithful to defendant, because it was not admissible, as it was extrinsic evidence of specific instances of the mother's conduct, in violation of subsection (b) of this rule, and because the evidence was not relevant under Rule 404 of the Rules of Evidence. *State v. Carson*, — Idaho —, 264 P.3d 54 (2011).

Opinion Testimony.

The fact that officer was supposedly an expert qualified to evaluate the credibility of statements made by witnesses during police interrogations does not make this opinion testimony admissible. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

Where the Court of Appeals determined that the detectives' opinions regarding the credibility of a witness must be based upon sufficient contact with the witness in order to enable them to permissibly render opinions, and where such a showing of sufficient contact was made, the detectives' opinions were relevant and admissible under this rule. *State v. Carsner*, 126 Idaho 911, 894 P.2d 144 (Ct. App. 1995).

"Otherwise."

The term "otherwise," as used in subsection (a) of this rule, embodies a recognition that a

witness's character might be attacked through questions or evidence ostensibly directed at an issue in the case, but having the real effect of impugning the witness. Thus, if evidence is presented of corrupt misconduct by the witness, even if germane to an issue in the case, it is generally agreed that the witness's character for truthfulness has been attacked. *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989).

Particular Wrongful Acts.

In prosecution for manufacturing a controlled substance, the question whether extrinsic evidence of drug-related activities should have been admitted to contradict the informant's cross-examination testimony was committed to the trial court's discretion on remand, the critical question being the foundation laid by the defendant for introducing the evidence. *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988).

Prior Alleged Perjury.

The trial court did not abuse its discretion under this rule or violate defendant's constitutional right of confrontation by refusing to allow cross-examination of the state's witness concerning the witness' prior alleged perjury. Additionally, the trial court correctly excluded testimony from a defense witness concerning specific instances of untruthfulness by the state's witness. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).

Prosecutor's Remarks.

It was not improper for prosecutor to say in opening remarks that the jurors would get to judge the victim for themselves to see what kind of a 13-year old girl she was, as this was a request that the jurors disregard any generalized biases or prejudices that they may hold concerning young teen-aged girls and that they judge the victim as presented. *State v. Reynolds*, 120 Idaho 445, 816 P.2d 1002 (Ct. App. 1991).

Where prosecutor's mention of a potential cocaine transaction involving defendant had nothing to do with either the alleged marijuana transaction with which defendant was charged, or defendant's credibility, the error was not harmless and required remand for a new trial. *State v. Fernandez*, 124 Idaho 381, 859 P.2d 1389 (1993).

Remote Events.

In a criminal action in which defendant was charged with lewd conduct with a minor under sixteen, the trial court in the exercise of its discretion properly concluded that prior accusations made by the minor eight to nine years earlier would have added nothing of probative value to the case, thus the defense

was prohibited from cross-examining the minor about such remote events. *State v. Downing*, 128 Idaho 149, 911 P.2d 145 (Ct. App. 1996).

"Truthfulness" and "Honesty."

"Truthfulness" and "honesty" are, by most dictionary definitions, synonymous. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989).

There was no error by trial court in allowing three state rebuttal witnesses to offer opinions as to defendant's truthfulness and honesty, despite the defendant's argument that witnesses could only give their opinion of his truthfulness, not his honesty. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989).

Testimony as to the veracity of another

witness was harmless beyond a reasonable doubt, where there was no reasonable possibility that this portion of his testimony might have contributed to defendant's conviction, and because it was harmless, this error should not serve as a basis for reversal. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

Whether a witness was being truthful at the time the witness made a statement is for the jury, not another witness to determine. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

Cited in: *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989); *State v. Siegel*, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Affidavit.

Evidence of Reputation.

Materiality.

Particular Wrongful Acts.

Affidavit.

Affidavit impeaching witness by showing that his reputation for truth and veracity was bad was proper in a civil case. *Hansen v. Standard Oil Co.*, 55 Idaho 483, 44 P.2d 709 (1935).

Evidence of Reputation.

While a lewd woman is less likely to be truthful than a chaste woman, still there is not such an immediate connection between unchastity and untruthfulness as to permit a woman's chastity to be called in question every time she goes on witness stand. *State v. Hammock*, 18 Idaho 424, 110 P. 169 (1910).

Whether or not evidence is too remote to have probative value on question of reputation of witness for truth and veracity, at the time of trial, is for the court. *State v. Goodrich*, 33 Idaho 654, 196 P. 1043 (1921).

The impeachment of a defendant who testified in his own behalf, by testimony purporting to show that defendant's reputation for truth, honesty, and integrity in the community in which he resided was bad, was improper, without defendant first putting his

reputation therefore in issue. *State v. Branch*, 66 Idaho 528, 164 P.2d 182 (1945).

Trial judge did not abuse his discretion in allowing testimony as to reputation which was three years old. *State v. May*, 93 Idaho 343, 461 P.2d 126 (1969).

Materiality.

Witness may not be impeached upon matter that is immaterial. *State v. Farmer*, 34 Idaho 370, 201 P. 33 (1921); *State v. Bush*, 50 Idaho 166, 295 P. 432 (1930).

Particular Wrongful Acts.

Witness cannot be impeached by evidence of particular wrongful acts having no connection with matter on trial. *State v. Anthony*, 6 Idaho 383, 55 P. 884 (1899); *Labonte v. Davidson*, 31 Idaho 644, 175 P. 588 (1918).

In prosecution for statutory rape it is not permissible for defendant to impeach evidence of prosecutrix by introducing in evidence particular acts of her unchastity with other persons. *State v. Henderson*, 19 Idaho 524, 114 P. 30 (1911); *State v. Farmer*, 34 Idaho 370, 201 P. 33 (1921); *State v. Black*, 36 Idaho 27, 208 P. 851 (1922); *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924).

Questions asked of third person for purpose of showing that accused participated in wrongful acts having no connection with matter on trial are not allowable. *State v. Muquerza*, 46 Idaho 456, 268 P. 1 (1928).

RESEARCH REFERENCES

A.L.R. Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. 44 A.L.R.3d 1203.

Propriety and prejudicial effect of impeach-

ing witness by reference to religious belief or lack of it. 76 A.L.R.3d 539.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack

Thereof. 24 A.L.R.6th 747.

Rule 609. Impeachment by evidence of conviction of crime.

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for the purpose of impeachment of a party to the action or proceeding, the party shall have the option to present evidence of the nature of the conviction, but evidence of the circumstances of the conviction shall not be admissible.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Withheld or vacated judgment; pardon for innocence.** Evidence of a withheld judgment or a vacated judgment shall not be admitted as a conviction. Nor shall a conviction that has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence be admissible under this rule.

(d) **Pardon, annulment or certificate of rehabilitation not based on innocence; pendency of an appeal.** If the conviction has been the subject of a pardon, annulment or certificate of rehabilitation or other equivalent procedure not based on a finding of innocence, or is the subject of a pending appeal, the evidence of a conviction is not rendered inadmissible, but shall be considered by the court in determining admissibility. Evidence of the pardon, annulment, certificate of rehabilitation or other equivalent procedure, or pendency of an appeal is admissible if evidence of the conviction is admitted. (Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998.)

JUDICIAL DECISIONS

ANALYSIS

Conviction of Informant.
Determination of Relevance.
Misdemeanor Convictions.
Nature of Felony.
Old Convictions.
Prior Conviction of Defendant.
Record of Trial Court.

Conviction of Informant.

The court found that the confidential informant's conviction for delivery of marijuana did not go to the ability of the witness to tell the truth and provided no basis from which the court could judge that a person with that kind of conviction was not truthful. The court then concluded that any relevance of the delivery conviction was outweighed by its prejudicial effect. The court, therefore, did not allow evidence that the informant had been convicted of delivery of marijuana and concluded that no abuse of discretion occurred by excluding evidence of the prior conviction. *State v. Wheeler*, 129 Idaho 735, 932 P.2d 363 (Ct. App. 1997).

Determination of Relevance.

A district court erred in permitting the state to introduce evidence of a prior felony conviction, for the purpose of impeaching the testimony of a witness, before determining the relevancy of the felony conviction. *State v. Franco*, 128 Idaho 815, 919 P.2d 344 (Ct. App. 1996).

In determining whether evidence of a prior conviction should be admitted, a trial court must (1) determine whether the fact or nature of the conviction is relevant to the witness's credibility, and (2) if so, whether the probative value of the evidence outweighs its prejudicial impact. *State v. Thompson*, 132 Idaho 628, 977 P.2d 890 (1999).

Where the district court considered the nature of a victim's prior conviction for aggravated assault, it correctly determined that it was not relevant to his credibility. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Misdemeanor Convictions.

Where plaintiff's conviction for failure to file income tax returns was a misdemeanor, not a felony, the trial court's decision to prohibit this evidence was upheld. *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991).

The prosecutor was not required to disclose information that the state's witnesses had misdemeanor charges against them dropped, because the defense would not have been able

to use the dismissed misdemeanor charges as grounds for impeachment of confidential informants under this rule, which only allows felony convictions to be used for impeachment purposes. *Ramirez v. State*, 119 Idaho 1037, 812 P.2d 751 (Ct. App. 1991).

Nature of Felony.

The court properly allowed evidence concerning the fact a murder defendant had been convicted of a felony and to minimize prejudice the court did not allow the state to show the nature of the felony. *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), *aff'd*, 119 Idaho 1047, 812 P.2d 1208 (1991).

Arranging a drug transaction in and of itself is not probative of whether a person is truthful or untruthful, and a trial court should be cautious in considering whether a felony conviction for participating in the delivery of a controlled substance is sufficiently relevant, when exploring its admissibility with respect to an issue of credibility under subsection (a) of this rule. *State v. Konechny*, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000).

Old Convictions.

While subsection (b) allows the use of prior convictions over ten years old upon adequate prior notice to the opposing party, where defendant provided no such notice, the trial court properly restricted the cross-examination of the witness. *State v. Barcella*, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

Prior Conviction of Defendant.

The fact that the defendant was convicted in another state for second degree rape, that prior felony, described as being similar to incest, involved a crime of passion which did not bear directly upon the defendant's honesty or veracity or establish a pattern of disrespect for law and lawful authority, and the potential for unfair prejudice to the defendant in admitting evidence thereof in the trial for aggravated battery was manifest and substantial, the trial judge abused his discretion in permitting of such evidence to be admitted. *State v. Allen*, 113 Idaho 676, 747 P.2d 85 (Ct. App. 1987).

In a trial for lewd conduct with a minor under sixteen, the trial court did not err in admitting the defendant's prior felony conviction in Nevada for lewdness with a minor, as such a felony has some relevance to the defendant's credibility. *State v. Muraco*, 132 Idaho 130, 968 P.2d 225 (1998).

The defendant's prior conviction for lewd and lascivious conduct was relevant for impeachment purposes in his trial for sexual

battery of a minor, where the issue of credibility was central to the case, and where the probative value of the evidence outweighed the prejudicial effect. *State v. Thompson*, 132 Idaho 628, 977 P.2d 890 (1999).

The district court did not err by allowing evidence of defendant's prior conviction of a felony to be introduced in cross-examination to impeach him. *State v. Page*, 135 Idaho 214, 16 P.3d 890 (2000).

Record of Trial Court.

For the purpose of assuring proper introduction of evidence pursuant to subsection (a) of this rule, a trial court must make a record

of its reasons for concluding that a felony conviction for any particular crime is relevant to the credibility of the witness with respect to whom the evidence is being adduced. *State v. Franco*, 128 Idaho 815, 919 P.2d 344 (Ct. App. 1996).

Cited in: *State v. Christopherson*, 108 Idaho 502, 700 P.2d 124 (Ct. App. 1985); *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (1986); *State v. Winkler*, 112 Idaho 917, 736 P.2d 1371 (Ct. App. 1987); *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988); *Matthews v. State*, 136 Idaho 46, 28 P.3d 387 (Ct. App. 2001).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Application.

Conviction of Defendant.

Conviction Required.

Improper Answers.

Improper Questions.

In Camera Hearing.

In General.

Manner of Proof.

Misdemeanor Convictions.

Number or Nature of Convictions.

Probative Value.

Procedure.

Prosecutor's Statement.

—Proper.

Rebuttal Evidence.

Use of Conviction.

Withheld or Vacated Judgment.

Application.

Right to ask a witness for the purpose of impeachment if he has been convicted of a felony is not limited to civil cases, but also applies to criminal cases. *State v. Kleier*, 69 Idaho 491, 210 P.2d 388 (1949).

Conviction of Defendant.

The legislature intended that a witness might be impeached in a criminal action as in a civil action; the defendant in a criminal action, as a party to the action, need not testify at all and if he deems it prudent to remain silent, no presumption is to be indulged against him; however, when he voluntarily assumes the character of a witness he exposes himself to the legitimate attacks which may be made upon any witness. *State v. Storms*, 84 Idaho 372, 372 P.2d 748 (1962).

Where defendant's own counsel asked whether he had been convicted of a felony, he was precluded from raising the constitutionality of the felony-impeachment rule by petition for postconviction relief. *Palmer v. State*, 101 Idaho 379, 613 P.2d 936 (1980).

Conviction Required.

A witness cannot be impeached by evidence of particular wrongful acts except that it may be shown by examination of witness or record of a judgment that he has been convicted of felony. *State v. Reding*, 52 Idaho 260, 13 P.2d 253 (1932).

Improper Answers.

Where a police officer was questioned about the character of an accused and the officer spoke of the accused in connection with a robbery and a child custody matter, no error was committed when the statements by the officer were stricken from the record and the jury told to disregard same. *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

Improper Questions.

Where prosecution asked one of the defendant's witnesses whether he had ever stolen any cattle while working for defendant, such question constituted improper impeachment, since prosecution may not inquire about any wrongful conduct that witness may have participated in which did not culminate in a felony conviction; however, court's ruling that because witness did not answer the question, any prejudicial inferences resulting from the asking of the question could be cured by instructing the jury to disregard the question and avoid speculating how the witness could have answered, was proper and denial of defendant's motion for mistrial was not an abuse of discretion. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

In Camera Hearing.

The judge did not impermissibly deny the defendant the opportunity to impeach the state's key witness with felony convictions where the defendant's counsel failed to re-

quest an in camera hearing after the judge informed him that one was necessary. *State v. Nab*, 113 Idaho 168, 742 P.2d 423 (Ct. App. 1987), review denied, *State v. Nab*, 116 Idaho 466, 776 P.2d 828 (1988).

In General.

Since the Idaho Supreme Court has the inherent power to promulgate procedural rules, it follows that the court also has the inherent power to establish rules of evidence, including a rule which allows a criminal defendant to be impeached by the use of a prior felony conviction. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Manner of Proof.

Usual manner of making proof of prior conviction of felony is to ask witness if he has suffered such conviction and, if he denies it, to produce copy of judgment of conviction. *State v. Alvord*, 46 Idaho 765, 271 P. 322 (1928).

Misdemeanor Convictions.

Conviction of misdemeanor is not admissible for purposes of impeachment. *State v. Alvord*, 46 Idaho 765, 271 P. 322 (1928).

The fact that a witness has been convicted of a misdemeanor is not admissible to impeach him. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

Misdemeanor convictions cannot be used for impeachment. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Number or Nature of Convictions.

Former statute did not require disclosure on either the number or the nature of the felony or felonies of which an accused had been previously convicted, to be used for impeachment purposes when he had taken the stand in his own defense. Where defendant charged with committing a lewd and lascivious act with a minor child under the age of 16 was asked the question on cross-examination, "Have you ever been previously convicted of a felony?" and the defendant answered in affirmative, it deprived the defendant of a fair trial to allow the prosecution to continue further interrogation concerning number or nature of such previous felonies. *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

In a prosecution for robbery, it was proper for the state to impeach the defendant by asking him whether he had ever been convicted of a felony, without asking the nature of the felony, since defendant's former robbery conviction was relevant to credibility under this rule. *State v. Ybarra*, 102 Idaho 573, 634 P.2d 435 (1981).

Probative Value.

Former rule regarding use of a prior felony

conviction to impeach a witness required a particularized determination, based upon the nature of the crimes, that the prior felony convictions were relevant to credibility. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

In a prosecution for robbery where the record disclosed that the defendant had prior felony convictions of injury to a public jail, resisting or obstructing police officers incident to escape, and for delivery of heroin, the defendant's prior felonies plainly had probative value on the question of his credibility and the district judge did not err by allowing the convictions to be used for limited impeachment. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

In robbery prosecution, prosecutor's question to defendant's wife as to whether she knew it was illegal for defendant to possess a firearm, and question to defendant as to whether he had previously been before a judge, did not require mistrial as being impermissible references to prior felony conviction where the same result would have been reached by the jury even if the disputed evidence had been excluded. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Where witness's felony convictions were not identified and the trial judge made no determination that any such convictions were relevant to credibility, the impeachment was ineffective and should be disregarded by the trial judge in weighing witness's testimony. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984).

Where the prior felony conviction is being admitted for the limited purpose of impeachment, it is not required that the trial judge make a determination that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. *State v. Christopherson*, 108 Idaho 502, 700 P.2d 124 (Ct. App. 1985).

Procedure.

A defendant in a criminal action who takes the witness stand in his own behalf may be required on cross-examination to state whether or not he has ever been convicted of a felony. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

Where defendant's witness on cross-examination attempted to interpose privilege of Fifth Amendment of United States Constitution to avoid answering question as to whether he had been convicted of a felony, trial court properly required him to respond. *State v. Stevens*, 93 Idaho 48, 454 P.2d 945 (1969).

Prosecutor's Statement.**—Proper.**

In prosecution for first-degree burglary, wherein the defendant took the stand in his own defense and testified that he had been at the scene merely to observe the burglary, the prosecutor's reference to the defendant's version of the facts as "the theory of an ex-convict" was proper inasmuch as the prosecutor was using the defendant's felony record to question his credibility as a witness. *State v. Palmer*, 98 Idaho 845, 574 P.2d 533 (1978).

Rebuttal Evidence.

In robbery prosecution, evidence that gun found in defendant's car was stolen was proper to rebut the testimony of defendant's wife that she was the owner of the weapon and to demonstrate the implausibility of her story that she had inadvertently left the gun in the car; the prejudicial effect of the evidence was outweighed by its value in testing her credibility. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Use of Conviction.

Although a felony record can be used to impeach the credibility of a witness, a careful

line must be drawn between impeaching a witness's credibility and using a prior conviction to imply that a criminal would commit another crime simply because he has committed a crime in the past. *State v. Palmer*, 98 Idaho 845, 574 P.2d 533 (1978).

The use of a prior felony conviction for impeachment purposes did not deprive defendant of his right to a fair and impartial jury trial where a jury instruction limited the prejudicial impact by stating that the conviction could be considered only on the issue of credibility and that the conviction did not necessarily impair defendant's credibility. *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980).

Withheld or Vacated Judgment.

Admission of all evidence relating to prior felony conviction of defendant in robbery trial was error where prosecution asked defendant if he had ever been convicted of a felony, and, upon obtaining a negative answer, put into evidence a prior judgment of conviction of defendant for robbery, and order vacating such judgment, and an order of nolle prosequi relative thereto. *State v. Barwick*, 94 Idaho 139, 483 P.2d 670 (1971).

RESEARCH REFERENCES

A.L.R. Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial. 16 A.L.R.3d 726.

Use of judgment in prior juvenile court proceeding to impeach credibility of witness. 63 A.L.R.3d 1112.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence. 83 A.L.R.5th 277.

Comment Note: What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule? - general considerations. 82 A.L.R.5th 359.

What constitutes crime involving "dishonesty or false statement" under rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule — nonviolent crimes. 84 A.L.R.5th 487.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS**Admissibility Proper.**

Evidence regarding a victim's marijuana use and religious affiliation was admissible for the purpose of providing context to her initial dishonesty about her drug use.. *State v.*

Sanchez, 142 Idaho 309, 127 P.3d 212 (Ct. App. 2005).

Evidence regarding a witness's religious affiliation was admissible to rehabilitate witness and explain how his background contrib-

uted to his initial denial of involvement in the attack. *State v. Sanchez*, 142 Idaho 309, 127 P.3d 212 (Ct. App. 2005).

Cited in: *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988).

Rule 611. Mode and order of interrogation and presentation.

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be made by leading questions. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Child Abuse Victim.
Cross-Examination.
—Criminal Defendant.
—Experts.
—Scope.
Discretion of Court.
Rebuttal of Defense Evidence.

Child Abuse Victim.

The trial court did not abuse its discretion in requiring that counsel sit in front of the child abuse victim when questioning her and that breaks be taken more frequently than normal, where in establishing the special procedures the court gave an instruction to the jury cautioning them not to give any different weight to the testimony because of the procedures. *State v. Larsen*, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993).

Cross-Examination.

The magistrate did not act improperly in cautioning the defendant against argumentative cross-examination, as the magistrate did not tell the defendant that she was prohibited from aggressively pursuing her defense, and the magistrate exercised restrained and appropriate control over the examination of witnesses throughout the trial. *State v. Palmer*, 114 Idaho 895, 761 P.2d 1247 (Ct. App. 1988).

Defendant's convictions for the attempted procurement of prostitution and the procurement of prostitution were proper because when defendant took the stand on her own behalf, she waived the privilege against self-incrimination in regard to questions related to the subject matter of the testimony and matters that related to the substantive issues. In its discretion, the district court found that the additional issues in question were relevant and therefore permissible matters for cross-examination. *State v. Grazian*, 144 Idaho 510, 164 P.3d 790 (2007).

Trial court did not abuse its discretion during defendant's trial for battery on a peace officer by concluding that it would allow cross-examination into the underlying events of the fight itself where the State was permitted to attack defendant's credibility by getting into the events of the fight. *State v. Rauch*, 144 Idaho 682, 168 P.3d 1029 (Ct. App. 2007).

—Criminal Defendant.

Where defendant testified as part of the self-defense argument that he was not in a position to be able to fight because of health problems, and that was part of the reason why he thought he had to defend himself with a gun, which led to the victim's death, the cross-examination by the prosecutor about defendant's history as boxer and being in-

volved in fist fights clearly was designed to provide a basis upon which the jury ultimately could reach a conclusion whether to believe defendant's version of his reason for killing; there was no error in the admission of the evidence, and the trial court did not err in denying the motion for mistrial and motion for a new trial. *State v. Babbitt*, 120 Idaho 337, 815 P.2d 1077 (Ct. App. 1991).

In prosecution for, inter alia, aggravated battery of a police officer, trial court properly refused to limit scope of potential cross-examination if defendant chose to testify to questions regarding an alleged admission overheard by a jailer. State should be allowed to rebut the inference that defendant did not shoot the officer, and should also be allowed to attack defendant's credibility by cross-examining him regarding the events of the fight itself. *State v. Rauch*, 144 Idaho 682, 168 P.3d 1029 (Ct. App. 2007).

—Experts.

In an action for wrongful death based on medical negligence, the district court did not abuse its discretion in barring defendant doctor from questioning plaintiffs' expert witness at cross-examination as to his opinion as to whether other parties, who settled out of court and had been dismissed from the case, had breached the standard of care. The line of proposed questioning was outside the scope of subsection (b) of this rule, because it did nothing to impeach the expert as it was not inconsistent with his direct testimony. *Aguilar v. Coonrod*, — Idaho —, 262 P.3d 671 (2011).

—Scope.

No abuse of court's discretion was found with respect to controlling the scope of the State's cross-examination of a defendant charged with possession of marijuana with intent to sell, where the subject matter of defendant's testimony on direct examination was his asserted lack of intent to deliver marijuana found in his possession and on

cross-examination the state challenged this alleged lack of intent by having defendant explain the nature of circumstantial evidence against him and attacked defendant's credibility by exposing his knowledge of marijuana values and marijuana delivery techniques and materials. *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989).

Discretion of Court.

The decision whether to admonish a witness lies within the trial court's discretion and flows from his or her role as manager of the trial. *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987).

Court abused discretion by limiting cross examination to one party's counsel where parties were no longer married, and had differing interests at trial. *Clark v. Klein*, 137 Idaho 154, 45 P.3d 810 (2002).

Rebuttal of Defense Evidence.

Although a potential defense must be raised through evidence presented by the defendant before the state may introduce evidence concerning that issue, it is not necessary that a defendant put on expert testimony before the state may rebut defense evidence with its own expert testimony. *State v. Johnson*, 132 Idaho 726, 979 P.2d 128 (Ct. App. 1999).

Where the defense theory that hypoglycemia accounted for the defendant's slurred speech, confusion and lack of coordination was already well developed before the state's expert witness was called, her testimony, which was limited to her medical opinion as to whether the defendant's symptoms at the time of his arrest could be attributed to hypoglycemia, would have been permissible rebuttal to the preceding defense witnesses even if the defendant had never called an expert witness. *State v. Johnson*, 132 Idaho 726, 979 P.2d 128 (Ct. App. 1999).

Cited in: *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988); *State v. Grinolds*, 121 Idaho 673, 827 P.2d 686 (1992).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Adverse Party.

Cross-Examination.

—Adverse Party.

—Connected Transactions.

—Criminal Defendant.

—Experts.

—Extent.

—Improper Questions.

—Party As to Whom Action Dismissed.

—Prior Convictions.

—Proper.

—Purpose.

—Scope.

Custody Proceedings.

Discretion of Court.

Divorce.

Hypothetical Questions.

Introductory Questions.

Leading Questions.

Malpractice Actions.

Mechanic's Lien Proceedings.

Mode of Examination.

Objectionable Questions.

Right of Examination.

—Tape Recordings.

—Use of Denied Facts.

Voluntary Testimony.

Waiver of Marital Privilege.

Adverse Party.

Opposing party may be called as to matters not readily provable in any other way, and it is not condition precedent thereto that party so calling shall have made out prima facie case. *Lessman v. Anschustigui*, 37 Idaho 127, 215 P. 460 (1923).

Cross-Examination.

—Adverse Party.

Cross-examination of adverse party is confined to material issues. *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

An adverse party can be cross-examined only as to matters which are peculiarly within the knowledge of the witness and which are not otherwise readily available. *Shrives v. Talbot*, 88 Idaho 209, 398 P.2d 448 (1965); *Cox v. Widmer*, 94 Idaho 451, 490 P.2d 318 (1971).

Where the statutory cross-examination of defendant by plaintiff's counsel was very brief and limited to matters peculiarly within defendant's personal knowledge, and was not an attempt to present his entire case by means of defendant's testimony, there was no abuse of the court's discretionary control over the scope of statutory cross-examination. *Ross v. Olson*, 95 Idaho 915, 523 P.2d 518 (1974).

—Connected Transactions.

In trial of criminal action, defendant should be permitted to cross-examine prosecuting witness as to any matters in connection with the transaction, as, for example, to the acts of prosecuting witness during the interim between meeting of prosecuting witness and defendant in the morning and the time of commission of the offense in the evening. *State v. Webb*, 6 Idaho 428, 55 P. 892 (1899).

In action on note where plaintiff testifies in chief that he purchased note before maturity and paid therefor a consideration, and that plaintiff was well-acquainted with payee and had been for many years, and that note purchased was one of a number of the same kind, plaintiff may be fully interrogated on cross-examination as to all facts connected with transaction in order to aid jury in determining whether note was purchased in good faith before maturity and without notice. *Park v. Johnson*, 20 Idaho 548, 119 P. 52 (1911).

—Criminal Defendant.

Defendant in criminal case cannot be compelled to testify in such action, but if he

voluntarily takes the stand and testifies for himself, he does so subject to rule that he may be cross-examined in regard to any facts material to issue. *State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969).

Where defendant has offered himself as a witness, cross-examination as to facts stated in his direct examination, or connected therewith, does not violate constitutional guaranty that no person may be required to be a witness against himself. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf, he is subject to the same rules applicable to other witnesses, and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith. *State v. Hargraves*, 62 Idaho 8, 107 P.2d 854 (1940).

Where accused voluntarily took stand in his own behalf, he was thereafter subject to the same rule governing the examination of other witnesses, and he may be cross-examined as to all matters he has testified to or connected thereto. *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

—Experts.

The courts should be liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and peculiarly applicable when it comes to the cross-examination of that class of witnesses commonly designated as experts. *Trull v. Modern Woodmen of Am.*, 12 Idaho 318, 85 P. 1081 (1906).

—Extent.

The control of cross-examination is committed to the sound discretion of the trial judge. The court's discretion should be exercised to allow a criminal defendant considerable latitude in cross-examining adverse witnesses; but a limitation imposed by the judge will not be overturned on appeal absent a showing of prejudice. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

—Improper Questions.

Where the prosecutor asked the son of the accused on cross-examination if he had not stated to a named witness that he, the witness, suspected his father of having committed a similar offense with other girls, one a member of his family, and that such conduct on the part of the accused caused the death of the witness' mother, and if at such conversation the witness did not cry and say, "I can't go against my father, even if he is guilty," and where the prosecutor repeatedly asked sub-

stantially the same question, such conduct of the prosecutor was reversible error. These questions were improper cross-examination and should not have been allowed to go before the jury camouflaged as impeaching questions. *State v. Irwin*, 9 Idaho 35, 71 P. 608 (1903).

—Party As to Whom Action Dismissed.

A party as to whom the action is dismissed is no longer an adverse party and cannot be called for cross-examination. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940).

—Prior Convictions.

After accused's direct testimony of imprisonment in penitentiary, cross-examination as to when he was released was proper. *State v. Smailes*, 51 Idaho 321, 5 P.2d 540 (1931).

Where defendant waived his right not to testify and admitted on direct examination that he had been convicted of three felonies prior to 1966, and that subsequent to 1966 he had not been in trouble, it was permissible for the prosecutor, on cross-examination, to inquire as to two arrests subsequent to 1966. *State v. McClellan*, 96 Idaho 569, 532 P.2d 574 (1975), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

—Proper.

In an action against a city for an injury sustained by a pedestrian who stumbled and fell on a raised portion of a sidewalk, the pedestrian's knowledge that the kind of defect causing her to stumble was commonly found wherever poplar or cottonwood trees grew along the sidewalk might have a legitimate bearing on the measure of due care and thus on the question of contributory negligence, and hence cross-examination of the pedestrian concerning her knowledge of trees growing along walks throughout the city and of similar defect in other places of the city was not improper. *Stewart v. City of Idaho Falls*, 61 Idaho 471, 103 P.2d 697 (1940).

—Purpose.

The purpose of cross-examination is to weaken or show the untruthfulness of the testimony of the party examined or the party's bias or prejudice, thus, where the defendant claimed on direct examination that he drove to city to gamble, the state, on cross-examination could ask him about items found in the car which indicated a different purpose — that he went to city to commit a robbery. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984).

—Scope.

Defendant in criminal action who has testified in his own behalf can only be cross-

examined by the state as to facts stated in his direct examination, or in connection therewith. *State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969).

Cross-examination of witness should be confined to facts stated by witness in his direct examination, or connected therewith. *State v. Anthony*, 6 Idaho 383, 55 P. 884 (1899).

Where defendant testified to going to a specified place with another and to spending night with such person, and gave no further testimony as to his movements or when he left such place, it was not error to permit prosecuting attorney to ask defendant when he left the place to which he and the other party had gone. *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911).

Where defendant had testified that he had received but one shipment of whisky by railroad, state may show that he had received other shipments. *State v. Silva*, 21 Idaho 247, 120 P. 835 (1912).

It is abuse of judicial discretion and of the privilege granted to permit party calling his adversary as witness to inquire into the entire controversy and to examine him with respect to matters about which other evidence is readily available. *Boeck v. Boeck*, 29 Idaho 639, 161 P. 576 (1916).

On cross-examination, counsel may cover a wide field for purpose of testing knowledge and recollection of witness concerning matters to which he testified on direct examination. *Barton v. Dyer*, 38 Idaho 1, 220 P. 488 (1923).

Where in action for accounting, plaintiff had testified on cross-examination that accounting was not correct as far as investigated, it was reversible error to refuse to allow an answer to the following question: "Now, will you designate to the court that portion of the total that is incorrect." *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 P. 1014 (1925).

In prosecution for manslaughter, counsel should be permitted on cross-examination to show whether witness, who was intoxicated and was riding in back seat of defendant's automobile at time of wreck, remembered anything about what occurred at the wreck or immediately before, although subject had not been gone into on direct examination. *State v. Frank*, 51 Idaho 21, 1 P.2d 181 (1931).

An accused in a criminal case may not open his case and present evidence to support it by cross-examination of the state's witnesses respecting matters not introduced on their direct examination. *State v. Smailes*, 51 Idaho 321, 5 P.2d 540 (1931).

Although cross-examination is limited to facts stated in the direct examination or connected therewith, this allows cross-examination not only as to all facts stated by a witness in his original examination, but as to other facts connected with them, directly or indirectly tending to explain, modify, or qualify the inference resulting from the facts stated by the witness in his direct examination. *Towne v. Northwestern Mut. Life Ins. Co.*, 58 Idaho 83, 70 P.2d 364 (1937).

Where appellant's co-defendant was called for cross-examination by plaintiffs, and no objection was sustained to questions propounded to him by appellant's counsel in the form of direct examination, and it appeared from the record that appellant's counsel examined him fully, and at length, on matters touched on by respondents in their cross-examination of him and, furthermore, appellant did not call him for cross-examination, the rulings were not erroneous, but if they had been, the error would not have been prejudicial because it did not appear that the appellant suffered disadvantage from them. *Manion v. Waybright*, 59 Idaho 643, 86 P.2d 181 (1938).

Any party to a proceeding may cross-examine his adversary as to any material fact or facts, and cross-examination is not restricted to matters peculiarly within knowledge of adversary. *Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952).

The trial court did not abuse its discretion so as to commit reversible error in limiting the cross-examination of defendants under the facts and circumstances of the case; the evidence sought to be brought out was substantially covered at other stages of the trial by one or more witnesses. *Grant v. Clarke*, 78 Idaho 412, 305 P.2d 752 (1956).

There was no abuse by the trial court in limiting cross-examination where questions principally related to traffic conditions existing at the time of the accident and testimony thus attempted to be adduced was introduced at other stages of the trial. *Morford v. Brown*, 85 Idaho 480, 381 P.2d 45 (1963).

Cross-examination addressed to the same events or events proximate in time and space to those covered on direct examination is proper. *State v. Jesser*, 95 Idaho 43, 501 P.2d 727 (1972), modified on other grounds, *State v. Gums*, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995).

Custody Proceedings.

In habeas corpus proceedings between husband and wife for custody of their child, the parties are adverse. *Mabbett v. Mabbett*, 34 Idaho 611, 202 P. 1057 (1921).

Discretion of Court.

Foundation necessary to show that matters inquired of may not be otherwise readily established is matter in discretion of trial court. *Lessman v. Anschustigui*, 37 Idaho 127, 215 P. 460 (1923).

Time when opposite party may be called, and extent of examination, are matters within discretion of trial court, which will not be overturned in absence of abuse. *Lessman v. Anschustigui*, 37 Idaho 127, 215 P. 460 (1923).

Cross-examination is largely in the discretion of trial court, and its refusal to allow one party to action to examine person called by another party is not abuse of such discretion. *Portland Cattle Loan Co. v. Gemmell*, 41 Idaho 756, 242 P. 798 (1925); *Evans v. Bannock County*, 59 Idaho 442, 83 P.2d 427 (1938).

Court did not abuse its discretion in allowing defendant to call and cross-examine plaintiff as an adverse witness where plaintiff's counsel examined plaintiff on same matters covered by defendant in cross-examination. *Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952).

In an automobile collision action where attorney, who had represented defendant in a suit against garage which worked on the car, was only questioned as to the origin of the report on defendant's brakes, plaintiff's question on cross-examination to attorney as to the extent to which he aided in answering interrogatories propounded by plaintiff was outside the scope of cross-examination and the trial court did not abuse its discretion in disallowing the question. *Rosenberg v. Toetly*, 94 Idaho 413, 489 P.2d 446 (1971).

Where defendant put details of grain transfers in issue on direct examination, trial court did not abuse discretion by allowing state on cross-examination to fix the location and identity of participants of the transfers and to trace movement of grain immediately thereafter. *State v. Jesser*, 95 Idaho 43, 501 P.2d 727 (1972), modified on other grounds, *State v. Gums*, 126 Idaho 930, 894 P.2d 163 (Ct. App. 1995).

Divorce.

Either party to a divorce action may call the other as witness. *Boeck v. Boeck*, 29 Idaho 639, 161 P. 576 (1916).

Hypothetical Questions.

A hypothetical question should state all the facts relevant to the formation of an opinion, and then assuming the facts stated to be true, ask the witness whether he is able to form an opinion therefrom, and, if so, to state such opinion. *Willis v. Western Hosp. Ass'n*, 67 Idaho 435, 182 P.2d 950 (1947).

The form of hypothetical questions and the facts to be embraced therein are matters resting largely in the sound discretion of the trial court. *Willis v. Western Hosp. Ass'n*, 67 Idaho 435, 182 P.2d 950 (1947).

The right and duty of properly framing a hypothetical question rests primarily on the counsel by whom the question is asked, and he should not be permitted to frame an improper question and then cast the burden of supplying its deficiencies on the opposing counsel. *Willis v. Western Hosp. Ass'n*, 67 Idaho 435, 182 P.2d 950 (1947).

Introductory Questions.

A question which, phrased broadly, is introductory in character, is permissible. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).

Leading Questions.

A leading or suggestive question is one which suggests to the witness the answer which the examining party desires. *Idaho Mercantile Co. v. Kalanquin*, 8 Idaho 101, 66 P. 933 (1901).

The allowance of leading questions is committed to the discretion of the trial court, and as a general rule a judgment will not be reversed on this ground unless there is clear and manifest abuse in the exercise of such discretion, and resulting in prejudice to the complaining party. *McLean v. Lewiston*, 8 Idaho 472, 69 P. 478 (1902); *Pedersen v. Moore*, 32 Idaho 420, 184 P. 475 (1919); *State v. Larsen*, 42 Idaho 517, 246 P. 313 (1926), reversed on other grounds, *State v. Larsen*, 44 Idaho 270, 256 P. 107 (1927).

It may be conceded that although ordinary leading questions are objectionable, yet an exception to the rule is made where the witness is a young and unsophisticated girl and is required to testify to the details of the crime of statutory rape. *State v. Larsen*, 42 Idaho 517, 246 P. 313 (1926), reversed on other grounds, *State v. Larsen*, 44 Idaho 270, 256 P. 107 (1927).

A question asked of a burglary defendant by his counsel as to whether he "knowingly, wilfully, and intentionally" burglarized the store in question was properly excluded as leading. *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968).

The allowance by the trial court of the state's limited use of leading questions for a witness who did not speak English did not constitute an abuse of discretion, where defendant in robbery prosecution failed to show any resulting prejudice. *State v. Gerhardt*, 97 Idaho 603, 549 P.2d 262 (1976).

In prosecution for lewd conduct with a minor under 16 and for kidnapping in the

second degree, where prosecution's witness, who was also defendant's mother, suffered an almost complete lapse of memory, the trial court did not abuse its discretion in permitting prosecution to ask leading questions. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976), superseded by statute as stated in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

In an action to quiet title to land, the question as to whether the defendant would have signed a quitclaim deed had she known of a mistake in the description of the land sought to be conveyed did not suggest the answer sought and was therefore not a leading question. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Malpractice Actions.

A plaintiff in a malpractice action has a right to cross-examine defendant as a medical expert. *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956).

Mechanic's Lien Proceedings.

Trial court committed error in permitting plaintiff to call defendants on cross-examination in foreclosure of mechanic's lien proceeding for matter inquired into was available to plaintiff through correspondence and plaintiff's own testimony, but error was not reversible where other evidence preponderantly supported judgment in favor of the plaintiff. *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956).

Mode of Examination.

Right of examination of such witness by his own counsel means that such examination shall be according to the rules governing direct examination. *Barton v. Dyer*, 38 Idaho 1, 220 P. 488 (1923).

Objectionable Questions.

In action for personal injuries, question of respondents' counsel to medical expert called by respondents as follows was objectionable: "I will ask you if it is not a fact that the medical profession recognizes the fact that in that class of cases almost all of them generally improve after the lawsuit or litigation concerning it is over?" *Quillin v. Colquhoun*, 42 Idaho 522, 247 P. 740 (1926).

Right of Examination.

Right of examination of adverse witness by his own counsel means that such examination shall be according to the rules gathered in direct examination. *Barton v. Dyer*, 38 Idaho 1, 220 P. 488 (1923).

In an action by a passenger against an airline company for personal injuries alleged to have been caused by negligent failure to

warn passengers to fasten seat belts when air turbulence causing violent motion of plane was likely, it was error to refuse to permit plaintiff to call defendant's pilot of the plane for cross-examination. *Ness v. West Coast Airlines*, 90 Idaho 111, 410 P.2d 965 (1965).

—Tape Recordings.

In prosecution for murder in the first degree where defendant's wife, as a defense witness, testified as to statements made to her by defendant immediately following the shooting, it was proper for the state to introduce, during rebuttal, a tape recording which revealed that defendant made statements to his wife other than those she mentioned on direct and cross-examination. *State v. McClellan*, 96 Idaho 569, 532 P.2d 574 (1975), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

—Use of Denied Facts.

It was improper for the cross-examiner to assume a state of facts which had theretofore been denied by the witness; thus, asking a defendant's witness in a criminal case on

cross-examination where she had put certain cartridges, after she had testified to having no cartridges, was improper. *State v. Bush*, 50 Idaho 166, 295 P. 432 (1930).

Voluntary Testimony.

Where a witness voluntarily makes a statement while testifying not in response to any question, the adverse party may move to strike such voluntary statement, but he has no right of cross-examination thereon. *Kelly v. Troy Laundry Co.*, 46 Idaho 214, 267 P. 222 (1928).

Waiver of Marital Privilege.

In a murder in the first degree prosecution, where the marital privilege was waived and the wife was a competent witness, she was subject to normal procedures of cross-examination and the tape recording of her interview by a police officer on the day of shooting was admissible under the rules governing cross-examination. *State v. McClellan*, 96 Idaho 569, 532 P.2d 574 (1975), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

RESEARCH REFERENCES

A.L.R. Irrelevancy as affecting cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses. 88 A.L.R.3d 74.

Establishing on a cross-examination incompetency of witness under statute including testimony of one person because of death of another, to testify in respect of lost or destroyed instruments. 18 A.L.R.3d 606.

Cross-examination as to religious belief or lack of it to affect credibility of witness. 76 A.L.R.3d 539.

Right to cross-examine witness as to his place of residence. 85 A.L.R.3d 541.

Insurance against liability, cross-examination of witness to show that defendant in personal injury or death action carries insurance. 40 A.L.R. Fed. 541.

Waiver of incompetency of witness as to transaction with decedent by cross-examination of him. 40 A.L.R. Fed. 541.

Scope and extent of cross-examination of defendant or witness in personal injury or death action with regard to. 40 A.L.R. Fed. 541.

Rule 612. Writing or object used to refresh memory.

(a) If while testifying, a witness uses a writing or object to refresh the memory of the witness, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) **Before testifying.** If, before testifying, a witness uses a writing or object, not privileged under these rules or not protected from disclosure under Rule 26 of the Idaho Rules of Civil Procedure or Rule 16 of the Idaho Criminal Rules, to refresh the memory of the witness for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) **Terms and conditions of production and use.** A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.
Foundation.
Harmless Error.
Prepared Notes.
What May Be Used.

Discretion of Court.

When a witness refers to notes or other materials to refresh his memory, the court must ensure that the witness actually has a present recollection and is not to allow inadmissible evidence to inadvertently slip in for its truth; to aid in accomplishing this purpose the court has broad discretion in determining whether the witness is truly using the writing to refresh his memory or whether he is effectively offering the writing for its truth, and opposing counsel has the right to inspect at trial whatever is used to refresh recollection, to cross-examine the witness on it, and to introduce relevant portions into evidence. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

The trial court did not abuse its discretion in refusing to allow use of unemployment documents where the court stated that it was not making a blanket ruling excluding all impeachment evidence and where the defendant was allowed two means of impeaching the plaintiff. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Foundation.

Two items of foundation must be laid before

a witness may refer to notes or to other materials to refresh his or her memory: first, the witness must exhibit the need to refresh his or her memory and second, the witness must confirm that the notes will assist in refreshing his or her memory. The witness may not testify directly from the notes but can use them to assist in recollection. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

Harmless Error.

In action involving a contract dispute that arose from a remodeling project that plaintiff performed on a residential home for defendant, the court erred in permitting plaintiff to use notes to refresh his independent recollection where no foundation was laid to show that he had any independent recollection to be refreshed or whether the notes would be of assistance; however, such error was not grounds for reversal because the evidence elicited from plaintiff while he was testifying from his notes was generally cumulative of other properly admitted evidence. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

Prepared Notes.

In action involving contract dispute which arose from a remodeling project that plaintiffs performed on a residential house for defendants, where plaintiff witness relied almost entirely on his notes to explain the composition of each item of plaintiff's exhibit and the record showed that neither of the plaintiffs

kept individual time cards, a daily diary or made entries into a ledger with this information near in time to when such work was allegedly completed it was error to allow a witness to testify at trial from prepared notes under the guise of refreshing recollection. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Answers Written in Advance.
Discretion of Court.
Examination by Adverse Party.
Foundation.
Harmless Error.
Mortgage Book.
Police Records.
Previous Testimony.
Refusal to Produce Notes.
Use of Memorandum.
Waiver.

Answers Written in Advance.

It may be stated as a general rule that answers of a witness should not be written out in advance and merely read into the record and such a procedure did not come within the purview of former rule governing refreshment of memory; yet where the defendant in a criminal case moved to strike all of the testimony of a witness who had read from a memorandum, the court properly denied the motion where a number of questions and answers were not contained in the memorandum. *State v. Jester*, 46 Idaho 561, 270 P. 417 (1928).

Discretion of Court.

Much discretion is reposed in the trial judge to regulate the examination of witnesses and the manner of refreshing of recollection. *State v. Jester*, 46 Idaho 561, 270 P. 417 (1928).

Where sheriff and state traffic officer collaborated in taking measurements at scene of accident and sheriff copied figures taken by traffic officer into his own book two days after the accident, court did not err in allowing sheriff to refer to his own notes in order to refresh his memory. *Gardner v. Hobbs*, 69 Idaho 288, 206 P.2d 539 (1949).

Examination by Adverse Party.

Where file contained several documents, one of which was used to refresh witness's memory, the entire file was not subject to scrutiny of adverse party, as the witness had not read the other documents on direct examination. *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969).

What May Be Used.

A witness may use virtually anything to refresh his or her memory and the materials need not be admissible themselves. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

Foundation.

In order for a witness to be permitted to use a memorandum for the purpose of refreshing his memory respecting a fact, it should be shown that the memorandum was written by the witness or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. *State v. Ramirez*, 33 Idaho 803, 199 P. 376 (1921).

Harmless Error.

It was error to refuse to allow the defense attorney to examine notes used by a state's witness to refresh his memory, but where the verdict of guilty was overwhelmingly supported by the evidence and all relevant and material facts testified to by the witness were corroborated substantially by other competent witnesses, such error was technical, harmless, and not reversible. *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968).

Mortgage Book.

Mortgage book kept for the convenience of the mortgage company was not admissible as independent evidence in action for foreclosure of mortgage held by the company, but could only be used to refresh memory. *Prudential Ins. Co. v. Folsom*, 48 Idaho 538, 283 P. 609 (1929).

Police Records.

Where during the course of the trial police officers used portions of the police record of the murder investigation to refresh their memories, it was not error to refuse to have entire record placed in evidence since much of it was irrelevant and defendant had the right to inspect items that had been used and could have read the relevant portion to the jury if he had so desired. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Previous Testimony.

Witness may refresh his recollection by reading evidence given by him upon former trial, and then testify, if he has an indepen-

dent recollection of transaction. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).

Refusal to Produce Notes.

Where witness refused to produce his notes, when ordered to by court, on the grounds that they were not used during trial to refresh his memory, he is guilty of contempt for wilful disobedience of an order lawfully issued by the court. *Barnett v. Reed*, 93 Idaho 319, 460 P.2d 744 (1969).

Use of Memorandum.

When testifying regarding the amount of hay sold, seller was permitted to refresh his

memory with a memorandum written by him at the time the hay was weighed. *Clark v. Gneiting*, 95 Idaho 10, 501 P.2d 278 (1972).

Waiver.

The error in permitting a witness for the state in a criminal case to use a memorandum for the purpose of refreshing his memory, which was not prepared by himself or under this direction, is not prejudicial where the defendant subsequently testifies to substantially all the facts testified to by the witness in relation to matters contained in the memorandum. *State v. Ramirez*, 33 Idaho 803, 199 P. 376 (1921).

Rule 613. Prior statements of witnesses.

(a) **Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) **Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2). (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Taped Conversation.

The trial court did not err by allowing state to introduce, in rebuttal to evidence presented by the defense, a tape-recorded conversation between defendant and the victim's mother where the tape contradicted defendant's testimony on issues relevant to the case as, inter alia, even though defendant admitted to mak-

ing the statements on the tape, its use was probative with regard to determining whether, as defendant claimed, his taped remarks were not meant to be taken seriously. *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989).

Cited in: *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Extrinsic Evidence.

Impeachment.

Extrinsic Evidence.

Where counsel has a genuine factual basis for questioning a witness about a prior inconsistent statement, and the witness testifies to a lack of recollection, it is not error if counsel later omits to prove the statement by extrinsic evidence. *Preuss v. Thomson*, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986).

Impeachment.

In general, when a foundation for impeachment has been laid, it should be followed by proof unless the prior statement has been admitted by the witness; nevertheless, the fact that unfinished impeachment is a disfavored practice does not mean that it is always reversible error. *Preuss v. Thomson*, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986).

Testimony by a witness that he or she cannot remember is sufficient to complete the foundation for impeachment with a prior inconsistent statement, as such a declaration is

equivalent to a denial. *Preuss v. Thomson*, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986).

Rule 614. Calling and interrogation of witnesses by court.

(a) **Calling by court.** When the court is the trier of fact, the court may on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) **Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.

(c) **Objections.** Objections to the interrogation of a witness by the court may be made at the time of interrogation or at the next available opportunity when the jury is not present. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Child Abuse Victim.

Purpose.

Questioning of Defendant.

Review of Questioning.

Child Abuse Victim.

The trial court did not go beyond the scope of its authority in questioning a child abuse victim where it sought to determine what the victim meant by "touching problems," and attempted to sort out the identity of the person who had abused the victim. *State v. Larsen*, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993).

Purpose.

It is vital that trial judges be allowed to ask questions for clarification and for gathering information during hearings in which they act as fact finders. *Wolfe v. State*, 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990).

Questioning of Defendant.

The court's questioning of the defendant did not constitute fundamental error where the judge questioned several prosecution and de-

fense witnesses throughout the trial and where the court's purpose in questioning the defendant was to clarify a perceived inconsistency between the defendant's testimony on direct and cross-examination. *State v. Lovelass*, 133 Idaho 160, 983 P.2d 233 (Ct. App. 1999).

Review of Questioning.

Where the defense made no objection at trial to the court questioning the defendant, the appellate court reviewed the questioning only for fundamental error. *State v. Lovelass*, 133 Idaho 160, 983 P.2d 233 (Ct. App. 1999).

Court did not improperly comment on a detective's credibility because, contrary to defendant's assertion, the statements were somewhat cryptic and did not evidence an explicit "high opinion" of the detective; the content of the conversation did not bolster the detective's testimony in any appreciable way. *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008).

Cited in: *Milton v. State*, 126 Idaho 638, 888 P.2d 812 (Ct. App. 1995); *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 895 P.2d 581 (1995); *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003).

Rule 615. Exclusion of witnesses.

(a) **General rule.** At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a crime victim whose exclusion is prohibited under Article I, Section 22 of the Idaho constitution.

(b) **Preliminary hearings.** Notwithstanding subsection (a) of this rule, in a preliminary hearing if either party requests it the magistrate must exclude all non-party witnesses who have not been examined.

(c) **Child witnesses.** Notwithstanding subsections (a) and (b) hereof or any other statutory provision, when a child is summoned as a witness in any hearing in any criminal matter, including any preliminary hearing, parents, a counselor, friend or other person having a supportive relationship with the child may, in the discretion of the court, remain in the courtroom during the child's testimony. (Adopted January 8, 1985, effective July 1, 1985; amended March 18, 1998, effective July 1, 1998.)

JUDICIAL DECISIONS

ANALYSIS

Discretion of Court.

—Violation of Order.

Exception to Rule.

Illustrative Cases.

Methods of Enforcement.

Purpose.

Trial Transcripts.

Discretion of Court.

The question whether to grant a motion to exclude witnesses is committed to the sound discretion of the trial judge. *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987).

Since granting or denying the request for exclusion is discretionary, permitting exceptions to or variations from an exclusion order also lies within the trial court's discretion, as does the nature of any sanction imposed for violation of the order. *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987).

The granting or denying of a request for exclusion under this rule is a discretionary decision of the trial court. The appropriate remedy for a breach of an exclusion order is also committed to the sound discretion of the trial court. In exercising its discretion, the trial court ordinarily should not exclude witnesses without a demonstration of probable prejudice. Moreover, a failure of the trial judge to order a mistrial when witnesses who have violated sequestration orders nevertheless testify will not justify reversal on appeal absent a showing of prejudice sufficient to constitute an abuse of discretion. *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (2008).

—Violation of Order.

Where the court reasoned that a mistrial would not cure the apparent prejudice visited upon the defense by the witnesses' communication and instead held that the defense would be allowed to question both offending

witnesses about their noncompliance with the non-communication order, putting their credibility in issue and also held that defense counsel would be granted leave during argument to comment on the offending witnesses' breach of the court's order, the district court rightly perceived the issue as one of discretion, acted within the outer boundaries of discretion and consistent with applicable legal standards and reached its decision by an exercise of reason. Therefore the district court's choice of sanction was not an abuse of its discretion, and the order denying the defense's motion for mistrial was properly granted. *State v. Slawson*, 124 Idaho 753, 864 P.2d 199 (Ct. App. 1993).

Where the plaintiffs discovered within the 14 day window to file a motion for a new trial that the defendant's counsel had provided trial transcripts to witnesses subject to an exclusion order, the court properly granted the plaintiffs' motion. *Slaathaugh v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999).

Exception to Rule.

The second exception under this rule for "an officer or employee of a party that is not a natural person" is applicable to investigative agents, including local police officers; therefore, where the detective had already testified and the state had rested its case in chief before defendants moved to exclude witnesses, the foundation needed for the court to rule on the state's request that the detective be allowed to remain in the courtroom under the second exception to this rule was already in the record, and no error was committed in allowing him to remain. *State v. Ralls*, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986).

Illustrative Cases.

In defendant's criminal trial for first degree murder and two counts of second degree kidnapping, two witness violated an exclusion order under this rule by having a discussion

in the witness room; defendant was not entitled to exclusion of their testimony even though the victim's mother changed her testimony after the discussion with the other witness. The victim's mother testified that her decision to tell the truth was motivated by personal reasons and there was no showing of prejudice to the defendant. *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (2008).

Methods of Enforcement.

There are four recognized methods of enforcing an exclusion order: (1) citing the witness for contempt, (2) permitting comment on the witness's noncompliance in order to reflect on his credibility, (3) refusing to let the witness testify, and (4) striking the witness's testimony. *State v. Slawson*, 124 Idaho 753, 864 P.2d 199 (Ct. App. 1993).

Purpose.

This rule recognizes that exclusion is one

means to reduce the possibility of a witness shaping his or her testimony to conform with or to rebut prior testimony of others. *State v. Ralls*, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986).

Trial Transcripts.

While an exclusion order did not specifically instruct defense counsel not to provide trial transcripts to witnesses subject to the order, since the purpose of this rule is to prevent witnesses from molding their own testimony to conform with or rebut testimony of other witnesses, the trial court did not err in finding that the defendant violated the order, even though no witness subject to the order "heard" the testimony of another witness. *Slaathaugh v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999).

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Discretion of Court.
Interest in Suit.

Discretion of Court.

The exclusion of witnesses who are not parties to the suit although interested therein, is wholly in the court's discretion. *Paine v. Strom*, 51 Idaho 532, 6 P.2d 849 (1931).

Permitting a witness to testify after earlier being present in the courtroom was not an abuse of discretion or reversible error in the absence of a showing how the adverse parties were prejudiced by the fact that the witness had been in the courtroom previous to his testimony. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

The exclusion of witnesses from the courtroom during trial rests in the sound discretion of the trial court and, where an examination of the record revealed that the defendant had originally requested that the state's witnesses be excluded, it was not error for the trial court to make the order applicable to both sides. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553

(1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

In the absence of specific authority, the trial judge's duty to cause witnesses to be kept separate and prevented from conversing with each other is at most discretionary. *State v. Lopez*, 100 Idaho 99, 593 P.2d 1003 (1979).

Since the granting or denial of the request for exclusion is discretionary in the first instance, it follows that permitting exceptions to or variation of the sequestration order must also lie within the court's discretion, as does the nature of the sanction imposed, if any, for violation of the order. *State v. Christensen*, 100 Idaho 631, 603 P.2d 586 (1979).

Interest in Suit.

Where an action was brought by the assignee of claims of others, and one of the plaintiff's assignors was excluded with other witnesses from the courtroom, under these circumstances, error cannot be predicated upon such exclusion on the theory that such assignor had an interest in the suit, because whatever interest he may have had, he was not a party. *Paine v. Strom*, 51 Idaho 532, 6 P.2d 849 (1931).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.

Rule 701. Opinion testimony by lay witness.

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness

and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702. (Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

ANALYSIS

Cause of Death.
Conditions for Opinion.
Evidence Held Admissible.
Evidence Properly Excluded.
Factual Basis for Opinion.
Fundamental Error.
Harmless Error.
Intent of Defendant.
Interested Witness.
Medical Condition.
Perception of Witness.
Restrictions.
Speed.

Cause of Death.

The trial court did not err in concluding that the lay opinion of husband, that his wife's death by cardiac arrest was caused by certain events in question, was not admissible under this rule and the prior decisions of the Supreme Court and the Court of Appeals; accordingly, if there was a wrongful death claim pled, the trial court did not err in dismissing it. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

Conditions for Opinion.

Generally, a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, so long as two conditions are met. First, the witness's opinion must be based on his or her perception; and second, the opinion must be helpful to a clear understanding of the witness' testimony or a determination of a fact in issue. *State v. Enyeart*, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993).

Evidence Held Admissible.

Investigating officer's statement at trial that defendant appeared not to have been truthful in his interview with the officer was admissible since defendant's own counsel had opened the door to such an explanation when he asked the officer if defendant had appeared shocked or shaken upon hearing his daughter's allegation of sexual misconduct. *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994).

Loss prevention officer's testimony was a permissible statement of opinion based on her own observations of the signatures from the separate transactions. She testified as a lay witness, describing the steps she took in her investigation of the transactions, which included comparing the signatures, and such comparison did not require scientific, technical or specialized knowledge. *State v. Waller*, 140 Idaho 764, 101 P.3d 708 (Ct. App. 2004).

Evidence Properly Excluded.

It was not error for the trial court to exclude from evidence those portions of pastor's testimony dealing with "demonic possession" or dealing with a scientific theory for which adequate foundation had not been laid or expertise established. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

The district court properly ruled that plaintiff could not testify about when her injury actually occurred and who was at fault for that injury, particularly since she was not qualified as a medical expert, and therefore could not give her opinion about whether the standard of care was breached by the defendants. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

As a lay person, plaintiff was not competent to testify about the cause of her injury, including her statements that the injury occurred during surgery and that her rotator cuff was not torn before surgery. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

Where a witness's opinion that the defendant's shooting of the victim was an accident amounted to inadmissible speculation as to the defendant's state of mind, court properly excluded it. *State v. Turner*, 136 Idaho 629, 38 P.3d 1285 (Ct. App. 2001).

Factual Basis for Opinion.

Where the record showed that a witness 1) had personal knowledge of LSD's effects and knew that it was present at the concert; 2) observed defendant throughout the afternoon from a very close range; and 3) testified as to defendant's condition and actions, there was sufficient factual basis for the opinion that defendant was under the influence of LSD the trial court did not abuse its discretion in

admitting the opinion. *State v. Enyeart*, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993).

Fundamental Error.

Defendant's claim that a prosecutor committed misconduct at trial by asking defendant on cross-examination whether other witnesses had lied under oath did not implicate a constitutional right and, therefore, did not present an issue of fundamental error. *State v. Herrera*, — Idaho —, 266 P.3d 499 (2011).

Harmless Error.

Although the trial court should not have allowed police officer's opinion concerning the bloody clothing, this was harmless error because there was not a reasonable possibility that this opinion might have contributed to the defendant's convictions. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

An abuse of discretion in admitting evidence is a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to his defense, and since admission of lay testimony pursuant to this rule is within the discretion of the trial court, if the trial court erred in admitting lay witness opinion, it was not fundamental. *State v. Babb*, 125 Idaho 934, 877 P.2d 905 (1994).

Intent of Defendant.

The trial court abused its discretion by admitting a property owner's testimony that a trespasser was on her property to harass, as such testimony under the circumstances of this case was an improper statement of a lay witness's opinion under this rule; it was clearly prejudicial, which justified reversal of defendant's conviction. *State v. Missamore*, 119 Idaho 27, 803 P.2d 528 (1990).

Interested Witness.

Since it was unlikely that the testimony of a lay witness influenced the jury where it was clear that he was an interested witness, any error in allowing the expression of his opinion was harmless. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 983 P.2d 834 (1999).

Medical Condition.

While under this rule and I.R.E. 702, a court has the discretion to determine whether to allow a lay witness to express an opinion relating to causation, a court should disregard lay opinion testimony relating to the cause of a medical condition as a lay witness is not competent to testify to such matters, and, therefore, such testimony is inadmissible for purposes of summary judgment. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997).

Expert opinion testimony was necessary to establish causation of a slip and fall victim's permanent ankle deformity, but the trial court erred by not considering her lay opinion in an affidavit as to her symptoms immediately after the fall; the causal relationship between the victim's fall and her immediate symptoms in the ankle, knee and back (the pain, swelling, and the inability to sit, stand or walk without assistance) was within the usual and ordinary experience of the average person. *Dodge-Farrar v. Am. Cleaning Servs. Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002).

Perception of Witness.

Where a physician not qualified as expert in a child sexual abuse prosecution offered an opinion based on the histories provided by the children and the mother, the opinion was not based upon his own perception but instead was based on what others had related to him, violating the first requirement of this rule. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Detective's remarks, prior to defendant's objection, regarding a witness's desire "to say something" or "to come forward" were not admissible lay opinion testimony because no "perception of the witness" giving some basis for the opinion had yet been presented. The detective had not yet described anything relating to the witness's behavior or demeanor, but instead expressed conclusory opinions. *State v. Hauser*, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006).

Defendant's convictions for burglary and petit theft were appropriate and there was no error in admitting into evidence the opinions of lay witnesses who identified the defendant as the man appearing in security videotape or in photographs derived from the videotape. The opinion of each lay witness, identifying defendant, was rationally based on the perception of the witness and the testimony was helpful to the jury in the determination of a fact in issue. *State v. Barnes*, 147 Idaho 587, 212 P.3d 1017 (2009).

Restrictions.

Both expert and lay opinions are subject to the restriction that when the question is one which can be decided by persons of ordinary experience and knowledge, it is for the trier of fact to decide. The court or jury must weigh the truth of the facts presented by the witnesses and draw its conclusions by the exercise of independent judgment and reasoning powers, without hearing the opinions of witnesses. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Where officer testified that his assessments

of a person's sobriety based upon field tests were 95 percent accurate after the officer conducted tests (presumably breathalyzer, blood, or urine tests) to confirm or disprove the opinion that he formed about intoxication, his testimony was admissible under this rule, because the opinion was rationally based on the perception of the witness, and was helpful to the determination of a fact in issue, namely, whether defendant was intoxicated when stopped. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

Speed.

A lay witness' opinion or inference as to

speed is admissible. *Smith v. Praegitzer*, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988).

Cited in: *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986); *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989); *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997); *State v. Vandenacre*, 131 Idaho 507, 960 P.2d 190 (Ct. App. 1998); *West v. Sonke*, 132 Idaho 133, 968 P.2d 228 (1998); *Cook v. Skyline Corp.*, 135 Idaho 26, 13 P.3d 857 (2000).

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Admissibility of Testimony.
 Applicability.
 Aura of Reliability.
 Child Abuse Cases.
 Credibility of Another Witness.
 Discretion of Court.
 Driving Under the Influence.
 Evidence Held Admissible.
 Evidence Held Inadmissible.
 —Rape.
 Future Liability on Claim.
 Harmless Error.
 Indicia of Reliability.
 Limitation of Testimony.
 Murder Cases.
 Plaintiff's Self-Diagnosis.
 Qualifications of Expert.
 Relevance.
 Restrictions.
 State of Mind.
 Summary Judgment.
 Witness Not Qualified.
 Witness Qualified.

Admissibility of Testimony.

Once a witness is qualified as an expert, the trial court must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence. If the testimony is thus competent and relevant, it may be admissible; the weight given to the testimony is left to the trier of fact. *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987).

Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and to determine a fact in question, however, an expert's opinion is not inadmissible merely because it embraces an ultimate issue to be decided by the trier of fact. *State v. Dragoon*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Although both professionals appeared to be well-qualified for the service they provided as counselors, the art or science of divining whether a child who has made allegations of sexual touching has in fact been abused calls for additional expertise that was not shown to be possessed by these witnesses; therefore, on the foundation presented, the district court erred in finding these counselors qualified to testify as to their diagnoses of sexual abuse. *State v. Konechny*, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000).

Court erred in finding there was sufficient foundation to admit an expert's opinion that an alleged victim was sexually abused, and error was not harmless, as the case turned upon the credibility of the witnesses, and the jury may have been swayed toward its finding of guilt by the expert's opinion, which bolstered the victim's credibility. *State v. Eytchison*, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001).

Where the issues related to the ambiguity in an insurance policy before the trial judge were matters of law, the offered expert opin-

ion was irrelevant, and there was no abuse of discretion in excluding the testimony. *Howard v. Or. Mut. Ins. Co.*, 137 Idaho 214, 46 P.3d 510 (2002).

Applicability.

The appropriate test for measuring the scientific reliability of evidence is this rule. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

Aura of Reliability.

Testimony concerning blood spatter interpretation, used to show that murder victim was moving away from defendant when shot, was not of a nature which would cause the jurors to be over-impressed by its aura of reliability; the testimony did not involve overly complex scientific or technological concepts with the potential for juror confusion. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991).

Child Abuse Cases.

Although the field of child abuse may be "beyond common experience," having an expert render an opinion as to the identity of the abuser is more of an invasion of the jury's function rather than an "assist" to the trier of fact. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

Whether a child has been sexually abused is beyond common experience and allowing an expert to testify on this issue will assist the trier of fact. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

There does not exist a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Physician should not have been allowed to offer his opinion that children had been sexually molested where (1) he had little if any experience with child sexual abuse; (2) the only information available to support his opinion was gleaned from one visit with the children in which he found no physical evidence of molestation; and (3) he relied solely on the histories provided by the children and the mother that the children had been molested. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Physician who had no expertise in the area of child sexual abuse was not properly qualified as an expert to speak in that capacity regarding whether certain children had been molested. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Although some behavioral patterns of child sexual abuse victims may not need expert explanation, the manner in which abuse vic-

tims attempt to disassociate themselves from the abuse do need explanation because this is beyond common experience. *State v. Ransom*, 124 Idaho 703, 864 P.2d 149 (1993), cert. denied, 510 U.S. 1181, 114 S. Ct. 1227, 127 L. Ed. 2d 571 (1994).

The issue of whether a child's conduct in relating the details of his or her sexual abuse is consistent with the behavior of other sexually abused children is a matter beyond the common experience of the jury, and was thus a proper subject of testimony by a qualified expert. *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

In a criminal action for sexual abuse, where the trial record was conspicuously lacking any explication of disciplined inquiry and methodology that would support a psychologist's testimony about the frequency with which children's accusations of sexual abuse are found to be false, the trial court correctly excluded this evidence for lack of adequate foundation. *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996).

In prosecution for lewd conduct and child abuse, counsel was not ineffective in failing to object to testimony of expert witness in field of child abuse which was limited to explaining the behavioral patterns of and characteristics, in general, of children sexually abused, since the witness acknowledged that she was there only to provide background information and such testimony was properly the kind of testimony suitable for expert opinion. The issues were beyond common experience and were necessary for jury education and clarification of certain child sexual abuse behavioral patterns, and thus summary dismissal of application for post-conviction relief was proper. *Matthews v. State*, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

In prosecution for lewd conduct with a minor child under sixteen, doctor's medical training and experience as a emergency room physician who had come into contact with 10 to 12 children alleging sexual abuse qualified him to report his visual observations of child's physical condition and the possible causes of observed injuries. Thus, an objection to his qualification as a expert would have been properly overruled, therefore, the absence of objection by defendant's counsel to doctor's testimony was not a deficiency in performance nor a cause of prejudice to defendant. *State v. Aspeytia*, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997).

In prosecution for lewd conduct with a minor child under 16 where doctors reported physical findings, some of which were, in their opinions, consistent only with sexual abuse, and there was adequate factual basis on

which they could reach the conclusion that child's injuries, were, in all likelihood, a result of molestation, and the interpretation of their physical findings were beyond the experience or knowledge of the average juror, if defendant's counsel had objected to such testimony he would have been overruled, consequently his failure to object did not amount to ineffective assistance of counsel. *State v. Aspeytia*, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997).

A foundational showing of expertise to render an opinion about whether sexual abuse has occurred requires more than general education and experience in mental health counseling. *State v. Konechny*, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000).

In a prosecution of defendant on three counts of lewd conduct with a minor, the trial court did not abuse its discretion by admitting an expert's testimony regarding the general behavioral and emotional characteristics of victim and offender in child sexual abuse cases, including the issue of delayed disclosure; the expert did not testify concerning matters outside her demonstrated expertise. *State v. Dutt*, 139 Idaho 99, 73 P.3d 112 (Ct. App. 2003).

Credibility of Another Witness.

I.R.E., Rule 704 must be read in the light of this rule. Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in issue. Opinions which directly pass on the credibility of witnesses are generally not allowed. *State v. Walters*, 120 Idaho 46, 813 P.2d 857 (1990).

In a criminal trial where the expert opinion involves the weighing of the credibility of witnesses based upon their out-of-court statements, special caution must be exercised by the trial court to make certain that the expert's opinion is based upon his or her expertise and that it will assist the trier of fact in determining a fact in issue. Historically, the evaluation of the credibility of witnesses has been committed solely to the jury and they alone have the responsibility to determine the guilt or innocence of the accused. *State v. Walters*, 120 Idaho 46, 813 P.2d 857 (1990).

In a case involving the alleged sexual abuse of children, nonexpert physician should not have been permitted to offer an opinion on the children's credibility, that is, that he believed they were telling the truth; in a jury trial, it is for the jury to determine the credibility of a witness, not another witness, and statements by a witness as to whether another witness is telling the truth are prohibited. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

In a second degree murder case, the trial

court's order, granting defendant's motion in limine to allow admission of a doctor's opinion that defendant was truthful when he made denial statements during a polygraph examination, was reversed, because the results of the polygraph were useful to bolster defendant's credibility but did not provide the trier of fact with any additional information that pertained to defendant's case, and to admit the results was an attempt to substitute the credibility determination appropriate for the jury with the doctor's interpretation of the alleged involuntary physiological results from the polygraph examination. *State v. Perry*, 139 Idaho 520, 81 P.3d 1230 (2003).

Discretion of Court.

Whether a witness is sufficiently qualified as an expert is a matter largely within the discretion of the trial court. *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987).

Defendant/manufacture moved for a mistrial when a safety engineering expert testified about other accidents and injuries caused by combines; in this case, it was clear that the trial court considered the motion and determined that it did not prejudice International Harvester sufficiently to warrant a mistrial. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992).

Since the admissibility of expert opinion testimony is discretionary and will not be disturbed on appeal absent a showing of an abuse of discretion, it is not error for a trial court to exclude from evidence testimony dealing with a scientific theory for which an adequate foundation has not been laid. *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996).

Where court refused to allow the witness to testify as an expert on the memory or perceptions of the officers relative to the presence of a firearm, on the ground that such testimony would not assist the trier of fact, the district court did not abuse its discretion in ruling that the reliability of the officers' observation of a firearm in defendant's hand was well within the ability of the jury to determine, so that no expert testimony was needed to aid the trier of fact in understanding the evidence or determining a fact in issue. *State v. Pacheco*, 134 Idaho 367, 2 P.3d 752 (Ct. App. 2000).

Court did not err by striking plaintiff's expert's affidavit in a wrongful death suit where there was no explanation of the methodology the expert used to determine the cause of the fire or to exclude possible causes, and where the expert's testimony lacked factual foundation. *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 48 P.3d 651 (2002).

Defendant's conviction for second-degree

murder was appropriate because there was other substantial, corroborative evidence that defendant was the shooter. Exclusion of expert-witness testimony regarding eyewitness identification was not an abuse of discretion on the part of the trial court. *State v. Wright*, 147 Idaho 150, 206 P.3d 856 (2009).

Driving Under the Influence.

In criminal case where defendant was charged with driving under the influence in violation of §§ 18-8004 and 18-8005(3), expert opinion evidence as to the scientific acceptance and reliability of the Intoximeter 3000 was properly admitted where adequate foundation was laid to qualify the expert witnesses, and their opinions were properly admitted into evidence. *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

The horizontal gaze nystagmus test (HGN) satisfies the test of *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (1923) for novel scientific evidence because the test is based on a generally accepted theory that persons who are intoxicated exhibit nystagmus. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

Defendant did not provide any evidence demonstrating the unreliability of the Alco-Sensor III and failed to show that the proper foundation under Idaho R. Evid. 702 for admission of his blood-alcohol test results was not established; the Alco-Sensor III was approved by the Idaho state police, additionally, the arresting officer testified that the device had been certified, that he followed the procedures required for accurate use of the device, including conducting a calibration check within twenty-four hours of its use, and that he was certified by the state as a specialist and an instructor in its operation. *State v. Alford*, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004).

Evidence Held Admissible.

Where, in a prosecution for rape and lewd and lascivious conduct with a minor, a physician did not suggest how, when or by whom a bruise could have been caused, but simply opined that a bruise observable one day would likely be visible a few days later, there was no error in allowing the testimony. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

In an action for bad faith denial of fire insurance proceeds, testimony by a criminal investigator as to his opinion that the insured had started the fire was admissible since the investigator carefully described the evidence upon which he relied when he stated his opinion. *Pacheco v. Safeco Ins. Co. of Am.*, 116 Idaho 794, 780 P.2d 116 (1989), rehearing denied, 117 Idaho 491, 788 P.2d 1314 (1989).

In DUI prosecution where deputy's testi-

mony relating to HGN test results was offered not as independent scientifically sound evidence of defendant's intoxication but rather for the same purpose as other field sobriety test evidence — a physical act on the part of defendant observed by the officer, contributing to the cumulative portrait of defendant's intimating intoxication in the officer's opinion, such evidence was properly admitted. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992).

The district court did not abuse its discretion by allowing a psychologist, who had treated the victim after the crime, to testify regarding whether the victim had been sexually abused, where a proper foundation had been laid. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

The fire investigation expert was sufficiently qualified to interpret the lightning strike data where the plaintiffs did not argue that the expert was not qualified as an expert in fire investigation, and prior to testifying in detail as to what the data indicated to him, the expert explained that his training and experience in fire investigation encompassed the interpretation of such data, and in addition, the expert testified that fire investigators routinely relied upon such lightning detection data when attempting to determine a fire's cause, and the trial court did not abuse its discretion in allowing the expert to testify to his interpretation of such data, as the expert was trained to interpret it and qualified to base an opinion on those interpretations. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997).

Defendant's grand theft conviction was proper pursuant to Idaho R. Evid. 702 and Idaho Crim. R. 16(b)(6) where the trial court did not err by allowing expert testimony from an attorney. While defense counsel complained generally about the lack of knowledge of the specific content of the witness's testimony, no discovery sanction was ever requested. *State v. Vondenkamp*, 141 Idaho 878, 119 P.3d 653 (Ct. App. 2005).

In a medical malpractice suit, defense expert witnesses were properly allowed to testify that the complication experienced by the patient was a known complication even though medical literature on the subject did not specify the particular injury as a known complication. The expert witnesses, who had individual knowledge, skill, experience, training, and education in thoracic surgery, testified that damage to the phrenic nerve was a complication based upon the proximity of the cyst to be removed to the nerve. *Thomson v. Olsen*, 147 Idaho 99, 205 P.3d 1235 (2009).

Where mother of a child who died after

extended sedation with Propofol presented evidence through an expert witness regarding the effects of that extended use, and this evidence was clearly influential in producing a jury verdict in favor of the mother, the trial court erred rejecting that evidence and in entering a j.n.o.v. in favor of the child's doctors, who were not entitled to attorney fees on appeal because they did not prevail. *Coombs v. Curnow*, 148 Idaho 129, 219 P.3d 453 (2009).

Evidence Held Inadmissible.

In prosecution for rape and lewd and lascivious conduct with a minor, expert opinion regarding the social beliefs, characteristics and mores of the local Hispanic people, particularly the females' desire to protect their husbands or lovers, would not be relevant to show that the victim and her mother might have been trying to protect the actual perpetrator of the crimes charged against the defendant, where the defendant did not produce any evidence reasonably tending to show that another person committed the crimes. *State v. Gong*, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

Where expert had no contact with the victim or her parents during the time period in question and defendant laid an insufficient foundation regarding expert's qualifications in child sexual abuse matters, the trial court properly excluded the testimony. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

It was not error for the trial court to exclude from evidence those portions of pastor's testimony dealing with "demonic possession" or dealing with a scientific theory for which adequate foundation had not been laid or expertise established. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

In suit against pharmacy alleging that substitute type of insulin for plaintiff's regular insulin caused his hypoglycemic seizures, statement of plaintiff's treating physician that it was possible the insulin blend could have caused a reaction was inadmissible because expert medical testimony must be based on a reasonable degree of medical probability in order to be admissible; a mere possibility of a causal connection does not satisfy this standard; thus such testimony could not be considered for the purposes of summary judgment. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997).

In a suit for wrongful death, admission of the expert's opinion on whether the widow's husband could have avoided the accident was error because the jury could have answered that question for itself based on the previous expert testimony. *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003).

Opinions of a corporate chairman of the board that the failure of the attorneys retained to represent the corporation in an underlying negligence action to pursue attorney fees rendered the corporation a target for increased litigation and damaged the corporation's reputation as an aggressive litigator were properly stricken because there was no identified factual basis for the opinions. *J-U-B Eng'rs, Inc. v. Sec. Ins. Co.*, 146 Idaho 311, 193 P.3d 858 (2008).

In a premises liability action stemming from injury sustained by a party guest who slipped on a bathroom rug while trying to extricate her heel from the hem of her pants, the trial court did not err in excluding expert witness opinion testimony because the determination of whether the bathroom presented a hazard or danger was within the competence of the average layman or juror and, therefore, the proffered opinion would not assist the trier of fact. *Chapman v. Chapman*, 147 Idaho 756, 215 P.3d 476 (2009).

—Rape.

Where defendant was on trial for lewd conduct and rape and defense counsel failed to object to a pediatrician's testimony that in his opinion the child had been sexually abused despite his failure to find any physical evidence of sexual abuse during his examination of the child, the defense counsel was deficient in failing to object, and the testimony was inadmissible as presented since the physician's conclusion was based on the logical consistencies and details of the child's story and was not based on any tests or interview techniques which were beyond the common experience of average jurors. *State v. Pugsley*, 128 Idaho 168, 911 P.2d 761 (Ct. App. 1995).

Future Liability on Claim.

The trial court did not abuse its discretion by refusing to allow a State Insurance Fund's (SIF) claims supervisor to estimate SIF's future liability for medical and disability benefits to passenger injured in an auto accident. *Lumbermens Mut. Cas. Co. v. Egbert*, 125 Idaho 678, 873 P.2d 1332 (1994).

Harmless Error.

Although it is now settled that admission of DNA evidence in a rape case is governed by this rule and not by the Frye test, and although the district court may have erred in applying the Frye test instead of this rule in rejecting defendant's claim to prevent introduction of DNA evidence, such error was harmless because other overwhelming evidence, including several fingerprints, proved the defendant's guilt. *State v. Amerson*, 129

Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Indicia of Reliability.

The studies used by the experts possessed sufficient indicia of reliability to meet the requirements under this rule and court properly admitted expert testimony based on the studies. *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998).

Limitation of Testimony.

The trial court did not abuse its discretion in limiting expert testimony where it found the witness' methodology deficient, since this was an exercise of reason supported by the record. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Murder Cases.

Given physician's qualifications, experience, and the foundation laid for his testimony, the Supreme Court could not say that the district court abused its discretion in allowing testimony as to the location of murder victims' bodies when they were shot. *State v. Thomasson*, 122 Idaho 172, 832 P.2d 743 (1992).

In prosecution for second degree murder, ordinarily testimony about mere possibilities rather than probabilities is inadmissible because it is speculative or irrelevant and does not aid in the fact-finding process. However, medical expert's inability to completely rule out any one of three possible causes of death did not render his testimony inadmissible where he testified to a reasonable degree of medical certainty that victim's death was caused by one or both bludgeonings, but acknowledged that suffocation could also have been a factor, for such testimony was relevant and could assist the trier of fact in addressing the factual issues of the case even though he could not specify which among the series of attacks on the victim resulted in death. *State v. Schneider*, 129 Idaho 59, 921 P.2d 759 (Ct. App. 1996).

Where the ultimate purpose of expert witness testimony regarding the defendant's state of mind was to evaluate the facts and circumstances of the murder as related to the expert by the defendant, which is the same evaluation that the jury would have to make in reaching its verdict on the issues in the case, and the testimony did not appear to involve either scientific or technological concepts outside the knowledge and understanding of the average juror, the testimony was properly excluded. *State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998).

Plaintiff's Self-Diagnosis.

In suit against pharmacy alleging that type

of insulin substituted for plaintiff's regular type caused plaintiff's hypoglycemic seizures, district court correctly disregarded plaintiff's testimony concerning his seizures since a lay person is not qualified to give an opinion about a medical diagnosis and thus plaintiff's testimony could not be considered for purposes of summary judgment; moreover, his testimony was not opinion testimony relating to causation because he simply testified to the nature and extent of the seizures from which he suffered after taking the substitute insulin, not to the cause of the seizures. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997).

Qualifications of Expert.

This rule provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. The five qualification areas are disjunctive, so that academic training is not always necessary, and practical experience or special knowledge or training in a related field each might suffice. *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987).

To give expert opinion testimony, a witness must first be qualified as an expert on the matter at hand. *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987).

This rule allows expert testimony where specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue and it does not require licensing in any particular discipline. *Jones v. Jones*, 117 Idaho 621, 790 P.2d 914 (1990).

The foundation for establishing a witness's qualifications as an expert must be offered before his testimony will be received in evidence. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Court did not err by qualifying a forensic scientist and a county coroner as experts in blood splatter pattern analysis and allowing them to testify in a murder prosecution; both witnesses had experience and training in blood splatter analysis. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991).

The trial court expressly found that no foundation had been established which permitted the court to consider witness's opinion that the frequency of flooding in mud basin in the future could be expected to occur once every seven years. Such opinion related to the science of hydrology and witness's affidavit demonstrated no qualifications which he might have had relating to hydrology. *Marty v. State*, 122 Idaho 766, 838 P.2d 1384 (1992).

In order for expert opinion testimony to be admissible, the party offering the evidence must show that the expert is a qualified

expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect. *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992).

The qualification of an expert to render an opinion under this rule does not turn upon his capacity for memorization, and an inability to recite from memory the composition of a chemical compound has no bearing upon an expert's capacity to identify the compound through proper application of reliable testing methods. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

A real estate agent, if properly qualified under the rule, may testify as to the value of property. *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 43 P.3d 768 (2002).

In suit by patient brought against anesthesiologists, alleging that his decreased vision was the result of medical malpractice, district court erred in holding that the patient's expert, an anesthesiologist, was not competent to testify as to ophthalmologic issues. Based on his experience as an anesthesiologist, expert was qualified on the issues of causation and injury. *Foster v. Traul*, 145 Idaho 24, 175 P.3d 186 (2007).

District court did not abuse its discretion in allowing the detective to testify regarding the Internet screen names where his testimony showed he had extensive training and experience in investigating Internet sexual abuse crimes where the use of a screen name was integral to the process; it was within the province of the jury to take the extent and type of training and experience that he had and decide how much weight to give his testimony. *State v. Glass*, 146 Idaho 77, 190 P.3d 896 (2008).

Where an expert witness did not possess the necessary skill, experience, or specialized knowledge specific to lineup procedures, a trial judge acted within her discretion in determining that the expert was not qualified to testify; it was irrelevant whether such testimony would assist the trier of fact. *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008).

Relevance.

Motion for an expert witness was denied in a case where a potential parolee was challenging the licensing requirements of I.C.A. § 20-223 because an expert's opinion regarding the merit of allowing psychological evaluations to be conducted by only licensed evaluators was not relevant to the legal determination of

whether licensing was required. *Dopp v. Idaho Comm'n of Pardons Parole*, 144 Idaho 402, 162 P.3d 781 (Ct. App. 2007).

Restrictions.

Both expert and lay opinions are subject to the restriction that when the question is one which can be decided by persons of ordinary experience and knowledge, it is for the trier of fact to decide. The court or jury must weigh the truth of the facts presented by the witnesses and draw its conclusions by the exercise of independent judgment and reasoning powers, without hearing the opinions of witnesses. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

State of Mind.

While a defendant's mental condition has been expressly eliminated as a defense under § 18-207(1), the defendant may still use expert evidence on the issue of the defendant's state of mind — subject to the Rules of Evidence — where it is an element of the offense. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

Trial court erred in allowing a state trooper, who was an accident reconstruction expert, to testify that an incident was not an accident, and that defendant acted intentionally because there was a lack of any evasive action. The testimony was improper opinion testimony in which the trooper gratuitously and unnecessarily injected his clearly inadmissible opinion that defendant acted intentionally. *State v. Ellington*, — Idaho —, 253 P.3d 727 (2011).

Summary Judgment.

In action alleging breach in agreement concerning sale of plaintiff's shares of stock of corporation formed by plaintiff and defendant to defendant, upon motion for summary judgment, action of district court in refusing to consider affidavit of plaintiff's expert witness in challenging the manner in which corporation was showing its profits and losses was improper because the court, instead of determining the admissibility of evidence prepared by an expert witness by examining foundational issues before ruling on summary judgment, used the term "foundation" to criticize the facts considered and opinions held by the expert. This was nothing more than a weighing of evidence and a determination of a witness's credibility, which is improper in a motion for summary judgment. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Summary judgment dismissing a medical malpractice action was properly granted where the patient failed to show a causal connection between an error in a prescription

for antibiotics (which resulted in the patient taking enormous doses) and a subsequent heart attack; neither the patient's proffered experts nor the written materials they claimed to rely on established any causal connection between the antibiotic and heart attacks. *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003).

Witness Not Qualified.

The qualifications of a professor of metallurgy as to whether dressmaking pins were defective or unreasonably dangerous were insubstantial and borderline at best, and the trial court did not abuse its discretion in refusing to permit such opinion testimony. *Sidwell v. William Prym, Inc.*, 112 Idaho 76, 730 P.2d 996 (1986).

Witness Qualified.

The magistrate abused his discretion in refusing to accept a witness as a qualified expert on the Intoximeter 3000, a device used to analyze blood alcohol concentration by sampling a person's breath. *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987).

In prosecution for DUI, state satisfactorily established police officer's qualifications regarding the administration of the HGN test where such officer had extensive training in traffic accident investigations, including DUI detection and arrest and had attended seminars conducted by doctor who had worked with highway traffic and safety organization to develop reliable field sobriety tests; therefore, officer was competent to testify as an expert on the administration of the test. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991).

Where witness testified that he had taken a

one-week course in blood spatter patterns taught by a professional instructor, that he received training in crime scene evaluation in his training as a forensic pathologist, that he had interpreted blood spatter patterns and investigated crime scenes on a number of occasions, and that he had given testimony on blood spatter patterns in other cases, the trial court did not abuse its discretion in allowing witness to testify as an expert concerning blood spatter. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

Defendants' expert qualified as an expert under the Rules of Evidence because of his experience as being a certified registered nurse anesthetist; he was licensed in three states and had practiced for nearly 20 years. *Grover v. Isom*, 137 Idaho 770, 53 P.3d 821 (2002).

Cited in: *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988); *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989); *Idaho Dep't of Law Enforcement v. \$34,000 United States Currency*, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991); *Levin v. Levin*, 122 Idaho 583, 836 P.2d 529 (1992); *State v. Fought*, 127 Idaho 873, 908 P.2d 566 (1995); *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996); *Kessler v. Barowsky*, 129 Idaho 647, 931 P.2d 641 (1997); *Walker v. American Cyanamid Co.*, 130 Idaho 824, 948 P.2d 1123 (1997); *Dachlet v. State*, 136 Idaho 752, 40 P.3d 110 (2002); *State v. Ransom*, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002); *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010); *State v. Herrera*, — Idaho —, 266 P.3d 499 (2011).

DECISIONS UNDER PRIOR RULE OR STATUTE

Malpractice Action.

A plaintiff in a malpractice action has the right to cross-examine the defendant as a

medical expert. *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956).

RESEARCH REFERENCES

A.L.R. Admissibility of results of presumptive tests indicating presence of blood on object. 82 A.L.R.5th 67.

Admissibility of expert testimony regarding reliability of accused's confession where accused allegedly suffered from mental disorder or defect at time of confession. 82 A.L.R.5th 591.

Admissibility of expert and opinion evidence as to cause or origin of fire — modern civil cases. 84 A.L.R.5th 69.

Admissibility of expert and opinion evidence as to cause or origin of fire in criminal prosecution for arson or related offense — modern cases. 85 A.L.R.5th 187.

Admissibility of expert testimony on child sexual abuse accommodation syndrome (CSAAS) in criminal case. 85 A.L.R.5th 595.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case. 87 A.L.R.5th 693.

Post-Daubert standards for admissibility of scientific and other expert evidence in state courts. 90 A.L.R.5th 453.

Admissibility and weight of voice spectrographic analysis evidence. 95 A.L.R.5th 471.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. 104 A.L.R.5th 503.

Admissibility of ion scan evidence. 124 A.L.R.5th 691.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused. 1 A.L.R.6th 657.

Admissibility in state criminal case of results of polygraph (lie detector) test—Post-Daubert cases. 10 A.L.R.6th 463.

Medical Negligence in Extraction of Tooth, Established Through Expert Testimony. 18 A.L.R.6th 325.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. 18 A.L.R.6th 613.

Admissibility of Actuarial Risk Assessment Testimony in Proceeding to Commit Sex Offender. 20 A.L.R.6th 607.

Admissibility of Expert Testimony by Nurses. 24 A.L.R.6th 549.

Qualification as Expert To Testify as to Findings or Results of Scientific Test Concerning DNA Matching. 38 A.L.R.6th 439.

Admissibility of Computer Forensic Testimony. 40 A.L.R.6th 355.

Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or “Black Boxes”. 40 A.L.R.6th 595.

Admissibility of Biomedical Engineer Testimony. 43 A.L.R.6th 327.

Necessity and Admissibility of Expert Testimony to Establish Malpractice or Breach of Professional Standard of Care by Architect. 47 A.L.R.6th 303.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney — General principles and conduct related to interaction with client. 58 A.L.R.6th 1.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney — Conduct related to procedural issues. 59 A.L.R.6th 1.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney — Conduct related to substantive representation and transactional matters. 60 A.L.R.6th 1.

Admissibility of expert or opinion evidence — Supreme court cases. 177 A.L.R. Fed. 77.

Admissibility of handwriting expert's testimony in federal criminal case. 183 A.L.R. Fed. 333.

Rule 703. Basis of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. (Adopted January 8, 1985, effective July 1, 1985; amended March 5, 2002, effective July 1, 2002.)

JUDICIAL DECISIONS

ANALYSIS

Admissibility of Testimony.
Evidence Described by Expert.
Foundation.
Independent Judgment of Expert.
Opinion Based on Inadmissible Evidence.
Records of Another Expert.

Summary Judgment.
Testimony Properly Excluded.
Testimony Properly Included.

Admissibility of Testimony.

Where mother of a child who died after extended sedation with Propofol presented evidence through an expert witness regarding

the effects of that extended use, and this evidence was clearly influential in producing a jury verdict in favor of the mother, the trial court erred in rejecting that evidence and in entering a j.n.o.v. in favor of the child's doctors. *Coombs v. Curnow*, 148 Idaho 129, 219 P.3d 453 (2009).

Evidence Described by Expert.

In an action for bad faith denial of fire insurance proceeds, testimony by a criminal investigator as to his opinion that the insured had started the fire was admissible since the investigator carefully described the evidence upon which he relied when he stated his opinion. *Pacheco v. Safeco Ins. Co. of Am.*, 116 Idaho 794, 780 P.2d 116 (1989), rehearing denied, 117 Idaho 491, 788 P.2d 1314 (1989).

Foundation.

It was not error for the trial court to exclude from evidence those portions of pastor's testimony dealing with "demonic possession" or dealing with a scientific theory for which adequate foundation had not been laid or expertise established. *State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992).

Where expert's testimony indicated that he relied in part on the notes of non-disclosed expert witness, as well as his own investigation, in forming and rendering his own independent expert opinion concerning any defects in tires, and where expert further testified that such foundation evidence was typically relied on by experts in his field in forming their expert opinions, the trial court did not err in admitting this evidence. *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387 (1992).

Testimony of the victim's examining physician as to what the victim and her mother reported to him was admissible for foundational purposes only, where the medical history solicited by the physician constituted part of the facts and data relied upon by him in forming his expert opinion, and the trier of fact was a judge, not a jury. *State v. Doe* (In re Doe), 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004).

Independent Judgment of Expert.

In personal injury action on theory that city was negligent in design of intersection where accident occurred, reports of other accidents that had occurred in the intersection area both before and after the occurrence of the collision between plaintiff's car and another car, referred to by plaintiff's expert witness as a basis of his opinion that the design of the accident site was dangerous and did not meet existing standards, was proper since an expert may rely on hearsay to form an opinion so long as such opinion is reached through

independent judgment. *Lawton v. City of Pocatello*, 126 Idaho 454, 886 P.2d 330 (1994).

Opinion Based on Inadmissible Evidence.

The trial court, in its discretion, may allow an expert to render an opinion based in part upon hearsay or other inadmissible evidence, as long as the expert testifies as to the specific basis of his opinion and reaches an opinion through his own independent judgment. *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387 (1992).

This rule authorizes the admission of expert opinions that are based upon hearsay or other inadmissible information, if the information is of a type reasonably relied upon by experts in the field, but the rule does not provide that the hearsay information itself is automatically, independently admissible in evidence. *State v. Scovell*, 136 Idaho 587, 38 P.3d 625 (Ct. App. 2001).

District court did not err in allowing the injured customer's expert to testify about and rely upon a summary of the store's accident history that contained irrelevant information about accidents that were not the result of improperly stacked merchandise because the accident summary was not admitted into evidence, rather, the accident summary was referred to by the expert as a basis for his opinion that the store was on notice that it lacked adequate training procedures for its employees regarding the safe and proper stacking of store merchandise, and that this deficiency was an extreme deviation from industry standards of care. I.R.E. 703 allows an expert to rely on inadmissible evidence to form an opinion provided that it is of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004).

Where defendant was convicted of lewd contact with a six-year-old girl, the testimony from a DNA expert who indicated that defendant's DNA was in the semen found on the girl's underwear and inside a condom was inadmissible; the expert was not at the lab to receive the evidence and did not perform the DNA testing herself. She relied on oral communications with her colleague and his notes in forming her conclusions about the DNA evidence, which was inadmissible hearsay. *State v. Watkins*, 148 Idaho 418, 224 P.3d 485 (2009).

Records of Another Expert.

A medical expert witness can give his opinion and state the facts upon which that opinion was based, even though he relies in part upon the records of another medical expert.

Long v. Hendricks, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985), *aff'd*, Long v. Hendricks, 114 Idaho 157, 754 P.2d 1194 (Ct. App. 1988).

Summary Judgment.

In action alleging breach in agreement concerning sale of plaintiff's shares of stock of corporation formed by plaintiff and defendant to defendant, upon motion for summary judgment, action of district court in refusing to consider affidavit of plaintiff's expert witness in challenging the manner in which corporation was showing its profits and losses was improper because the court, instead of determining the admissibility of evidence prepared by an expert witness by examining foundational issues before ruling on summary judgment, used the term "foundation" to criticize the facts considered and opinions held by the expert. This was nothing more than a weighing of evidence and a determination of a witness's credibility, which is improper in a motion for summary judgment. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997).

Testimony Properly Excluded.

Where expert had no contact with the victim or her parents during the time period in question and defendant laid an insufficient foundation regarding expert's qualifications in child sexual abuse matters, the trial court properly excluded the testimony. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

The trial court did not abuse its discretion by refusing to allow a State Insurance Fund's (SIF) claims supervisor to estimate SIF's future liability for medical and disability benefits to passenger injured in an auto accident. *Lumbermens Mut. Cas. Co. v. Egbert*, 125 Idaho 678, 873 P.2d 1332 (1994).

Where defendant's expert witness did not finish his metallurgic analysis on composition or integrity of shotgun pellets prior to trial,

the expert could not testify as to information he received through a telephone call to the manufacturer of the pellets. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), *cert. denied*, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Testimony Properly Included.

The fire investigation expert was sufficiently qualified to interpret the lightning strike data where the plaintiffs did not argue that the expert was not qualified as an expert in fire investigation, and prior to testifying in detail as to what the data indicated to him, the expert explained that his training and experience in fire investigation encompassed the interpretation of such data, and in addition the expert testified that fire investigators routinely relied upon such lightning detection data when attempting to determine a fire's cause. The trial court did not abuse its discretion in allowing the expert to testify to his interpretation of such data, as the expert was trained to interpret it and qualified to base an opinion on those interpretations. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997).

Where injured parties brought suit against a cow owner, pasture owners and the state when their vehicle struck a cow carcass on an interstate highway, the trial court did not abuse its discretion in allowing the pasture owners' expert to testify as to why the cows might have broken down a pasture gate and gone out onto the highway. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004).

Cited in: *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989); *Idaho Dep't of Law Enforcement v. \$34,000 United States Currency*, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991); *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992); *Reed v. Foster*, 130 Idaho 74, 936 P.2d 1316 (1997).

RESEARCH REFERENCES

A.L.R. Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case. 87 A.L.R.5th 693.

Post-Daubert standards for admissibility of scientific and other expert evidence in state courts. 90 A.L.R.5th 453.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. 104 A.L.R.5th 503.

Admissibility of ion scan evidence. 124 A.L.R.5th 691.

Admissibility and sufficiency of bite mark

evidence as basis for identification of accused. 1 A.L.R.6th 657.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney — General principles and conduct related to interaction with client. 58 A.L.R.6th 1.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney — Conduct related to procedural issues. 59 A.L.R.6th 1.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney — Conduct related to substantive representa-

tion and transactional matters. 60 A.L.R.6th 1.

Admissibility of handwriting expert's testi-

mony in federal criminal case. 183 A.L.R. Fed. 333.

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Child Abuse Cases.

Credibility of Witness.

Evidence Held Admissible.

Eyewitness Identification.

In General.

State of Mind.

Child Abuse Cases.

Physician's opinion that children had been molested embraced an ultimate issue, and although this rule allows such testimony if it will assist the trier of fact, the testimony in this case would not assist the jury because the physician was not qualified as an expert in the area of child sexual abuse and it should not have been admitted. *State v. Johnson*, 119 Idaho 852, 810 P.2d 1138 (Ct. App. 1991).

Credibility of Witness.

This rule must be read in the light of Rule 702. Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in issue. Opinions which directly pass on the credibility of witnesses are generally not allowed. *State v. Walters*, 120 Idaho 46, 813 P.2d 857 (1990).

In a criminal trial where the expert opinion involves the weighing of the credibility of witnesses based upon their out-of-court statements, special caution must be exercised by the trial court to make certain that the expert's opinion is based upon his or her expertise and that it will assist the trier of fact in determining a fact in issue. Historically, the evaluation of the credibility of witnesses has been committed solely to the jury, and they alone have the responsibility to determine the guilt or innocence of the accused. *State v. Walters*, 120 Idaho 46, 813 P.2d 857 (1990).

Evidence Held Admissible.

Even though the doctor was allowed to give his opinion as to whether "great bodily injury," one of the elements of the aggravated assault charge against the defendant, could have resulted from the victim's injuries, there

was no abuse of discretion that would warrant a reversal of the conviction, where testimony by the doctor, in addition to his opinion, overwhelmingly established that great bodily injury occurred, and the jury was instructed by the judge that it should consider the nature and extent of any injuries in deciding whether those injuries were likely to produce great bodily harm. *State v. Crawford*, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986).

In a criminal prosecution for forgery, a loan agreement signed by defendant, which stated that the purpose was to pay for a forged check, was not rendered inadmissible by I.R.E. 704 since the loan agreement was not an improper lay opinion testimony, nor did it speak to an ultimate issue in the case. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

Officers' observations that defendant was under the influence of alcohol and too impaired to drive went to an ultimate issue of fact, but did not invade the province of the jury as to its determination of whether defendant was or was not guilty of having driven an automobile while under the influence of alcohol and, thus, were admissible under this rule. *State v. Corwin*, 147 Idaho 893, 216 P.3d 651 (2009).

Eyewitness Identification.

Where a scientist's research casts doubt upon the ability of eyewitnesses to perceive accurately, or to memorize and recall fully, certain observed events, such research meets the criterion of I.R.E., Rule 401, and any concern for invasion of the jury's factfinding mission is obviated by this rule, which permits experts to render opinions on ultimate issues; accordingly, expert testimony concerning eyewitness identification is admissible under appropriate circumstances. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

In General.

Expert testimony is only admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence

and to determine a fact in question; an expert's opinion is not inadmissible merely because it embraces an ultimate issue to be decided by the trier of fact. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

State of Mind.

While a defendant's mental condition has been expressly eliminated as a defense under § 18-207(1), the defendant may still use expert evidence on the issue of the defendant's state of mind — subject to the Rules of Evidence — where it is an element of the offense. *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997).

State trooper, who was an accident reconstruction expert, gratuitously and unneces-

sarily injected his clearly inadmissible opinion that defendant acted intentionally; not only was his answer an inadmissible intrusion into the jury's domain of determining the defendant's state of mind, it also was completely unsolicited and wholly unnecessary. *State v. Ellington*, — Idaho —, 253 P.3d 727 (2011).

Cited in: *Sidwell v. William Prym, Inc.*, 112 Idaho 76, 730 P.2d 996 (1986); *Sliman v. Aluminum Co. of Am.*, 112 Idaho 277, 731 P.2d 1267 (1986); *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988); *Idaho Dep't of Law Enforcement v. \$34,000 United States Currency*, 121 Idaho 211, 824 P.2d 142 (Ct. App. 1991); *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008).

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, provided that the court may require otherwise, and provided further that, if requested pursuant to the rules of discovery the underlying facts or data were disclosed. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Applicability.

Cross-Examination.

Testimony Held Admissible.

Applicability.

Finding against the State and in favor of defendant was improper where the magistrate erred in imposing a discovery sanction for a defense request not allowed by the Idaho Criminal Rules; there was no motion pursuant to Idaho Crim. R. 16(b)(8) and therefore, the magistrate's order to disclose the facts and data underlying the expert's opinion was not within the scope of the applicable criminal discovery rules, thus, the ordered sanction of preventing the expert from testifying was in error. *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004).

Cross-Examination.

Trial court should have permitted cross-examination of the defense's accident reconstruction expert concerning defendant's statement to an insurance adjuster, where expert

did not read defendant's statement prior to testifying about causation of the accident. *Dabestani ex rel. Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998).

Testimony Held Admissible.

In an action for bad faith denial of fire insurance proceeds, testimony by a criminal investigator as to his opinion that the insured had started the fire was admissible since the investigator carefully described the evidence upon which he relied when he stated his opinion. *Pacheco v. Safeco Ins. Co. of Am.*, 116 Idaho 794, 780 P.2d 116 (1989), rehearing denied, 117 Idaho 491, 788 P.2d 1314 (1989).

The trial court correctly admitted the deposition of the injured party that was taken in a lawsuit involving a prior accident in which the injured party was involved, and the trial court did not abuse its discretion in allowing the deposition to be read to the jury as facts underlying an expert opinion. *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991).

Cited in: *Priest v. Landon*, 135 Idaho 898, 26 P.3d 1235 (Ct. App. 2001).

Rule 706. Court appointed experts.

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the expert witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; a deposition of the witness may be taken by any party; and the witness may be called to testify by any party or by the court pursuant to Rule 614(a). The expert witness shall be subject to cross-examination by each party, including a party calling the expert as a witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Parties' experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS**Proper Denial of Expert or Investigative Assistance.**

In prosecution for rape, the decision to deny the defendant expert or investigative assistance was not an abuse of the district court's

discretion, where the state laboratory was available for any additional scientific testing which the defendant desired. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

RESEARCH REFERENCES

A.L.R. Right of indigent defendant in state criminal prosecution to ex parte in camera

hearing on request for state-funded expert witness. 83 A.L.R.5th 541.

ARTICLE VIII. HEARSAY.**Rule 801. Definitions.**

The following definitions apply under this Article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if—

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony and was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with declarant’s testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party’s agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Admission by Party Opponent.
 Adoptive Admissions.
 Agent of Party-Opponent.
 Complaint As Judicial Admission.
 Corporate Designees.
 Harmless Error.
 Inconsistent Statements.
 Intoximeter Printout.
 Preservation for Review.
 Purpose of Testimony.
 Recent Fabrication.
 Statement by Co-Conspirator.
 Statement by Party Opponent.
 Statement Inadmissible.
 Statement Not Hearsay.
 Statements in Furtherance of Conspiracy.
 Testimony Erroneously Prohibited.

Admission by Party Opponent.

Subdivision (d)(2)(E) of this rule essentially equates testimony concerning an extrajudicial statement by a co-conspirator with testimony by the co-conspirator himself concern-

ing an extrajudicial statement by the defendant; both types of testimony are treated as an admission by a party-opponent and are deemed to be nonhearsay, rather than exceptions to the hearsay rule. *State v. Caldero*, 109 Idaho 80, 705 P.2d 85 (Ct. App. 1985).

The testimony of an alleged co-conspirator, concerning incriminatory statements made by the defendant, may be viewed as containing an admission by a party-opponent; the statements are deemed to be nonhearsay rather than an exception to the hearsay rule, as prior case law characterized them. *State v. Walker*, 109 Idaho 356, 707 P.2d 467 (Ct. App. 1985).

Testimony about an offer to sell may be viewed as a non-hearsay admission of a party-opponent. *Brazier v. Brazier*, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986).

In prosecution for violation of state sales tax laws, the checks written by the taxpayer to his suppliers were party admissions. *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

Victim's testimony, concerning letters defendant allegedly wrote to victim after an aggravated battery, was not hearsay and was admissible because letters were written by defendant who was a party to the action and therefore were an admission by a party-opponent. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Evidence of a party's plea of guilty to a traffic infraction is admissible against that party in a subsequent civil proceeding arising from the same occurrence as an admission by a party-opponent; however, evidence of such a plea is not conclusive on the issue of negligence; the party against whom the evidence is offered is free to explain the circumstances under which the guilty plea was entered, and the jury, as the trier of fact, shall determine the weight to which that explanation is entitled. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

Defendant's statement that he had just been released from prison was an oral assertion, which was offered against him at trial, thus it falls within the definition of an admission by a party-opponent under this rule. *State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995).

Adoptive Admissions.

Tape recording of an interview of several alleged accomplices of robbery defendant in which they made inculpatory statements, with defendant allegedly present and nodding his head occasionally in apparent agreement with those statements, was erroneously admitted as adoptive admissions; statements were in the form of two or three co-defendants speaking at once where one's narration overlaid the statements of the other and any attempt to identify which statements defendant purportedly agreed to would have been impossible. *State v. Nguyen*, 122 Idaho 151, 832 P.2d 324 (Ct. App. 1992).

Agent of Party-Opponent.

Statements by a bouncer employed at defendant's bar whereby the bouncer explained to assault victim that he was sorry the assault happened in the bar, that codefendant, the alleged perpetrator of the attack, had no business being there, and that she did the same thing to someone else a week earlier, could be admitted as an admission by an agent of a party-opponent under this rule. *McGill v. Frasure*, 117 Idaho 598, 790 P.2d 379 (Ct. App. 1990).

Record contained independent evidence of an agency relationship between the business owner and his daughter where, during his previously published deposition, the owner testified that his daughter helped him man-

age the company, thereby acting as his agent in the day-to-day function of the company, and the owner also stated that he asked the daughter to pay off the Bank of Idaho loan with the money he gave her; based on this evidence, the district court did not abuse its discretion in determining that the daughter was acting as an agent at the time of the transfer, and that her comments to the family concerning the transfer were admissible as a statement by a party's agent. *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009).

Complaint As Judicial Admission.

A complaint against a railroad in a wrongful death action was correctly excluded from use as evidence of prior admissions and for impeachment purposes; the complaint did not rise to the level of judicial admission. *Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 831 P.2d 541 (1992).

Corporate Designees.

Depositions by nurses were ruled admissible as statements from party agents who are not corporate designees, not as depositions by persons who were testifying on behalf of a corporation. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

Harmless Error.

Although the physician's testimony about the victim's statements identifying her husband as the assailant was hearsay, it was harmless error where, prior to the doctor's testimony, two other witnesses had already testified as to the victim's statements incriminating her husband. *State v. Crawford*, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986).

Where the defendant admitting having rented the ministorage unit and the investigator testified, without objection, that he had a conversation with the ministorage caretaker that showed the defendant was renting it, the defendant's rental of the unit was a fact firmly established and never denied at trial, and any error in admitting the rental agreement over the hearsay objection was harmless. *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986).

In a criminal case where trial court overruled defendant's hearsay objection under subsection (c) of this rule, but the Court of Appeals noted that the trial court should have sustained the objection until the proponent made an offer of proof that the statement was not hearsay, under I.R.E. 103 the testimony was harmless error because other non-hearsay evidence amply proved fact related by the objectionable testimony. *State v. Gomez*, 126 Idaho 700, 889 P.2d 729 (Ct. App. 1995).

In view of the considerable amount of independent evidence, essentially un rebutted by the defense, that identified defendant as the second man who fled from officer, and in view of the district court's directive to the jury to disregard officer's testimony that was designed to convey hearsay, court held that the misconduct of the prosecutor was harmless beyond a reasonable doubt. *State v. Agundis*, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995).

Inconsistent Statements.

It was more appropriate to analyze the admissibility of the videotape under I.R.E. 106 because the essence of the prosecutor's reason for seeking admission of the tape was to demonstrate, by providing context, that the allegedly inconsistent statements introduced on cross-examination of victim were actually not inconsistent, rather than introduce prior consistent statements to mitigate inconsistent statements. *State v. Bingham*, 124 Idaho 698, 864 P.2d 144 (1993).

Intoximeter Printout.

A printout from the Intoximeter is not a "statement" for hearsay purposes. The printout, although a writing offered to prove the truth of the matter asserted therein, is not extrajudicial testimony prohibited by the hearsay rule; the printout is a test result produced by a machine. The Intoximeter machine is not a "declarant" capable of being hailed into the courtroom, placed under oath, made to testify and then cross-examined. *State v. Van Sickie*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

Preservation for Review.

The district court did not abuse its discretion by denying the admissibility of defendant's statements made during the police interrogation on hearsay grounds when trial counsel argued their admissibility as admissions of a party-opponent. Defendant's contention that admission of the statements was justified under other Rules of Evidence was not properly preserved for appeal and did not rise to the level of fundamental error. *State v. Parmer*, 147 Idaho 210, 207 P.3d 186 (2009).

Purpose of Testimony.

Officer's testimony about what he had learned from third parties concerning defendant's activities relating to a prior bank robbery was not offered for the truth of any of the facts relayed in the testimony; rather, it was presented only to show what defendant was told by the officer, which precipitated defendant's confession. *State v. Nichols*, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993).

Where the testimony of a witness was not offered to prove that the defendant had re-

cently been released from prison, but rather to rehabilitate the victim's testimony regarding the defendant's statement to him, the testimony was not hearsay and was properly admitted. *State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995).

Where the prosecutor's purpose for the testimony, as admitted during his argument on defendant's objection, was to convey an identification to the jury by implication, such testimony, which conveys the substance of an out-of-court statement for the truth of the matter asserted, was properly characterized as hearsay even though the statement was not directly repeated. *State v. Agundis*, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995).

Where an attorney's testimony disclosed that his client had expressed guilt when he told the witness he was having trouble sleeping and that he wanted to get the matter off his conscience, the statement sought to prove the matter asserted, and was inadmissible hearsay. *State v. Trevino*, 132 Idaho 888, 980 P.2d 552 (1999).

Recent Fabrication.

Because, on cross-examination, defendant attempted to elicit testimony which would support his claim that child's mother spent the three years before the trial programming the child to say defendant had abused her, the video tape of child's interview with CARES (Child at Risk Evaluation Services) nurse was admissible for the purpose of refuting defendant's charge of recent fabrication. *State v. McAway*, 127 Idaho 54, 896 P.2d 962 (1995).

Statement by Co-Conspirator.

Statements by a co-conspirator made during the course of and in furtherance of a conspiracy, which are not considered hearsay under this rule, were properly admitted before the conspiracy was established during the trial, where evidence such as the informant's testimony and the circumstances of the drug transactions, sufficiently established a conspiracy between the co-defendants. *State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991).

In order to be admissible under this section, it is not necessary that the statements were made in the presence of, or with the knowledge of, the other conspirators; nor is it necessary that the defendant be a part of the conspiracy at the time the statements were made. *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994).

The statute of limitation for the crime of conspiracy does not automatically bar the use of statements by a person who cannot be charged with the crime of conspiracy due to

the operation of the statute of limitation. Once there is some evidence of a conspiracy or promise of its production, any statement made by a co-conspirator during the course of and in furtherance of the conspiracy are admissible; it makes no difference whether the declarant or any other partner in crime could actually be tried, convicted and punished for the crime of conspiracy. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

Witness physician's testimony, based on witness physician's review of procedures recorded in surgical logs rather than his personal observation, which was offered to prove the truth of his conclusions, was speculative and excludable as hearsay. *Woodfield v. Board of Professional Discipline*, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995).

The descriptive statement, made 45 minutes after the incident as repeated by the officer in his testimony, was admissible as a prior identification by a witness and was not hearsay, and the district court did not err in admitting the descriptive testimony. *State v. Woodbury*, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995).

Where the use of a common address was circumstantial evidence of a link between the two men, both involved in a flight from a police officer, and this link was probative in determining whether defendant was the second man observed by officer, when used in this way, as circumstantial evidence of defendant's association with arrested man and not to prove that defendant or arrested man had ever been at a specific address, the evidence was not hearsay. *State v. Agundis*, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995).

Where the statement of a friend of the defendant was not made during, or in furtherance of, a conspiracy, but after the completion of the crime and after arrest, and where it was not made to conceal or perpetuate the conspiracy, the statement was not properly admissible under this rule, either as a statement against interest or as a statement of a co-conspirator. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

Statements made by defendant's girlfriend to an undercover officer during a drug exchange were admissible as nonhearsay because the evidence showed that the conspiracy between defendant and his girlfriend was ongoing at the time, and it demonstrated that defendant was involved in the conspiracy because defendant was present at the drug exchanges; moreover, the admission of the statements under I.R.E. 801(d)(2)(e) did not violate the Confrontation Clause. *State v. Ingram*, 138 Idaho 768, 69 P.3d 188 (Ct. App. 2003).

Note written by defendant's co-conspirator to the co-conspirator's girlfriend, showing that the co-conspirator was attempting to cover up the crime by dissuading his girlfriend from divulging information to police, was not hearsay; although the note was offered in error under subsection (d)(2)(E) of this rule, such error was harmless because the note was admissible on other grounds. *State v. Harris*, 141 Idaho 721, 117 P.3d 135 (Ct. App. 2005).

District court did not err in admitting a co-conspirator's testimony about another co-conspirator's statements under subdivision (d)(2)(E), because the statements were made in furtherance of the conspiracy. The statements were made after the co-conspirator had agreed to join the drug ring and were part of his "orientation" as they explained the operation and roles of the conspiracy. *State v. Rolon*, 146 Idaho 684, 201 P.3d 657 (2008).

Statement by Party Opponent.

When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. *Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (2005).

Where defendant and his accomplice were apprehended separately and charged with burglary and attempted robbery and where both gave the same residential address at the time of booking, the trial court erred in ruling that the accomplice's statement of his residence address was an admission of a party opponent when proffered against defendant, because a nonjudicial statement is admissible under subsection (d)(2) only as against the party who made the statement or on whose behalf it was made. While the state was entitled to introduce the accomplice's statement to prove its case against the accomplice himself, the statement was hearsay as to defendant. *State v. Gerardo*, 147 Idaho 22, 205 P.3d 671 (2009).

Where defendant and his accomplice were apprehended separately and charged with burglary and attempted robbery, the trial court erred in admitting the accomplice's statements to police regarding the location of the guns used in the commission of the offenses at defendant's trial; the accomplice's statements were not the admissions of a party opponent when proffered against defendant, because a nonjudicial statement is admissible under subsection (d)(2) only as against the party who made the statement or on whose behalf it was made. While the state was entitled to introduce the accomplice's statement to prove its case against the accomplice

himself, the statement was hearsay as to defendant. *State v. Gerardo*, 147 Idaho 22, 205 P.3d 671 (2009).

Statement Inadmissible.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he “wanted to kill a cop” was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to “kill a cop” and it was irrelevant if offered for the nonhearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers’ motives did not prove any element of the offense charged. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

Where a witness never stated that the reason he was willing to testify against the defendant was because of feelings of guilt that were weighing on him, that comment, made to his attorney, could not be construed as a prior consistent statement which preceded any motive on his part to lie, and the admission of this testimony was error. *State v. Trevino*, 132 Idaho 888, 980 P.2d 552 (1999).

During defendant’s trial for lewd conduct with a minor, the district court abused its discretion by admitting testimony from a DNA expert who testified that defendant’s DNA was in semen found on the girl’s underwear and inside a condom; the expert was not at the lab to receive the evidence and did not perform the DNA testing herself. *State v. Watkins*, 148 Idaho 418, 224 P.3d 485 (2009).

Statement Not Hearsay.

Where the testimony of the neighbor was not offered for the purpose of proving the truth of the overheard statement, no hearsay was involved and no error was committed in allowing the neighbor to testify about what he had heard. *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986), review denied, 116 Idaho 466, 776 P.2d 828 (1986).

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, the testimony of the preliminary hearing witness regarding the defendant’s alleged statement in her presence was not hearsay but a party’s statement under subdivision (d)(2) of this rule; however, on remand the trial court should make a ruling on the application of I.R.E. 403 to this testimony. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

Police officer’s testimony that he had not been contacted by the hospital staff was not

hearsay since there was no basis in the record to support a conclusion that the hospital staff intended that their failure to contact the officer was an assertion regarding the victim’s involvement in the shooting with which defendant was charged. *State v. Morrison*, 130 Idaho 85, 936 P.2d 1327 (1997).

A witness’ out-of-court comment to a police officer did not constitute hearsay where it was not a statement of fact but a request, and where, since it contained no assertion of any fact, it could not have been offered for the truth of the matter “asserted.” *State v. Salinas*, 134 Idaho 362, 2 P.3d 747 (Ct. App. 2000).

District court did not abuse its discretion by admitting evidence concerning a beneficiary’s intent when signing a promissory note on behalf of a relative because the action did not concern a demand against an estate or a claim against an executor or administrator under Idaho Code § 9-202(3); moreover, the evidence did not constitute hearsay because it was offered for the purpose of showing the beneficiary’s state of mind. *Rowan v. Riley*, 139 Idaho 49, 72 P.3d 889 (2003).

Officer’s testimony regarding another officer’s administration of field sobriety tests was not inadmissible as hearsay because the administering officer’s verbal directions to defendant were not assertions of fact and could not be offered to prove the truth of the matter asserted. *State v. McDonald*, 141 Idaho 287, 108 P.3d 434 (Ct. App. 2005).

Statements in Furtherance of Conspiracy.

Idaho law does not require contemporaneous independent proof of a conspiracy. Idaho law simply requires that there be some evidence of conspiracy or promise of its production, before the court can admit evidence of statements made in furtherance of the conspiracy under this rule. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

Where there was sufficient evidence to support the trial court’s ruling that conspiracy was for the paid murder of victim, the conspiracy was not complete until final payment was made, and all statements made in furtherance of the conspiracy until final payment were admissible. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994).

Testimony Erroneously Prohibited.

Where plaintiff called one of defendant’s employees as a witness in an assault case, the employee should have been permitted to testify concerning an admission made to him by another of defendant’s employees, as it was not necessary to show that the employee making the admission had personal knowledge regarding the matters in question.

McGill v. Frasure, 117 Idaho 598, 790 P.2d 379 (Ct. App. 1990).

Cited in: State v. Rosencrantz, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986); Preuss v. Thomson, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986); State v. Burton, 115 Idaho 1154, 772 P.2d 1248 (Ct. App. 1989); Stewart v. Rice, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991); State v. Larsen, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993); State v. Vivian, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996); State v. Welker, 129 Idaho 805, 932 P.2d 928 (Ct. App.

1997); State v. Cox, 136 Idaho 858, 41 P.3d 744 (Ct. App. 2002); State v. Siegel, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002); State v. Howell, 137 Idaho 817, 54 P.3d 460 (Ct. App. 2002); Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 48 P.3d 1241 (2002); State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003); State v. Timmons, 145 Idaho 279, 178 P.3d 644 (Ct. App. 2007); State v. Barnes, 147 Idaho 587, 212 P.3d 1017 (2009); State v. Thorngren, 149 Idaho 729, 240 P.3d 575 (2010).

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho. (Adopted January 8, 1985, effective July 1, 1985; amended March 26, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Effect of § 19-3024.
Evidence Held Inadmissible.
No Objection.
Statement Hearsay.

Effect of § 19-3024.

The trial court should not have considered the admission of the five-year-old victim's out-of-court statements or the testimony with regard to victim's out-of-court statements by the psychologist who counseled the victim, or the statements made by victim in her sleep overheard by family members under § 19-3024; to the extent that § 19-3024 attempts to prescribe the admissibility of hearsay evidence and is in conflict with the Idaho Rules of Evidence, it is of no force or effect. State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992).

Evidence Held Inadmissible.

Where the State should not have been permitted to elicit testimony by victim's mother about defendant's alleged attempt to choke mother in the first instance, the State could not predicate the admissibility of otherwise inadmissible testimony by mother's coworker upon its value to impeach other evidence that was itself inadmissible and should have been excluded. State v. Wood, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994).

Although the hearsay rule presented no obstacle to the admission of the transcript for impeachment purposes, due to the plaintiffs' untimely motion for admission of the partial transcript, the appellate court found no error in the trial court's exclusion of the transcript. Herrick v. Leuzinger, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010).

No Objection.

Where hearsay evidence is admitted without objection, it may properly be considered in determining the facts; the important question being the weight to be given such evidence. Phillips v. Erhart, — Idaho —, 254 P.3d 1 (2011).

Statement Hearsay.

In prosecution for assault with intent to commit a serious felony upon a law enforcement officer, testimony of the witness that the police radio dispatcher stated that the defendant had said he "wanted to kill a cop" was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to "kill a cop" and it was irrelevant if offered for the nonhearsay purpose of showing

what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged. *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

Witness physician's testimony, based on witness physician's review of procedures recorded in surgical logs rather than his personal observation, which was offered to prove the truth of his conclusions, was speculative and excludable as hearsay. *Woodfield v. Board of Professional Discipline*, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995).

Where the excluded portion of the minutes of the highway district board of directors meeting contained hearsay statements allegedly made by persons not in attendance at the meeting, they were properly excluded. *Bur-*

gess v. Salmon River Canal Co., 127 Idaho 565, 903 P.2d 730 (1995).

Cited in: *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988); *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988); *Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 788 P.2d 1293 (1990); *State v. Vivian*, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996); *Quinto v. Millwood Forest Prods., Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997); *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002); *Rowan v. Riley*, 139 Idaho 49, 72 P.3d 889 (2003); *Hurtado v. Land O'Lakes, Inc.*, 147 Idaho 813, 215 P.3d 533 (2009); *State v. Thorngren*, 149 Idaho 729, 240 P.3d 575 (2010).

RESEARCH REFERENCES

A.L.R. Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R.6th 771.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or

marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence thirty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or arts, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits, except upon motion and order for good cause shown.

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to bound-

aries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among the person's associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Medical or dental tests and test results for diagnostic or treatment purposes.** A written, graphic, numerical, symbolic or pictorial representation of the results of a medical or dental test performed for purposes of diagnosis or treatment for which foundation has been established pursuant to Rule 904, unless the sources of information or other circumstances indicate lack of trustworthiness. This exception shall not apply to:

(A) psychological tests

(B) reports generated pursuant to I.R.C.P. 35(a)

(C) medical or dental tests performed in anticipation of or for purposes of litigation or

(D) public records specifically excluded from the Rule 803(8) exception to the hearsay rule.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 24, 2005, effective July 1, 2005; amended October 23, 2008, effective January 1, 2009.)

JUDICIAL DECISIONS

ANALYSIS

Application to Standing.
 Authentication of Records.
 Business Records.
 Confrontation Clause Analysis.
 Declarations by Children.
 Documentary Evidence.
 Evidence Inadmissible.
 Excited Utterance.
 Existing Mental, Emotional, or Physical Condition.
 Governmental Records and Reports.
 Hearsay As Basis for Affidavit.
 Hearsay Within Hearsay.
 Learned Treatises.
 Medical Diagnosis.
 Other Exceptions.
 —Guarantees of Trustworthiness.
 —Medical Report.
 —Requirements.
 —Spontaneity and Trustworthiness.
 —Totality of Circumstances.
 —Trustworthiness and Necessity.
 Preservation of Objections.
 Prior Consistent Statements.
 Probation Files.
 Public Records and Reports.
 Recorded Recollection.
 Sales Charts.
 Statements of Victim.
 Statement to Prove Matter Asserted.
 Testimony of Spouse.
 Videotape of Testimony.

Application to Standing.

Idaho R. Evid. 803 governs the admissibility of evidence; it has no application to the issue of standing. Thus, a lease of a state land lessee did not constitute an admission conveying third party beneficiary status on adjoining landowners, and they had no standing to enforce a provision that required compliance with local laws and ordinances. *Fenwick v. Idaho Dep't of Lands*, 144 Idaho 318, 160 P.3d 757 (2007).

Authentication of Records.

Records need not be authenticated by the person who actually made them; all that is necessary is that the record be authenticated by a person who has custody of the record as a regular part of his or her work, or has supervision of its creation. *State, Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992).

Business Records.

A trial court's decision to admit business record evidence will not be overturned absent

a clear showing of abuse. *Beco Corp. v. Roberts & Sons Constr. Co.*, 114 Idaho 704, 760 P.2d 1120 (1988), overruled on other grounds, *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 803 P.2d 978 (1990).

Where the summation was produced from daily time cards of individuals and from daily job activity sheets produced by the employee in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial, the record was properly admitted pursuant to subdivision (6) of this rule. *Beco Corp. v. Roberts & Sons Constr. Co.*, 114 Idaho 704, 760 P.2d 1120 (1988), overruled on other grounds, *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 803 P.2d 978 (1990).

Certain types of hearsay evidence are admissible because the circumstances behind their creation implies a high degree of veracity; business records are one such legitimate and important classification, and the trial court is vested with the authority to admit such evidence. *Christensen v. Rice*, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988).

The trial court did not abuse its discretion in not admitting the curriculum vitae of the doctor, who made the human leukocyte antigen (HLA) report but did not testify, under either § 7-1116 or under the business records exception to the hearsay rule contained in subdivision (6) of this rule. *State, Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992).

Where the department of health and welfare's witness was not a "qualified witness" as she did not supervise the creation of the human leukocyte antigen (HLA) report, the trial court did not abuse its discretion in refusing to admit the HLA report under subdivision (6) of this rule. *State, Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992).

Computer printout of city's labor and equipment costs incurred during the time for which it assessed liquidated damages against contractor was a "business record" and not a "summary" and was admissible upon laying a proper foundation. *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993).

Subdivision (6) of this rule does not require a foundation of testimony by the person who prepared the document in order to admit the document as a business record. *Large v. Caferty Realty, Inc.*, 123 Idaho 676, 851 P.2d 972 (1993).

The business records exception was inapplicable, although Court Appointed Special Advocate program (CASA) might have been a

business entity within the scope of the rule, CASA was not the business that prepared the letter, and putting the letter in CASA's files did not transform it into CASA's business record. *Wood v. State, Dep't of Health & Welfare*, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

Where deceased's sister testified that deceased regularly made entries in the cattle notebook and these entries were in her handwriting and where a certified accountant testified that the notebook reliably reflected the income from and the expenses of the cattle, a sufficient foundation was established to admit the notebook into evidence under the business record exception to the hearsay rule. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Magistrate did not err in admitting blood test report and doctor's testimony under the business records exception to the hearsay rule as doctor was accepted as expert witness, doctor was custodian of the business records and thus able to testify to the record keeping process, and proper foundation was established regarding his testimony. *Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6 (1996).

The exhibit satisfied the requirements of subdivision (6). The employer was the custodian of the exhibit. The exhibit was prepared by the employer's record keeping employees in the regular course of business, at or near the time at issue, and was based upon the employer's record keeping employees' personal knowledge. The exhibit was not produced in anticipation of trial, and the court properly admitted it as an exception to the hearsay rule. *State v. Evans*, 129 Idaho 758, 932 P.2d 881 (1997).

Under Idaho R. Evid. 803(8) and 803(6), the state police crime lab report should not have been admitted into evidence as either a business records exception or public records exception because it was an investigative report offered by the prosecution; however, all the information obtained in the report was testified to by the forensic lab technician and was a duplicate of testimony under oath; therefore, the error was harmless. *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003).

In a criminal prosecution for forgery, the trial court erred by admitting a reclamation document advising the bank that the payee's social security check had been forged where there was no testimony presented by any witness familiar with the system used to create the document; however, the error was harmless because the reclamation document did not present the jury with any information that had not already been introduced through

the testimony of other witnesses. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004).

Mere receipt and retention by a business entity of a document that was created elsewhere did not transform the document into a business record of the receiving entity for purposes of this rule. *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 111 P.3d 162 (Ct. App. 2005).

Although a doctor testified that he requested lab reports and relied upon such records in the regular course of his medical practice, a lab report regarding defendant's human immunodeficiency virus status was improperly admitted into evidence under the business records exception to the hearsay rule because the doctor's business did not make the record. *State v. Kanay Aongola Mubita*, 145 Idaho 925, 188 P.3d 867 (2008).

Because there was conflicting testimony on whether the alarm went off when defendant left the store, and whether logging occurred in this instance, the log was material to the defense and the district court abused its discretion in excluding it entirely. *State v. Karpach*, 146 Idaho 736, 202 P.3d 1282 (2009).

The general requirements for the admission of business records are that the documents be produced in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial. These foundational requirements supply the degree of trustworthiness necessary to justify an exception to the rule against hearsay. *Hurtado v. Land O'Lakes, Inc.*, 147 Idaho 813, 215 P.3d 533 (2009).

Ranch's exhibits, created for use at trial from an informal method of tracking arrival and death rate of new calves, were not regularly kept business records within the meaning of this rule and were not admissible. *Hurtado v. Land O'Lakes, Inc.*, 147 Idaho 813, 215 P.3d 533 (2009).

During defendant's trial for lewd conduct with a minor, the district court abused its discretion by admitting testimony from a DNA expert who testified that defendant's DNA was in semen found on the girl's underwear and inside a condom; the expert was not at the lab to receive the evidence and did not perform the DNA testing herself. *State v. Watkins*, 148 Idaho 418, 224 P.3d 485 (2009).

Confrontation Clause Analysis.

The residual hearsay exception, contained in subdivision (24) of this rule, is not a firmly rooted hearsay exception for Confrontation Clause purposes; admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trust-

worthiness of certain types of out-of-court statements; however, hearsay statements admitted under the residual exception, almost by definition, do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Where hearsay statements do not fall within a firmly rooted hearsay exception, they are presumptively unreliable and inadmissible for purposes of the Confrontation Clause of the U.S. Constitution, and must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

It was not appropriate for the trial court to address the application of the Confrontation Clause to the testimony of social worker, who interviewed child in lewd conduct case, until the court determined that the social worker's testimony was admissible under an exception to the hearsay rule. *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993).

Declarations by Children.

Hearsay declarations of child witnesses have generally been considered reliable only because they were excited utterances or part of the *res gestae*; the theory being that there was no time for fabrication, coaching or confabulation and, therefore, the guarantees of reliability shared by those traditional exceptions to the rule against admission of hearsay statements were present. *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), *aff'd*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

There does not exist a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

With regard to out-of-court statements made by children regarding sexual abuse, a mechanical test shall not be imposed for determining particularized guarantees of trustworthiness under the Confrontation Clause of the United States Constitution; rather, the unifying principle is that the factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Where the trial court found that the statements were reliable because the five-year-old victim of lewd and lascivious conduct made the statements the next morning after returning from visiting her father, and concluded that the short length of time between the

victim's visit to her father and her bath the next morning indicated that there was not enough time for the victim to fabricate the story, the totality of the circumstances supported the finding of the trial court and the trial court did not abuse its discretion in admitting this evidence pursuant to this rule. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

Where the victim's great-grandmother testified that the victim screamed, "Don't daddy, don't," in her sleep the night after she returned from visiting her father, the trial court should not have admitted these out-of-court statements. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

The trial court did not abuse its discretion by admitting testimony of psychologist of out-of-court statements by five-year-old victim pursuant to subdivision (24) of this rule where (1) the statements had sufficient circumstantial guarantees of trustworthiness equivalent to those set out in the other exceptions of I.R.E. 803, (2) the statements were offered as evidence of a material fact, i.e., whether the victim was in fact sexually abused, and (3) the interests of justice would be served because the statements were made in a situation less threatening than open court might be for a very young child. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

Admission of letter written by minor child to judge which contained the thoughts and fears of a child who was the subject of an action under the Child Protective Act was not error, as evidence was clearly relevant. *Wood v. State*, Dep't of Health & Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995).

Where a young girl related the details of three events of sexual abuse to her brother only a few minutes after the last incident had occurred and where the brother testified that his sister was in tears and appeared to be distraught when she recounted the incidents, there was an adequate showing that the victim was under the stress of a startling event and that her statement was a spontaneous reaction made without reflective thought; consequently, the trial court's decision to allow the brother's testimony was not an abuse of discretion. *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996).

Documentary Evidence.

Where the report at issue did not purport to relate to the investigation, diagnosis, treatment, correction or prescription for any disease, ailment, injury, infirmity, deformity or other condition, physical or mental, but rather, it compared the genetic identity of the blood of rape suspect and the victim with that

of the victim's vaginal secretions containing sperm from the perpetrator of the rape, where the director of the laboratory who signed the affidavit to which the report was attached did not purport to be a medical doctor, and where the report concerned the results of scientific examinations and not medical facts or reports, the report was not admissible under I.C.R., Rule 5.1 or under subdivision (24) of this rule. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

Evidence Inadmissible.

Where minor submitted a letter purporting to be from the U.S. Department of Justice to show that the federal government intended his mother to hold and spend death benefits, as a fiduciary, for his benefit, the district court properly determined that the letter was inadmissible hearsay because there was no evidence of authentication to demonstrate that the letter was qualified as a public record under subdivision (8). *Herman v. Herman*, 136 Idaho 781, 41 P.3d 209 (2002).

Excited Utterance.

Judge's ruling, that a remark by a defendant charged with aggravated battery and using a firearm during the commission of a crime was not an "excited utterance" under this rule, was upheld where the remark was uttered some five minutes after the event of the crime; the remark was made after defendant had driven away from the scene of the crime and was therefore removed by time and distance from the events, and the remark was self-serving. *State v. Burton*, 115 Idaho 1154, 772 P.2d 1248 (Ct. App. 1989).

The admissibility of excited utterances, pursuant to subdivision (2) of this rule, is not dependent on whether the person making those statements is called as a witness, or is, in fact, competent to be a witness. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

The admission of excited utterances pursuant to subdivision (2) of this rule, as an exception to the hearsay rule, is left to the sound discretion of the trial court. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

At the time the court ruled to admit the evidence as an excited utterance, the court had before it testimony that victim had been beaten, raped and threatened with death. Victim testified that after escaping from defendant's car, she made her way to the interstate where witness picked her up 15 or 20 minutes later. Witness testified that at the time he picked her up, victim appeared excited, scared and frightened. Upon this foundation, the court reasonably could conclude that victim was still under the stress of the events in defendant's car when witness

stopped for her. *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992).

Child sex abuse victim's statements to family friend within a few hours of the alleged molestation could still be considered an excited utterance even though child had already told his eight-year-old brother about defendant's actions. *State v. Stover*, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994).

There was a sufficient evidentiary foundation upon which the trial court could reasonably determine that child sex abuse victim's out-of-court statement was an excited utterance where child's description of the abuse was given to a family friend within a few hours of the alleged molestation when the child was still likely to be emotionally distressed by the troubling event. *State v. Stover*, 126 Idaho 258, 881 P.2d 553 (Ct. App. 1994).

The taped conversation between a minor and the police and paramedics in which the minor, who was crying and hysterical, informed them of the acts of lewd conduct performed on her by the defendant just 30 minutes prior to the call was properly admitted into evidence as an excited utterance. *State v. Valverde*, 128 Idaho 237, 912 P.2d 124 (Ct. App. 1996).

Where police officer testified that the minor victim was very obviously upset and still in an excited state, that it took some time to calm her down and that she had been crying, there was sufficient evidence to support the district court's finding that statements made to her mother and the officer within an hour of the event were the product of her distress, not reflective thought, and were therefore admissible as excited utterances. *State v. Monroe*, 128 Idaho 676, 917 P.2d 1316 (Ct. App. 1996).

There was no abuse of discretion in the court's determination that child was under the stress of her abduction and molestation when she made the statements to her mother and to the police officer and that her statements were therefore admissible under subsection (2) of this rule. *State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996).

The excited utterance exception did not apply where the declarant was an adult woman who had suffered no physical trauma in the course of a fight with her boyfriend, even though she was crying and upset when she spoke with the police officer ten minutes later. *State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999).

Court, in defendant's domestic battery case, did not err by admitting statements made by the victim to a security guard where the victim was badly beaten and the victim made the statements only a few minutes after being found. *State v. Hoover*, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003).

A boy's statement made during a telephone call to his aunt was an excited utterance and was therefore admissible under Idaho R. Evid. 803(2) as an exception to the hearsay rule where the defendant called the boy a profane name, the boy ran to his mother's car, and the mother arrived at the car, where the aunt testified that when the boy called her, he was extremely hysterical, crying, and was besides himself at what had happened. *State v. Poe*, 139 Idaho 885, 88 P.3d 704 (2004).

Statements by a four-year-old victim to her mother and grandmother to the effect that defendant put his finger in her vagina were admissible as excited utterances, where the victim made the statements within minutes of the incident, the injury suffered by her was of an intimate and shocking nature, the victim was only four years old, and the statements were made in response to her mother asking what was wrong upon finding the victim crying hysterically. *State v. Doe (In re Doe)*, 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004).

Admission of a victim's prior statement, made to police on the night before her death, that petitioner had tried to break into her home, was not a violation of petitioner's rights under the Confrontation Clause because, although the state court relied on its residual exception, which was not firmly rooted, the court had no doubt that the evidence could properly have come in under the excited utterance exception of Idaho R. Evid. 803(2). The victim was speaking while under the baleful influence of an exceedingly stressful event—the attempt by an intruder to break into her home—and she lacked the time or the incentive to reflect upon and make up a story. *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004), cert. denied, 545 U.S. 1105, 125 S. Ct. 2540, 162 L. Ed. 2d 277 (2005).

In defendant's lewd conduct and sexual battery case, the court erred by admitting two hearsay statements regarding what the child said because two days had passed between the incident and the statements, the statements were not volunteered, and the child's initial refusal to speak about the incident to her sister tended to show that when she finally did, the statements were a result of reflective thought. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007).

In a felony injury to a child case, the court properly admitted the child's hearsay statements to a neighbor, even though they were not spontaneous. Given the child's young age, proximity to the physical altercation, and ongoing emotional upset, the statements were the product of the startling events and not the child's normal reflective thought process. *State v. Timmons*, 145 Idaho 279, 178 P.3d 644 (Ct. App. 2007).

Defendant's son's statement to a friend was admissible as an excited utterance because news of his father's murder was sufficiently startling to render inoperative the son's reflective thought process and, although in response to a general question, the statement was a spontaneous reaction to his mother's apparent involvement in the murder. *State v. Thorngren*, 149 Idaho 729, 240 P.3d 575 (2010).

Existing Mental, Emotional, or Physical Condition.

Subdivision (3) of this rule treats testimony regarding a victim's expression of fear as hearsay but grants it limited admissibility under the exception for "existing mental, emotional, or physical condition" so long as it is not offered to prove the fact remembered or believed by the declarant. *State v. Rosenkrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

In wrongful death action in which father sought damages for loss of son's affection, love and companionship, the trial court was correct in permitting witnesses to testify as to statements made by deceased son regarding the relationship between him and his father. These statements fell within the exceptions to hearsay provided in subdivision (3) of this rule. *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987).

In a first degree murder case, where the State offered the testimony of victim's boyfriend as to statements made to him by the victim the night before her death about her relationship with defendant, and where the boyfriend's testimony indicated that the victim had told him she was worried because she did not know where defendant was, testimony was admissible under this section as evidence of the victim's existing state of mind. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989), cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989), cert. denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Where the alleged sexual abuse occurred during the period of November 15-27 and the officer heard victim's statement which the trial court admitted as an "excited utterance" on December 2, this delay from the time of the "event or condition" to the time of the declarant's statement was too long. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

Governmental Records and Reports.

Some governmental departments will be

able to generate and retain records or reports that could be admissible in evidence to show compliance with the requirements in § 49-623(3). *State v. Monaghan*, 116 Idaho 972, 783 P.2d 311 (Ct. App. 1989).

Where city council clerk testified that a motion authorizing the lease of former hospital to state for use as correctional facility was presented at the December 20, 1989 meeting of the city council and that the city council took a final vote at that time but that she did not record this vote and mayor later signed the resolution, trial court concluded that the oral motion made and passed by the city council amounted, in substance, to a "resolution" within the meaning of § 50-902 prior to execution of the lease and the trial court did not abuse its discretion in admitting the copy of the resolution. *Foster v. City of St. Anthony*, 122 Idaho 883, 841 P.2d 413 (1992).

Hearsay As Basis for Affidavit.

Hearsay may be the basis for issuance of the warrant "so long as there [is] a substantial basis for crediting the hearsay". The delivery of the cocaine to the informant, who was searched before and after going into the trailer, was uncontroverted, and the communications between defendant and the informant were recorded and monitored by the officer; on this information which was supplied by the officer to the magistrate in support of the search warrant, the reliability of the informant was established and the magistrate had a substantial basis to accept hearsay in the affidavit that drugs were present in the trailer. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

Hearsay Within Hearsay.

Statement of defendant in police report, that he denied having dropped drugs while running from officer, was inadmissible on the grounds that it was hearsay within hearsay not within any exception to the hearsay rule and district court did not err in excluding such statement. *State v. Vivian*, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996).

Learned Treatises.

Admission of an article in a scientific magazine on the subject of eyewitness testimony was not barred in a prosecution for robbery by this state's version of the hearsay rule, despite a lack of live testimony by the author. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Medical Diagnosis.

The trial court should not have admitted psychologist's testimony pursuant to subdivision (4) of this rule; only out-of-court statements necessary for medical diagnosis and

treatment are admissible under subdivision (4) of this rule and the victim did not make her statements to psychologist for the purposes of medical treatment. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

Several factors supported the court's determination that the child's statements were made for purposes of diagnosis or treatment. The child's abduction and the consequent medical examinations were not associated with any domestic dispute, and there was no apparent motivation for any of the adults involved to try to influence the child's story. Although the child's age was an important factor, the court was unwilling to hold as a matter of law that a child of four years and two months cannot be motivated to give information for the purposes of medical diagnosis or treatment. *State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1996).

Other Exceptions.

Trial judge properly considered the factors of subdivision (24) of this rule, and his ruling admitting into evidence the alleged child molestation victim's out-of-court statements to his mother under that exception was correct; moreover, since the judge found the victim to be "unavailable," I.R.E., Rule 804(b)(5) would also be applicable and would allow the admission of his statements to his mother regarding incidents of sexual molestation. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

In child abuse case where trial court allowed doctor to testify to out-of-court statements of defendant's younger daughter, and where defendant claimed statements were unreliable because of alleged suggestiveness of doctor's questions (by referring to "daddy") and the younger daughter's alleged inability to recollect and communicate because of her age, trial court did not err when it allowed doctor to testify concerning the younger daughter's statements to him since there was physical evidence to corroborate that sexual abuse occurred, since there was no motive to make up a story of this nature in a child of these years, and since the older daughter testified as to the identification of the perpetrators. *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989), cert. denied, *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989).

The admission of a hearsay statement under subsection (24) of this rule by a trial court is a proper exercise of discretion only when the court finds that (A) the hearsay statement has circumstantial guarantees of trustworthiness equivalent to those in subsections (1) through (23) of this rule, (B) the statement is offered as evidence of a material fact, (C) the statement is more probative on the point for which it is offered than any other evidence

which the proponent can procure through reasonable efforts, (D) the general purposes of the rules of evidence, and the interests of justice, will best be served by admission of the statement into evidence, and (E) the proponent gives the adverse party adequate notice and information regarding use of the statement. *State v. Ransom*, 124 Idaho 703, 864 P.2d 149 (1993), cert. denied, 510 U.S. 1181, 114 S. Ct. 1227, 127 L. Ed. 2d 571 (1994).

Under this rule, the admissibility of plaintiffs' predecessor's statements turns upon whether the statements were probative as to her state of mind about ownership of the cattle; where it is apparent that her statements indicated her belief that she owned the cattle, the statements are relevant for determining whether she had an ownership interest. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995).

Subdivision (24) is not a well-rooted exception to the hearsay rule and hearsay admitted pursuant to this subsection must be proven to have particularized guarantees of trustworthiness. The spontaneity of the statement, the consistency of repetition, the mental state of the declarant and the lack of motive to fabricate are indicators of trustworthiness, but these factors are not exclusive. The existence of corroborating evidence may indicate that any error in the admission of the statement was harmless, but is not an appropriate consideration in finding a statement was trustworthy. *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997).

In a murder prosecution, the trial court did not err in excluding testimony of a witness as to a statement by the victim regarding bruises she suffered at the hands of a man other than defendant. *State v. Hawkins*, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998).

—Guarantees of Trustworthiness.

The use of corroborating evidence to support a hearsay statement's particularized guarantees of trustworthiness would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, and this is a result at odds with the requirement that hearsay evidence admitted under the Confrontation Clause of the United States Constitution be so trustworthy that cross-examination of the declarant would be of marginal utility. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Because the surgical logs from the hospital were records kept in the regular course of business, court concluded that the surgical logs were admissible under subsection (6) of this rule. *Woodfield v. Board of Professional*

Discipline, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995).

A magistrate erred, in defendant's battery trial, by admitting a videotaped interview of the victim under the residual hearsay exception because the statements lacked particularized guarantees of trustworthiness, however, the error was harmless. *State v. Doe*, 137 Idaho 519, 50 P.3d 1014 (2002).

—Medical Report.

Where except for the department's claim in its complaint that putative father had a duty to repay the department \$207 for costs incurred in the drawing, shipping and analysis of the blood samples and the allegation that a true and correct copy of the analysis result was attached to the complaint, there was no basis to support a finding that the department gave putative father adequate information and notice regarding the use of the human leukocyte antigen (HLA) report; therefore, the trial court did not abuse its discretion in not admitting the HLA report under subdivision (24) of this rule. *State, Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992).

—Requirements.

Hearsay evidence may not be admitted under subdivision (24) of this rule when there are not specific findings that each of the five requirements of the rule have been fulfilled. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

—Spontaneity and Trustworthiness.

If there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness with regard to statements by a young child. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

—Totality of Circumstances.

With regard to the admissibility of hearsay statements, particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

If the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

—Trustworthiness and Necessity.

The admissibility of hearsay pursuant to

subdivision (24) of this rule depends upon the trustworthiness of the evidence and the necessity for its use. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

A physician's testimony regarding the declarations of a two and one-half year old alleged victim of sexual abuse lacked the constitutionally required guarantees of trustworthiness, where the interview was not recorded on videotape for preservation and perusal by the defense at or before trial, where the physician had a preconceived idea of what the child should be disclosing, and where the physician used blatantly leading questions throughout his interview. *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), *aff'd*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Preservation of Objections.

A litigant who has made a motion in limine requesting advance rulings on the admissibility of hearsay testimony must continue to assert his objections as the evidence is offered or his objections are not preserved. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

Prior Consistent Statements.

In a trial on charges of lewd conduct with a minor under 16 years of age and sexual abuse of a child, prior consistent statements made by the victim to a number of different individuals were admissible because the prior statements were more reliable than the victim's trial testimony (due to the lapse in time between the abuse and the trial), were probative of whether the abuse actually occurred, and contained the necessary circumstantial guarantees of trustworthiness. *State v. Rosignol*, 147 Idaho 818, 215 P.3d 538 (2009).

Probation Files.

Probation files can fall under both the business records exception and the public records exception to the hearsay rule. *State v. Nez*, 130 Idaho 950, 950 P.2d 1289 (Ct. App. 1997).

Public Records and Reports.

The magistrate properly concluded that the teletype documents which an officer used to determine that defendant's driving privileges were suspended were hearsay but admissible as evidence under the public records exception to the hearsay rule in subdivision (8) of this rule. *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992).

Where the excluded portion of the minutes of the highway district board of directors meeting contained hearsay statements allegedly made by persons not in attendance at the meeting, they were properly excluded. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995).

The coroner's report with the lab report attached should have been admitted under subsection (8) because it was an investigative report prepared by law enforcement personnel, presented factual findings resulting from special investigation of a case, and was offered by defendant in the criminal case against him. *State v. Santana*, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000).

Under Idaho R. Evid. 803(8) and 803(6), the state police crime lab report should not have been admitted into evidence as either a business records exception or public records exception because it was an investigative report offered by the prosecution; however, all the information obtained in the report was testified to by the forensic lab technician and was a duplicate of testimony under oath; therefore, the error was harmless. *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003).

Grant of summary judgment in favor of the employer in the employee's wrongful termination action was proper where his actions were not protected under the Idaho Protection of Public Employees Act, Idaho Code § 6-2101 et seq.; further, the district court did not abuse its discretion in striking a letter regarding the Attorney General's investigation into Correctional Industries' operation because it was excluded from the hearsay exception of Idaho R. Evid. 803(8). *Mallonee v. State*, Dep't of Corr., 139 Idaho 615, 84 P.3d 551 (2004).

In a child custody proceeding, a certified copy of a Nevada proceeding was admissible because it fell within the public record exception to the hearsay rule. *Navarro v. Yonkers*, 144 Idaho 882, 173 P.3d 1141 (2007).

Recorded Recollection.

Pursuant to subsection (5) of this section, the reading of witness's notes from the first trial into evidence would have been proper only after the trial court had admitted them. Defendant's counsel did not, however, object to witness's reading of the notes. Had defendant's attorney objected, the trial judge would have been correct in ruling that the state had laid a proper foundation for the admission of the notes, and that witness could read the notes into the record even if they could not be received as a full exhibit unless offered by defendant's attorney. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

Sales Charts.

Defendant pharmaceutical company was permitted to use sales charts at trial under any of three exceptions to the hearsay rule: (1) the business records exception pursuant to subdivision (6) of this rule, (2) the public records exception pursuant to subdivision (8)

of this section, and (3) the market reports exception pursuant to subdivision (17) of this rule. *Cosgrove ex rel. Winfree v. Merrell Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 788 P.2d 1293 (1990).

Statements of Victim.

The individual whose state of mind was relevant to the defendant's defense was not the victim, but rather her ex-boyfriend. The victim's statements that she feared her ex-boyfriend did not show that he possessed an intent to harm her. Therefore, the statements did not bear on a material issue at trial in the same manner as those statements of fear which had been found to be admissible as descriptions of an existing mental state. The victim's fear of a third person did not establish or disprove the defendant's guilt. The victim's statements regarding her concerns about her ex-boyfriend were inadmissible because they failed to meet the test for relevancy. *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997).

In seeking admission of the evidence at trial, the defendant's counsel presented the court the content of the statements. Defense counsel did not provide an offer of proof which indicated the circumstances surrounding the victim's declarations. There was no record of the circumstances surrounding the statements, and the victim's statements regarding her ex-boyfriend's behavior and occupation did not have the circumstantial guarantees of trustworthiness which would have justified admission under subsection (24). *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997).

In defendant's murder trial for the killing of his ex-wife and her boyfriend, the trial court erred in allowing the State to introduce the ex-wife's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide because the evidence was not relevant where the defense did not assert that the victims had died as a result of suicide rather than murder. However, in light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of a fire in an attempt to conceal the murders, and further testimony regarding defendant's actions on the day of the victims' deaths, defendant failed to establish beyond a reasonable doubt that the error would have changed the outcome of the verdict. *State v. Shackelford*, 150 Idaho 355, 247 P.3d 582 (2010).

Statement to Prove Matter Asserted.

Where an attorney's testimony disclosed that his client had expressed guilt when he told the witness he was having trouble sleeping and that he wanted to get the matter off his conscience, the statement sought to prove the matter asserted, and was inadmissible hearsay. *State v. Trevino*, 132 Idaho 888, 980 P.2d 552 (1999).

Testimony of Spouse.

At trial, the defendant's counsel inquired into the happiness of the defendant's marriage. The defendant placed the happiness of his marriage at issue through the cross-examination of a witness for the state. The wife's state of mind regarding her marriage thereby became relevant to the defendant's defense against the charges. However, the court did not admit the statements under subdivision (24), and instead the court admitted the statements under the firmly rooted hearsay exception of subdivision (3). Hence, the court's admission of statements reflecting the wife's state of mind was proper. *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997).

Videotape of Testimony.

Where the state put defendant on notice that it would seek to admit videotaped testimony of victim's prior inconsistent statements as evidence, and not just for the purpose of impeachment, and where defendant failed to object to the testimony or to request a limiting instruction at that time, defendant's later requested limiting instruction was neither timely nor specific. *State v. Vaughn*, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993).

Cited in: *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988); *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988); *Pass v. Kenny*, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990); *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991); *Bumgarner v. Bumgarner*, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993); *Viebrock v. Gill*, 125 Idaho 948, 877 P.2d 919 (1994); *State v. Frederick*, 126 Idaho 286, 882 P.2d 453 (Ct. App. 1994); *State v. McAway*, 127 Idaho 54, 896 P.2d 962 (1995); *Lunders v. Estate of Snyder*, 131 Idaho 689, 963 P.2d 372 (1998); *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998); *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

RESEARCH REFERENCES

A.L.R. When is hearsay statement made to 911 operator admissible as “present sense impression” under Uniform Rules of Evidence 803(1) or similar state rule. 125 A.L.R.5th 357.

Construction and Application of Uniform Rule of Evidence 803(17), Providing Hearsay Exception for Market Reports, and Commercial Publications. 54 A.L.R.6th 593.

When is hearsay statement “present sense impression” admissible under Rule 803(1) of Federal Rules of Evidence. 165 A.L.R. Fed. 491.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of Federal Rules of Evidence. 186 A.L.R. Fed. 485.

Rule 804. Hearsay exceptions; declarant unavailable.

(a) **Definition of unavailability.** “Unavailability as a witness” includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of declarant’s statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of declarant’s statement has been unable to procure declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of declarant’s statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that declarant’s death was imminent, concerning the cause or circumstances of what declarant believed to be the declarant’s impending death.
- (3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid a claim by declarant against another, that a reasonable man in declarant’s position would not have made the statement

unless declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(6) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the party's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Adopted January 8, 1985, effective July 1, 1985; amended April 4, 2008, effective July 1, 2008.)

JUDICIAL DECISIONS

ANALYSIS

Appellate Review.
 Death of Witness.
 Evidence.
 —Admissible.
 Former Testimony.
 —Opportunity Requirement.
 —Preliminary Hearing.
 Precedence of Rule over § 9-336.
 Reasonable Means.
 Statement Against Interest.
 Unavailability of Witness.

Appellate Review.

Where trial court determines whether party opposing use of preliminary hearing testimony had an opportunity and similar motive to develop the testimony by direct,

cross, or redirect examination, and where such findings are challenged on appeal the Court of Appeals will apply the "clear error" standard of review. If the factual predicates of I.R.E. 804 are met, and if there are no other reasons shown under the rules for its exclusion, the court may admit the evidence at trial. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Death of Witness.

Affidavit of a witness prepared in support of a pre-trial motion for summary judgment was inadmissible hearsay at trial where witness died before trial without being deposed; affidavit was not the product of a proceeding wherein opposing party had an opportunity to develop its contents through direct cross, or

redirect examination. *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993).

In an aggravated assault case where the victim testified in a preliminary hearing but died before trial, defendant's confrontation right was not violated by admission of that testimony at trial. Defendant was represented at the preliminary hearing by counsel who engaged the victim in full and effective cross-examination as to his truthfulness, bias, memory, and motive. *State v. Mantz*, 148 Idaho 303, 222 P.3d 471 (2009).

Evidence.

—Admissible.

Preliminary hearing testimony of a witness not present at trial is not admissible. *State v. Elisondo*, 114 Idaho 412, 757 P.2d 675 (1988).

Trial judge properly considered the factors of I.R.E., Rule 803(24), and his ruling admitting into evidence the alleged child molestation victim's out-of-court statements to his mother under that exception was correct; moreover, since the judge found the victim to be "unavailable," subsection (b)(5) of this rule would also be applicable and would allow the admission of his statements to his mother regarding incidents of sexual molestation. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

Former Testimony.

Among the factors which may influence a party's motive to develop testimony are: (1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

The right of confrontation is no longer a basis for excluding the prior testimony of an absent witness. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Defendant failed to demonstrate, and the court could not see, how § 9-336 and subsection (b)(1) of this rule were inconsistent. Both allow the use at trial of the preliminary hearing testimony of a witness who, at the time of trial, is shown to be unavailable. Moreover, the statute is consistent with the inherent policy of I.R.E. 402. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Trial court did not err in admitting testimony of witness into evidence through the preliminary hearing transcript where there was no other evidence to support count 17 except the testimony of this witness, where substantial efforts were made to locate the witness but such efforts were unsuccessful and where defendant's counsel during the

preliminary hearing cross-examined the witness and it was evident from the jury instructions that the manner in which the theft in count 17 was alleged to have occurred remained consistent in both the preliminary hearing and the trial as required by subdivision (b)(1) of this rule. *State v. Owen*, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997).

In a suit by former wife seeking partition of real property held by former husband and his father as tenants in common, district court did not err in admitting an exhibit that had been previously admitted during the divorce action, since did not challenge the admission of the father's testimony in the divorce proceeding, and that testimony provided the foundation for the admission of the exhibit. *Bahnmler v. Bahnmler*, 145 Idaho 517, 181 P.3d 443 (2008).

—Opportunity Requirement.

The "opportunity" requirement of subsection (b)(1) of this rule is no different from the requirement in § 9-336. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Where there was no indication in the record that counsel's opportunity to cross-examine was curtailed in any way by the magistrate, and whether counsel chose to utilize that opportunity fully was more a matter of tactics or strategy than opportunity, district court did not err in deciding that defendant's counsel had an opportunity to develop the testimony by cross-examination at the preliminary hearing. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

—Preliminary Hearing.

If the requirements of subsection (b)(1) of this rule and § 9-336 are satisfied, then the use of the evidence from the preliminary hearing in the case must be allowed. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

The court could not adopt a per se rule that preliminary hearing testimony is inadmissible in light of the explicit statement of policy in § 9-336 and the implicit statement of policy in I.R.E. 402 and subsection (b)(1) of this rule. A case-by-case approach is the better way to determine whether the district court was correct in ruling that the preliminary hearing testimony was admissible. Such an approach would allow the trial court to determine, as matters of fact, whether the party opposing the use of such testimony had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Identity of the issues remained the same throughout the proceedings in the courts be-

low since the arresting officer was the only person whose testimony could provide the state with “substantial evidence on every material element of the offense charged.” Where, while the standard of proof is obviously different for the two proceedings, the factual elements to be established at the preliminary hearing and at the trial are exactly the same, and where the alignment of the parties in relation to each other and to the witness were exactly the same, the district court did not commit clear error in finding that defendant had a similar motive and opportunity to develop the officer’s testimony at the preliminary hearing as she would have at trial. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Precedence of Rule over § 9-336.

To the extent that subsection (b)(1) of this rule places greater strictures upon the use of evidence than does § 9-336, the rule must govern. *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Reasonable Means.

Where the witness was not present within city limits at the precise time he was to be called as a witness at the second trial, by not seeking a continuance to allow the witness time to make a flight into the city, the state failed to use reasonable means to procure the witness’s testimony as required by subsection (a)(5), and due to the critical nature of the testimony, the error was not harmless beyond a reasonable doubt. *State v. Button*, 134 Idaho 864, 11 P.3d 483 (Ct. App. 2000).

Statement Against Interest.

In action for misdelivery of lumber, introduction of documents that showed that party to whom lumber was delivered was purchasing lumber from plaintiff and that plaintiff had authorized said party to sell the lumber and did so and credited plaintiff at a price above market value were statements as likely to be self-serving as they were to be against the author’s pecuniary interest and as they lacked the indicia of trustworthiness, were not admissible under subdivision (b)(3) of this rule as being against declarant’s pecuniary or proprietary interest. *Quinto v. Millwood Forest Prods., Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct. App. 1997).

Where the statement of a friend of the defendant was not made during or in furtherance of a conspiracy, but after the completion of the crime and after arrest, and where it was not made to conceal or perpetuate the conspiracy, the statement was not properly admissible under this rule, either as a statement against interest or as a statement of a

co-conspirator. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. *Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (2005).

The factors for determining the reliability and corroboration of a statement subjected to the hearsay exception established in subdivision (b)(3) are: (1) whether the declarant is unavailable; (2) whether the statement is against the declarant’s interest; (3) whether corroborating circumstances exist which clearly indicate the trustworthiness of the exculpatory statement, taking into account contradictory evidence, the relationship between the declarant and the listener, and the relationship between the declarant and the defendant; (4) whether the declarant has issued the statement multiple times; (5) whether a significant amount of time has passed between the incident and the statement; (6) whether the declarant will benefit from making the statement; and (7) whether the psychological and physical surroundings could affect the statement. *State v. Meister*, 148 Idaho 236, 220 P.3d 1055 (2009).

A judge’s inquiry, made to assure himself that the corroboration requirement of subdivision (b)(3) has been satisfied, should be limited to asking whether evidence in the record corroborating and contradicting the declarant’s statement would permit a reasonable person to believe that the statement could be true. *State v. Meister*, 148 Idaho 236, 220 P.3d 1055 (2009).

Habeas petitioner’s due process rights were not violated at his trial by the exclusion under Idaho R. Evid. 804(b)(3) of a confession by another person to the murder for which the petitioner was being tried because the confession lacked persuasive assurances of trustworthiness as the declarant was intoxicated when he confessed and recanted when he was sober, his alibi checked out, and there was no other evidence linking him to the crime. *Rhoades v. Henry*, 596 F.3d 1170 (2010).

Exclusion under Idaho R. Evid. 804(b)(3) of testimony that another person confessed to a kidnapping and murder for which an inmate was convicted did not violate due process; the other person confessed while intoxicated and recanted when sober, the other person had an alibi, and no other evidence linked the other person to the crime. *Rhoades v. Henry*, 638 F.3d 1027 (9th Cir.), cert. denied, — U.S. —, 132 S. Ct. 401, 181 L. Ed. 2d 263 (2011).

Unavailability of Witness.

The trial court erred in ruling that the

jailed witness who refused to testify was in fact an unavailable witness without first bringing him back into court and ordering him to testify under the direct threat of contempt; therefore, the witness was not an unavailable witness as defined by subsection (a)(2) and the admission of his preliminary hearing testimony was error. *State v. Barcella*, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

Having opposed a continuance until a former girlfriend, who was pregnant, was able to

attend defendant's trial, defendant waived the claim that defendant's right to confront adverse witnesses was violated when the trial court admitted the former girlfriend's videotaped testimony. *State v. Bagshaw*, 137 Idaho 613, 51 P.3d 427 (Ct. App. 2002).

Cited in: *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985); *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988); *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990); *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (Ct. App. 1991).

RESEARCH REFERENCES

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When is witness "unavailable" for purposes

of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable. 174 A.L.R. Fed. 1.

Construction and application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., hearsay exception based on unavailable witness' wrongfully procured absence. 193 A.L.R. Fed. 703.

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Evidence Inadmissible.

Statement of defendant in police report, that he denied having dropped drugs while running from officer, was inadmissible on the grounds that it was hearsay within hearsay not within any exception to the hearsay rule,

and district court did not err in excluding such statement. *State v. Vivian*, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996).

Cited in: *State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988).

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with declarant's hearsay statement, is not subject to any requirement that declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

Cited in: State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989); State v. Fisher, 123 Idaho 481, 849 P.2d 942 (1993).

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION.

Rule 901. Requirement of authentication or identification.

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if

authentic, would likely be, and (C) has been in existence 30 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Supreme Court rule or by a statute or as provided in the Constitution of this State. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Admission Proper.
Blood Test Results.
Evidence Inadmissible.
Harmless Error.
Intoximeter.
Progress Notes.
Public Records and Reports.
Standard for Admission.
Writings.

Admission Proper.

Where both agents involved in the seizure of a poker machine testified that the machine was the one taken, that they observed a sticker on the machine and that one of the agents placed his initials on the machine, and the defendants offered no rebuttal testimony other than eliciting the fact that the machine's coin box had been removed after the machine was taken from the trunk and before it had been recovered by the police, the machine was sufficiently identified for the hearing officer to admit it into evidence. *State, Dep't of Law Enforcement v. Engberg*, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985).

In a prosecution for aggravated driving under the influence, allegations, not specified as grounds for objection at trial, that the state failed to prove the blood sample was withdrawn in the proper manner and properly processed for testing, or that the hospital's automatic chemical analyzer operated on the basis of accepted scientific principles, did not establish failure of authentication and identification constituting plain error in admitting evidence of the test result. *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).

There was sufficient foundation to admit into evidence stolen silver coins because, although defendant was arrested possessing only four silver dollars out of the nearly 300 that were stolen, defendant had, on two recent, previous occasions, sold a large number of silver dollars to a coin shop, the victim's

rare 1898-S Morgan dollar was found in a group of coins defendant sold to the store and was identified by two people as belonging to the victim's collection, and defendant was arrested attempting to sell four other silver dollars in protective containers to a pawn shop. *State v. Simmons*, 120 Idaho 672, 818 P.2d 787 (Ct. App. 1991).

Loss prevention officer's testimony was not offered to identify or authenticate any of the signatures as being that of a particular individual, nor was the testimony foundational for introduction of copies of the signatures. The purpose was to show that the signatures from the earlier transactions looked different from the signature presented in the transaction giving rise to the charged offense. *State v. Waller*, 140 Idaho 764, 101 P.3d 708 (Ct. App. 2004).

Blood Test Results.

Where a detailed explanation regarding hospital procedure and protocol was presented, and where the defendant failed to offer any evidence that her blood samples were tampered with or mishandled, the district court did not abuse its discretion in denying the defendant's motion to suppress blood test results. *State v. Gilpin*, 132 Idaho 643, 977 P.2d 905 (Ct. App. 1999).

The requirement of authentication or identification as a condition precedent to admissibility was satisfied by evidence sufficient to support a finding that the matter in question was what its proponent claimed. Blood alcohol test results from an automobile accident victim were properly admitted where testimony established the chain of custody and tests were performed according to established methods. *Dachlet v. State*, 136 Idaho 752, 40 P.3d 110 (2002).

Evidence Inadmissible.

Where minor submitted a letter purporting to be from the U.S. Department of Justice purporting to show that the federal govern-

ment intended his mother to hold and spend death benefits as a fiduciary, for his benefit, the district court properly determined that the letter was inadmissible hearsay because there was no testimony by a witness with knowledge regarding the letter and no evidence of authentication. *Herman v. Herman*, 136 Idaho 781, 41 P.3d 209 (2002).

Harmless Error.

Although foundational evidence was minimal, any error, in admitting into trial notebook pages containing names and phone numbers found in defendant's residence as evidence that defendant possessed marijuana with intent to deliver, was harmless given the overwhelming evidence against defendant. *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989).

Intoximeter.

The state presented proof that the Intoximeter 3000 was a test for alcohol concentration approved by the Idaho Department of Health, administered in accordance with its required procedures, thus meeting the authentication condition of this section and no expert testimony establishing the reliability of the testing process was necessary. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

Progress Notes.

In prosecution for provider fraud, certain progress notes of personal care provider were adequately authenticated where state investigator testified that these notes were discussed during an interview he had with defendant and during such interview defendant admitted that he had signed these documents and that they accurately reflected the hours he had worked thus, these unrefuted admissions adequately authenticated these documents as his progress notes under this rule. *State v. Silversen*, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997).

In prosecution for provider fraud where evidence showed state investigator on June 30, 1991 sent defendant by certified mail a written request for defendant's progress notes and he received the notes in the mail on July 20, 1991, it can be reasonably inferred that the delivered documents were what the investigator had requested from defendant and

hence what their proponent at trial claimed them to be, therefore, they were sufficiently authenticated. *State v. Silversen*, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997).

Public Records and Reports.

In prosecution for provider fraud where defendant personal care provider was authorized and in fact required to file physician invoices and they were from the public office where such documents were kept, they met the criteria of subdivision (b)(7) of this rule concerning authentication of public records and reports and further the state relied on these documents by issuing checks to defendant for the amounts claimed and he accepted such payment without protest and thus district was correct in overruling defendant's objection that the invoices were inadmissible for lack of authentication. *State v. Silversen*, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997).

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from Idaho R. Evid. 1002's requirement that he produce the original orders, because his copies were not properly certified or authenticated. *State v. Korn*, 148 Idaho 413, 224 P.3d 480 (2009).

Standard for Admission.

The requirement of demonstrating a positive chain of custody is a function of the authentication or identification of evidence. The standard for the admissibility of evidence is whether the hearing officer can determine, in all reasonable probability, that the proffered evidence has not been changed in any material manner. *State, Dep't of Law Enforcement v. Engberg*, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985).

Writings.

Written and signed documents, like any other type of evidence, may be authenticated through any means which is sufficient to support a finding that the matter in questions is what its proponent claims; this may include authentication through circumstantial evidence. *State v. Silversen*, 130 Idaho 283, 939 P.2d 859 (Ct. App. 1997).

Cited in: *State v. Hebner*, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985).

RESEARCH REFERENCES

A.L.R. Authentication of bullets and other inorganic substances removed from human body for purposes of analysis. 79 A.L.R.5th 237.

Admissibility in evidence of aerial photographs. 85 A.L.R.5th 671.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Re-

cording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. 18 A.L.R.6th 613.

Authentication of Electronically Stored Evidence, Including Text Messages and E-mail. 34 A.L.R.6th 253.

Authentication and Admission of Foreign Business Records in Federal Criminal Proceeding Pursuant to 18 USCS § 3505. 41 A.L.R. Fed. 2d 537.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signatures and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this State, or rule prescribed by the Idaho Supreme Court.

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions created by law.** Any signature, document, or other matter declared by any law of the United States or of this State, or rule prescribed by the Idaho Supreme Court, to be presumptively or prima facie genuine or authentic.

(11) **Certified records of regularly conducted activity.** The original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified individual certifies (i) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) is kept in the course of the regularly conducted activity and (iii) was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes the intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it. As used in this subsection, "certifies" means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position (i) of the individual executing the certificate or (ii) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certification must be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States. (Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.)

JUDICIAL DECISIONS

ANALYSIS

Fingerprint Cards.
Foreign Judgments.
Manufacturer's Certificates or Labels.
Public Records.
—Witness's Affidavit.
Trade Inscriptions.
Uncertified Copies.

Fingerprint Cards.

Although the district court erred in admitting the fingerprint cards over defendant's objection for a lack of foundation, where there was a multitude of other sources of information from which the jury would have come to the same conclusion regarding defendant's guilt, the admission of the fingerprint evidence was harmless. *State v. Norton*, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000).

Foreign Judgments.

A judgment of conviction from a California court may be admitted and proved by satisfying the relevant provisions of this rule and does not also need to satisfy the requirements of § 9-312 or 28 U.S.C.S. § 1738. Section 9-312 is just one method by which a public record may be certified in accordance with subsection (4) of this rule. *State v. Howard*, 150 Idaho 471, 248 P.3d 722 (2011).

Manufacturer's Certificates or Labels.

In some instances, manufacturers' certificates or labels may constitute prima facie evidence of compliance with the requirements in § 49-623(3). *State v. Monaghan*, 116 Idaho 972, 783 P.2d 311 (Ct. App. 1989).

Rule 903. Subscribing witness' testimony unnecessary.

Except as provided for by statute, the testimony of a subscribing witness is not required to authenticate a writing. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 904. Authentication of medical or dental tests and test results for diagnostic or treatment purposes.

(1) **Authentication of items described in Rule 803(23).** Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for items described in Rule 803(23) if the proposed exhibit identifies the person or entity who conducted or interpreted the test, the name of the patient, and the date when the test was performed, and notice was given in accord with subsection (2) of this rule.

(2) **Notice.** No less than 45 days before trial, any party intending to offer a document under this rule must serve on all parties a notice, stating that the document is being offered under this rule and shall be deemed authentic and admissible without testimony or further identification, unless objection

Public Records.**—Witness's Affidavit.**

The district court erroneously relied on the fact that a witness's affidavit, as part of the defendant's motion for summary judgment, had become part of the court record, and thereby attained a degree of authenticity, sufficient for admission under subdivision (4) of this rule. *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993).

Trade Inscriptions.

In a prosecution for aggravated driving while under the influence of alcohol, the labeling on the blood-alcohol test kit with its manufacturer's certificate satisfied for foundational purposes the requisite showing of authenticity required to establish the presence of the contested chemicals. *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988).

Uncertified Copies.

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from Idaho R. Evid. 1002's requirement that he produce the original orders, because his copies were not certified in accordance with this rule. *State v. Korn*, 148 Idaho 413, 224 P.3d 480 (2009).

Cited in: *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

is filed and served within 14 days of the date of notice, pursuant to subsection (3) of this rule. The notice served on the parties shall include a brief description of the document along with the name, address and telephone number of the document's author or maker, and the notice shall be accompanied by a copy of the document. The notice, but not the accompanying document, shall be filed with the court.

(3) **Objection to authenticity or admissibility.** Within 14 days of notice, any other party may object by filing and serving on all parties a written objection to any document offered under this rule, identifying each document to which objection is made. The grounds for the objection shall be specifically set forth, except objection on the grounds of relevancy need not be made until trial. If the court in a civil case finds that an objection was made without reasonable basis and the document is admitted at trial, the court may award the offering party any expenses incurred and reasonable attorney fees.

(4) **Effect of Rule.** This rule does not restrict argument or proof relating to the weight to be accorded the evidence submitted, nor does it restrict the trier of fact's authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties. Nothing contained in this rule shall prohibit the admissibility of a written, graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible. (Adopted October 23, 2008, effective January 1, 2009.)

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, motion pictures, and similar products of processes which produce recorded images of objects.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures [miniatures], or by mechanical or electronic re-recording, or by chemical reproduction, or by

other equivalent techniques which accurately reproduces the original. (Adopted January 8, 1985, effective July 1, 1985.)

STATUTORY NOTES

Compiler's Notes. The bracketed word "miniatures" in subdivision (4) was inserted by the compiler.

JUDICIAL DECISIONS

ANALYSIS

Duplicate.
Original.

Duplicate.

Where sellers admitted that a duplicate of the tape recording of a conversation between buyers and sellers was an edited version of the original and that the original had been lost, the duplicate did not meet the standards set forth in this rule because it was a version of the original edited only by one party, and thus did not accurately reproduce the original tape recording. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

Original.

In a child protective custody case, the magistrate did not err in admitting the photographs of the children's injuries into evidence as "original" under subsection (3) of this rule and Idaho R. Evid. 1002 because, while the photos might have been somewhat discolored, such distortion went to the weight of the evidence and did not automatically render the photos inaccurate and inadmissible. *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103, 244 P.3d 247 (2010).

Cited in: *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Evidence Held Admissible.
In General.
Photograph.
Uncertified Copies.

Evidence Held Admissible.

The "best evidence" rule did not bar admission of the officer's testimony of an interview with the defendant where a tape recording of the interview existed, and the officer used the tape recording only to refresh his memory. *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

In General.

The "best evidence" rule, codified as § 9-411 and essentially reproduced in this rule, states a preference in favor of original written instruments — as opposed to copies, testimony, or other secondary sources of information — to prove the terms of a writing; the rule is not

applicable if the writing is collateral to testimony about an extrinsic event. *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

Photograph.

In a child protective custody case, the magistrate did not err in admitting the photographs of the children's injuries into evidence as "original" under Idaho R. Evid. 1001(3) and this rule, because, while the photos might have been somewhat discolored, such distortion went to the weight of the evidence and did not automatically render the photos inaccurate and inadmissible. *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103, 244 P.3d 247 (2010).

Uncertified Copies.

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the

bankruptcy court. Defendant was not excused from producing the original orders, because his copies were not certified in accordance

with Idaho R. Evid. 902. *State v. Korn*, 148 Idaho 413, 224 P.3d 480 (2009).

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Authenticity of Original.
Second, Re-Recorded Copy.

Authenticity of Original.

A duplicate tape recording should not have been admitted because there was a genuine question regarding the authenticity of the original. The party submitting the tape admitted that the original tape had “turned on and off” when the party’s jacket blew in the wind. This raised a significant question regarding the admissibility of the original tape

had it been available. *Christensen v. Ransom*, 123 Idaho 99, 844 P.2d 1349 (Ct. App. 1992).

Second, Re-Recorded Copy.

It was not a violation of this rule for trial court to admit a second, re-recorded copy of an audio tape of a planning and zoning commission’s hearing in a real estate fraud action, where the first re-recorded copy of the tape was available to be played for jury. *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 851 P.2d 972 (1993).

Cited in: *Simons v. Simons*, 134 Idaho 824, 11 P.3d 20 (2000).

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) **Original not obtainable.** No original can be obtained by any reasonably practicable, available judicial process or procedure; or
- (3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and the party does not produce the original at the hearing; or
- (4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue. (Adopted January 8, 1985, effective July 1, 1985.)

Admissibility.

In an action on a credit card account, a district court, at worst, committed harmless error in not admitting a prospectus and pooling agreement under Idaho R. Evid. 1004(3) and 1008(3) because those documents, even if

admitted, would have shown that the bank remained the owner of the account and that it was required to collect payments due under the receivables; thus, the bank was the real party in interest. *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 240 P.3d 583 (2010).

Rule 1005. Public records.

(a) **Proof of public record.** The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(b) **Use of official transcripts of district court proceedings.** In all cases where a party desires to place in evidence a transcript or partial transcript of a district court proceeding, or disclose the contents of a transcript during the examination of a witness, the transcript must be an official transcript as provided in subsection 27(d), Idaho Court Administrative Rules. (Adopted January 8, 1985, effective July 1, 1985; amended March 15, 2004, effective July 1, 2004.)

JUDICIAL DECISIONS**ANALYSIS**

Fingerprint Cards.
Uncertified Copies.

Fingerprint Cards.

Although the district court erred in admitting the fingerprint cards over defendant's objection for a lack of foundation, where there were numerous other sources of information from which the jury would have come to the same conclusion regarding defendant's guilt, the admission of the fingerprint evidence was harmless. *State v. Norton*, 134 Idaho 875, 11 P.3d 494 (Ct. App. 2000).

Uncertified Copies.

Where defendant was charged with possessing exotic animals in violation of a county ordinance, the magistrate judge did not abuse its discretion in excluding two orders from the bankruptcy court. Defendant was not excused from Idaho R. Evid. 1002's requirement that he produce the original orders; because his copies were not certified, the public records exception did not apply. *State v. Korn*, 148 Idaho 413, 224 P.3d 480 (2009).

DECISIONS UNDER PRIOR RULE OR STATUTE**ANALYSIS**

Homestead Certificate of Entry.
Legal Custodian.
Proof of Publication of Ordinances.
Records of Sister State.

Homestead Certificate of Entry.

Homestead is recognized as private property and certificate of entry is primary evidence that holder thereof is owner of land therein described. *Johnson v. Oregon S. L. R.R.*, 7 Idaho 355, 63 P. 112 (1900); *Fall Creek Sheep Co. v. Walton*, 24 Idaho 760, 136 P. 438 (1913).

Legal Custodian.

It was error to admit in evidence a purported photocopy of fingerprint records on testimony of the county recorder that he had

compared it with the original and found them to be identical without evidence that the county recorder was the legal custodian of the original record. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Proof of Publication of Ordinances.

Proof of publication of ordinance as a prerequisite to their introduction in evidence is not required. *State v. Dawe*, 31 Idaho 796, 177 P. 393 (1918).

Records of Sister State.

A certified copy of a record of a sister state, not certified by the officer who is a legal keeper of the records of that state, is not admissible in evidence. *Kleinschmidt v. Scribner*, 54 Idaho 185, 30 P.2d 362 (1934).

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS**ANALYSIS**

Foundation.
Notice.

Foundation.

The party offering a summary must lay a foundation showing that the underlying documents would be admissible. *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

Hearsay summary that is prepared in anticipation of litigation is analyzed under this rule; if the summarizing document was not prepared in anticipation of litigation, then proper analysis is under the business records exception to the hearsay rule. *Reed v. Reed*, 137 Idaho 53, 44 P.3d 1108 (2002).

In a suit by former wife seeking partition of real property held by former husband and his father as tenants in common, district court did not err in admitting an exhibit that had

been previously admitted during the divorce action, since did not challenge the admission of the father's testimony in the divorce proceeding, and that testimony provided the foundation for the admission of the exhibit. *Bahnmler v. Bahnmler*, 145 Idaho 517, 181 P.3d 443 (2008).

Notice.

To facilitate meaningful cross-examination, the party planning to offer a summary should notify the opposing party and should make the underlying documents available to him or her. *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

Cited in: *Beco Corp. v. Roberts & Sons Constr. Co.*, 114 Idaho 704, 760 P.2d 1120 (1988); *Van Brunt v. Stoddard*, 136 Idaho 681, 39 P.3d 621 (2001); *Hurtado v. Land O'Lakes, Inc.*, 147 Idaho 813, 215 P.3d 533 (2009).

RESEARCH REFERENCES

A.L.R. Admissibility of summaries or charts of writings, recordings, or photographs under Rule 1006 of Federal Rules of Evidence. 198 A.L.R. Fed. 427.

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (a) the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine

as in the case of other issues of fact. (Adopted January 8, 1985, effective July 1, 1985.)

Admissibility.

In an action on a credit card account, a district court, at worst, committed harmless error in not admitting a prospectus and pooling agreement under Idaho R. Evid. 1004(3) and 1008(3) because those documents, even if

admitted, would have shown that the bank remained the owner of the account and that it was required to collect payments due under the receivables; thus, the bank was the real party in interest. *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 240 P.3d 583 (2010).

ARTICLE XI. MISCELLANEOUS RULES.

Rule 1101. Adoption and amendments.

(a) **Adoption.** These rules shall take effect on the date stated in the order of adoption.

(b) **Amendments.** These rules may be amended or repealed by order of the Supreme Court effective on the date stated in the order. Any such order shall be published before the effective date as ordered by the Supreme Court, except in cases declared to be an emergency, in which case the order may be declared effective immediately. (Adopted January 8, 1985, effective July 1, 1985.)

Rule 1102. Effect on evidentiary statutes and rules.

Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect. (Adopted January 8, 1985, effective July 1, 1985.)

JUDICIAL DECISIONS

ANALYSIS

Construction with § 18-8004.
Construction with § 19-3002.
Effect of § 9-202.
Effect of § 19-3024.

Construction with § 18-8004.

Section 18-8004(4) of the Idaho Code does not eliminate the foundation requirement for the admission of evidence, but merely specifies one means by which the necessary foundation may be established for alcohol concentration tests, thus meeting foundational standards under the state rules of evidence. *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (Ct. App. 1999).

Construction with § 19-3002.

Rule 601 clearly takes precedence over I.C. § 19-3002 by virtue of this rule. *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994).

Where defendant filed motion asserting that a search warrant was invalid because it was based upon information provided by

spouse-witness given in violation of § 19-3002, and that spouse-witness's preliminary hearing testimony and potential trial testimony were inadmissible for the same reasons, the Supreme Court held in *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994) that I.R.E. 601 and this rule repealed § 19-3002 when the Idaho Rules of Evidence became effective in 1985, and, as such, the Court of Appeals opined the spousal incompetency provision was ineffective when defendant originally pleaded guilty, and § 19-3002 would not have prevented the State's use of the spouse-witness's testimony. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Effect of § 9-202.

Section 9-202, which provides that children under ten cannot be witnesses if they appear incapable of receiving just impressions of the facts or of relating them truly, is invalid to the extent that it attempts to prescribe admissibility of hearsay and is in conflict with this rule. *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993).

Effect of § 19-3024.

The trial court should not have considered the admission of the five-year-old victim's out-of-court statements or the testimony with regard to victim's out-of-court statements by the psychologist who counseled the victim, or the statements made by victim in her sleep overheard by family members under § 19-3024; to the extent that § 19-3024 attempts to prescribe the admissibility of hearsay evi-

dence and is in conflict with the Idaho Rules of Evidence, it is of no force or effect. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

Cited in: *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989); *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989); *Idaho County Nursing Home v. Idaho Dep't of Health & Welfare*, 120 Idaho 933, 821 P.2d 988 (1991).

Rule 1103. Application.

The trial court shall apply these rules and any amendments to these rules to actions, cases and proceedings pending on the effective date unless it finds that such application would prejudice the substantive rights of any party. (Adopted January 8, 1985, effective July 1, 1985.)

Index to Idaho Rules of Evidence

A

ACCOUNTANTS.

Privileged communications, Evid 515.

ADMISSIBILITY.

Character evidence, Evid 404.

Methods of proving character, Evid 405.

Other crimes, wrongs or acts, Evid 404.

Health care professionals.

Expressions of condolence or sympathy.

Inadmissibility, Evid 414.

Hearsay.

General rule, Evid 802.

Exceptions, Evid 803, 804.

Hearsay within hearsay, Evid 805.

Hospital expenses.

Payment, Evid 409.

Liability insurance, Evid 411.

Limited admissibility, Evid 105.

Medical expenses.

Payment, Evid 409.

Medical malpractice.

Screening panels.

Proceedings, Evid 413.

Photographs.

Duplicates, Evid 1003.

Other evidence of contents, Evid 1004.

Pleas, plea discussions and related statements, Evid 410.

Preliminary questions, Evid 104.

Recordings.

Duplicates, Evid 1003.

Other evidence of contents, Evid 1004.

Relevancy.

Exclusion of relevant evidence.

Prejudice, confusion or waste of time, Evid 403.

Relevant evidence generally admissible, Evid 402.

Writings.

Duplicates, Evid 1003.

ADMISSIBILITY —Cont'd

Writings —Cont'd

Other evidence of contents, Evid 1004.

ADOPTION OF RULES, Evid 1101.

AMENDMENTS, Evid 1101.

ANCIENT DOCUMENTS.

Authentication or identification, Evid 901.

Hearsay.

Exception, Evid 803.

APPLICABILITY OF RULES, Evid 1103.

Exceptions, Evid 101.

Scope, Evid 101.

ATTORNEYS AT LAW.

Privileged communications.

Lawyer-client privilege, Evid 502.

AUTHENTICATION OR IDENTIFICATION.

Illustrations, Evid 901.

Medical or dental tests for diagnostic or treatment purposes, Evid 904.

Requirement, Evid 901.

Self-authentication, Evid 902.

Witnesses, Evid 901.

Subscribing witness's testimony unnecessary, Evid 903.

B

BEST EVIDENCE RULE.

Definitions, Evid 1001.

Public records, Evid 1005.

Writings, recordings and photographs.

Original required, Evid 1002.

Duplicates.

Admissibility, Evid 1003.

Defined, Evid 1001.

Other evidence of contents.

Admissibility, Evid 1004.

Functions of court and jury, Evid 1008.

Public records, Evid 1005.

BEST EVIDENCE RULE —Cont'd
Writings, recordings and photographs —Cont'd
 Proof of contents by testimony or written admission of party, Evid 1007.
 Summaries, Evid 1006.

C

CHARACTER EVIDENCE.

Admissibility, Evid 404.

Methods of proving character, Evid 405.

Other crimes, wrongs or acts, Evid 404.

Methods of proving character, Evid 405.

Relevancy.

Admissibility generally, Evid 404.

Reputation or opinion.

Methods of proving character, Evid 405.

Specific instances of conduct.

Methods of proving character, Evid 405.

CITATION OF RULES.

Title, Evid 101.

CLERGY.

Privileged communications, Evid 505.

COMPROMISE AND OFFERS TO COMPROMISE.

Relevancy, Evid 408.

CONDOLENCES.

Expressions of condolences by health care professionals.

Inadmissible in certain actions, Evid 414.

CONFIDENTIAL COMMUNICATIONS.

See **PRIVILEGED COMMUNICATIONS.**

CONFLICT OF LAWS.

Conflicting statutes and rules of no force or effect, Evid 1102.

CONSTRUCTION AND

INTERPRETATION, Evid 102.

CREDIBILITY.

Evidence relevant to.

Right of party to introduce before jury, Evid 104.

D

DEFINITIONS.

Health care professional, Evid 414.

Hearsay, Evid 801.

Photographs, Evid 1001.

Privileged communications.

Accountant-client privilege, Evid 515.

Hospital, in-hospital medical staff committee and medical society privilege, Evid 519.

Husband and wife privilege, Evid 504.

Lawyer-client privilege, Evid 502.

Licensed counselor-client privilege, Evid 517.

Mediation communication, Evid 507.

Parent-child privilege, Evid 514.

Physician and psychotherapist-patient privilege, Evid 503.

Religious privilege, Evid 505.

School counselor-student privilege, Evid 516.

Social worker-client privilege, Evid 518.

Recordings, Evid 1001.

Relevant evidence, Evid 401.

Unanticipated outcome, Evid 414.

Writings, Evid 1001.

DENTAL TESTS.

Authentication, Evid 904.

Hearsay exceptions, Evid 803.

DYING DECLARATIONS.

Hearsay.

Exception, Evid 804.

E

ELECTIONS.

Privileged communications.

Political vote, Evid 506.

EXPRESSIONS OF

**CONDOLENCES OR
SYMPATHY.**

Health care professionals.

Inadmissibility in certain cases, Evid 414.

G

GUARDIANS.

Privileged communications.

Guardian or legal custodian-ward privilege, Evid 514.

H

HABIT.

Relevancy, Evid 406.

HEALTH CARE PROFESSIONALS.

Defined, Evid 414.

Expressions of condolence or sympathy.

Inadmissibility, Evid 414.

Medical malpractice.

Admissibility of proceedings, Evid 413.

Medical or dental tests for diagnostic or treatment purposes.

Authentication, Evid 904.

Hearsay exceptions, Evid 803.

Privileged communications.

Medical malpractice screening panels, Evid 520.

Physician and psychotherapist-client privilege, Evid 503.

HEARSAY.

Admissibility.

General rule, Evid 802.

Exceptions, Evid 803, 804.

Hearsay within hearsay, Evid 805.

Ancient documents.

Exception as to, Evid 803.

Credibility of declarant.

Attacking and supporting, Evid 806.

Declarant.

Availability.

Exceptions to rule.

Availability of declarant immaterial, Evid 803.

Declarant unavailable, Evid 804.

Credibility.

Attacking and supporting, Evid 806.

HEARSAY —Cont'd

Definitions, Evid 801.

Dental tests for diagnostic or treatment purposes.

Authentication, Evid 904.

Exception as to, Evid 803.

Dying declarations.

Exception as to, Evid 804.

Exceptions.

Availability of declarant immaterial, Evid 803.

Declarant unavailable, Evid 804.

Hearsay within hearsay, Evid 805.

Excited utterances.

Exception as to, Evid 803.

Former testimony.

Exception as to, Evid 804.

General rule, Evid 802.

Exceptions, Evid 803, 804.

Hearsay within hearsay, Evid 805.

Learned treatises.

Exception as to, Evid 803.

Medical tests for diagnostic or treatment purposes.

Authentication, Evid 904.

Exception as to, Evid 803.

Present sense impression.

Exception as to, Evid 803.

Records.

Exceptions.

Availability of declarant immaterial, Evid 803.

Reputation.

Exceptions as to, Evid 803.

Statement against interest.

Exception as to, Evid 804.

Vital statistics.

Records.

Exception as to, Evid 803.

HOSPITALS.

Payment of hospital expenses.

Admissibility, Evid 409.

Privileged communications.

Hospital, in-hospital medical staff committee and medical society privilege, Evid 519.

HUSBAND AND WIFE.

Privileged communications, Evid 504.

I

INFORMERS.

Privileged communications.

Identity of informer, Evid 509.

INSTRUCTIONS TO JURY.

Judicial notice of adjudicative facts, Evid 201.

Presumptions.

Civil actions and proceedings, Evid 301.

Criminal cases, Evid 303.

Privileged communications.

No inference to be drawn from claim of privilege, Evid 512.

INSURANCE.

Liability insurance.

Admissibility, Evid 411.

Subsequent remedial measures,
Evid 407.

INTERPRETERS.

Witnesses, Evid 604.

J

JUDGES.

Witnesses.

Competency of judge, Evid 605.

JUDICIAL NOTICE.

Adjudicative facts, Evid 201.

JURY.

Judicial notice.

Adjudicative facts.

Instructing jury, Evid 201.

Preliminary questions.

Hearing of jury, Evid 104.

Presumptions.

Civil actions and proceedings.

Operation of presumption and jury instructions, Evid 301.

Criminal cases.

Instructing jury, Evid 303.

Submission to jury, Evid 303.

Privileged communications.

Instructions to jury.

No inference to be drawn from claim of privilege, Evid 512.

Rulings on evidence.

Hearing of jury, Evid 103.

Witnesses.

Competency of jurors, Evid 606.

L

LIMITED ADMISSIBILITY, Evid 105.

M

MALPRACTICE.

Medical malpractice.

Expressions of condolence or sympathy.

Inadmissibility, Evid 414.

Screening panels.

Admissibility of proceedings, Evid 413.

Privileged communications, Evid 520.

MEDIATION, Evid 507.

MEDICAL EXPENSES.

Payment.

Admissibility, Evid 409.

MEDICAL MALPRACTICE.

Expressions of condolence or sympathy.

Inadmissibility, Evid 414.

Screening panels.

Admissibility of proceedings, Evid 413.

Privileged communications, Evid 520.

MEDICAL TESTS.

Authentication, Evid 904.

Hearsay.

Exceptions, Evid 803.

O

OATHS.

Witnesses, Evid 603.

P

PARENT AND CHILD.

Privileged communications, Evid 514.

PENDING ACTIONS AND PROCEEDINGS.

Application of rules to, Evid 1103.

PHOTOGRAPHS.

Definitions, Evid 1001.

Original required, Evid 1002.

Duplicates.

Admissibility, Evid 1003.

Defined, Evid 1001.

Other evidence of contents.

Admissibility, Evid 1004.

Functions of court and jury, Evid 1008.

PHOTOGRAPHS —Cont'd

Original required —Cont'd

Other evidence of contents —Cont'd
Public records, Evid 1005.

Proof of contents by testimony or written admission of party,
Evid 1007.

Summaries, Evid 1006.

PHYSICIANS AND SURGEONS.

Expressions of condolence or sympathy.

Inadmissibility, Evid 414.

Medical malpractice.

Screening panels.

Admissibility of proceedings, Evid 413.

Medical tests for diagnostic or treatment purposes.

Authentication, Evid 904.

Hearsay exceptions, Evid 803.

Privileged communications.

Medical malpractice screening panels, Evid 520.

Physician and psychotherapist-client privilege, Evid 503.

PLEAS.

Inadmissibility of pleas, plea discussions and related statements, Evid 410.

PRELIMINARY HEARINGS.

Witnesses.

Exclusion of witnesses, Evid 615.

PRELIMINARY QUESTIONS, Evid 104.

PRESUMPTIONS.

Civil actions and proceedings, Evid 301.

Federal law.

Applicability, Evid 302.

Criminal cases, Evid 303.

Jury.

Civil actions and proceedings.

Operation of presumption and jury instructions, Evid 301.

Criminal cases.

Instructions, Evid 303.

PRIVILEGED COMMUNICATIONS.

Accountant-client privilege, Evid 515.

Applicability of rules of privilege, Evid 101.

Comment upon or inference from claim of privilege, Evid 512.

PRIVILEGED COMMUNICATIONS —Cont'd

Compulsion.

Privileged matter disclosed under compulsion, Evid 511.

Definitions.

Accountant-client privilege, Evid 515.

Hospital, in-hospital medical staff committee and medical society privilege, Evid 519.

Husband-wife privilege, Evid 504.

Lawyer-client privilege, Evid 502.

Licensed counselor-client privilege, Evid 517.

Parent-child privilege, Evid 514.

Physician and psychotherapist-patient privilege, Evid 503.

Religious privilege, Evid 505.

School counselor-student privilege, Evid 516.

Social worker-client privilege, Evid 518.

Disclosure of privileged matter under compulsion or without opportunity to claim privilege, Evid 511.

Exceptions.

Mediation communications, Evid 507.

Exclusive nature of rules, Evid 501.

Governmental privileges, Evid 508.

Guardian or legal custodian-ward privilege, Evid 514.

Hospital, in-hospital medical staff committee and medical society privilege, Evid 519.

Husband-wife privilege, Evid 504.

Informers.

Identity, Evid 509.

Jury.

Instruction, Evid 512.

Lawyer-client privilege, Evid 502.

Lawyer may exercise claim of privilege, Evid 513.

Licensed counselor-client privilege, Evid 517.

Mediation communications, Evid 507.

Medical malpractice screening panel privilege, Evid 520.

Parent-child privilege, Evid 514.

Physician and psychotherapist-patient privilege, Evid 503.

Political vote, Evid 506.

PRIVILEGED COMMUNICATIONS

—Cont'd

Religious privilege, Evid 505.

School counselor-student privilege,
Evid 515.

**Secrets of state and other official
information**, Evid 508.

Social worker-client privilege, Evid
518.

Voluntary disclosure.

Waiver of privilege, Evid 510.

Waiver of privilege.

Mediation communications, Evid 507.

Voluntary disclosure, Evid 510.

PROFESSIONAL COUNSELORS.

Privileged communications.

Licensed counselor-client privilege,
Evid 517.

PURPOSE OF RULES, Evid 102.

R

RAPE.

Victim's past behavior.

Relevance, Evid 412.

RECORDINGS.

Definitions, Evid 1001.

Original required, Evid 1002.

Duplicates.

Admissibility, Evid 1003.

Defined, Evid 1001.

Other evidence of contents.

Admissibility, Evid 1004.

Functions of court and jury, Evid
1008.

Public records, Evid 1005.

**Proof of contents by testimony or
written admission of party**,
Evid 1007.

**Remainder of related recorded
statements**, Evid 106.

Summaries, Evid 1006.

RECORDS.

Authentication or identification.

Self-authentication, Evid 902.

Hearsay.

Exceptions, Evid 803.

Public records, Evid 1005.

Proof of contents, Evid 1005.

RELEVANCY.

Admissibility.

Exclusion of relevant evidence.

Prejudice, confusion or waste of
time, Evid 403.

RELEVANCY —Cont'd

Admissibility —Cont'd

Relevant evidence generally
admissible, Evid 402.

Character evidence.

Admissibility generally, Evid 404.

**Compromise and offers to
compromise**, Evid 408.

Defined, Evid 401.

Exclusion of relevant evidence.

Prejudice, confusion or waste of time,
Evid 403.

Habit, Evid 406.

Rape.

Victim's past behavior, Evid 412.

Relevancy conditioned on fact.

Preliminary questions, Evid 104.

Routine practice, Evid 406.

Subsequent remedial measures,
Evid 407.

RELIGION.

Impeachment of witnesses.

Religious beliefs or opinions
inadmissible, Evid 610.

Privileged communications.

Religious privilege, Evid 505.

RELIGIOUS ORGANIZATIONS.

Hearsay.

Exceptions.

Records of religious organizations,
Evid 803.

REPUTATION EVIDENCE.

Hearsay.

Exceptions, Evid 803.

ROUTINE PRACTICE.

Relevancy, Evid 406.

RULINGS ON EVIDENCE.

Erroneous ruling.

Effect, Evid 103.

Errors affecting substantial rights,
Evid 103.

Jury.

Hearing of jury, Evid 103.

Objections, Evid 103.

Offer of proof, Evid 103.

Record of offer and ruling, Evid 103.

S

SCOPE OF RULES, Evid 101.

SOCIAL WORKERS.

Privileged communications, Evid
518.

STATEMENTS AGAINST INTEREST.

Hearsay.

Exception, Evid 804.

STATUTES.

Conflicting statutes of no force or effect, Evid 1102.

SUBSEQUENT REMEDIAL MEASURES.

Relevancy, Evid 407.

SYMPATHY.

Expressions of sympathy by health care professionals.

Inadmissible in certain actions, Evid 414.

T

TITLE OF RULES, Evid 101.

TRANSCRIPTS.

Use of official transcripts of district court proceedings, Evid 1005.

W

WEIGHT.

Evidence relevant to.

Right of party to introduce before jury, Evid 104.

WITNESSES.

Accused.

Testimony by accused, Evid 104.

Affirmations.

Oath or affirmation, Evid 603.

Authentication or identification, Evid 901.

Subscribing witness's testimony unnecessary, Evid 903.

Competency.

Exceptions, Evid 601.

General rule, Evid 601.

Judge, Evid 605.

Juror, Evid 606.

Conviction of crime.

Impeachment by evidence of conviction of crime, Evid 609.

Cross-examination.

Scope, Evid 611.

Exclusion of witnesses, Evid 615.

Expert testimony.

Authentication and identification, Evid 901.

WITNESSES —Cont'd

Expert testimony —Cont'd

Court appointed experts, Evid 706.

Opinion testimony, Evid 702.

Basis of opinion testimony, Evid 703.

Facts or data underlying expert opinion.

Disclosure, Evid 705.

Hearsay.

Generally, Evid 801 to 806.

See HEARSAY.

Impeachment.

Character evidence, Evid 608.

Conviction of crime.

Evidence of, Evid 609.

Religious belief or opinions, Evid 610.

Specific instances of conduct, Evid 608.

Who may impeach, Evid 607.

Interpreters, Evid 604.

Interrogation and presentation.

Calling and interrogation of witnesses by court, Evid 614.

Control by court, Evid 611.

Judges.

Competency, Evid 605.

Jurors.

Competency, Evid 606.

Lack of personal knowledge, Evid 602.

Leading questions, Evid 611.

Minors.

Exclusion of child witnesses, Evid 615.

Oath or affirmation, Evid 603.

Opinion testimony.

Authentication or identification, Evid 901.

Experts, Evid 702.

Basis of opinion testimony, Evid 703.

Facts or data underlying expert opinion.

Disclosure, Evid 705.

Lay witnesses, Evid 701.

Ultimate issue, Evid 704.

Personal knowledge.

Lack of personal knowledge, Evid 602.

Photographs.

Proof of contents by testimony or written admission of party, Evid 1007.

Preliminary hearings.

Exclusion of witnesses, Evid 615.

INDEX

WITNESSES —Cont'd

Prior statements, Evid 613.

Privileged communications, Evid 501 to 520.

See **PRIVILEGED COMMUNICATIONS**.

Recordings.

Proof of contents by testimony or written admission of party, Evid 1007.

Refreshing memory.

Writings or objects, Evid 612.

Religious beliefs or opinions.

Not admissible, Evid 610.

Writings.

Proof of contents by testimony or written admission of party, Evid 1007.

Writing or object used to refresh memory, Evid 612.

WRITINGS.

Authentication or identification.

Generally, Evid 901 to 903.

WRITINGS —Cont'd

Definitions, Evid 1001.

Original required, Evid 1002.

Duplicates.

Admissibility, Evid 1003.

Defined, Evid 1001.

Other evidence of contents.

Admissibility, Evid 1004.

Functions of court and jury, Evid 1008.

Public records, Evid 1005.

Proof of contents by testimony or written admission of party,

Evid 1007.

Remainder of or related writings, Evid 106.

Summaries, Evid 1006.

Witnesses.

Proof of contents by testimony or written admission of party, Evid 1007.

Writing or object used to refresh memory, Evid 612.

